



OSHA **Know Your Rights**

with **TRENT COTNEY**

ADAMS AND REESE LLP.

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PANELIST

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Heidi Ellsworth:

It started. Today, I am so proud to have Trent Cotney on the RLW again. Trent, as you all know, leading, leading thought leader in the industry and no one knows OSHA better than Trent. So today, it's all about OSHA, and knowing your rights. And for the few of you out there today, who may not know Trent, Trent is a partner and practice group leader at Adams & Reese. He is the general contractor along... General contractor, general counsel for several associations, including the NRCA, FRSA, and Western States. Trent, welcome to the show. We're so happy to have you back.

Trent Cotney:

[inaudible 00:00:53] it's great to be here. It's good to see you again.

Heidi Ellsworth:

Good to see you. And I am so excited about this today. Talk about an important topic for everyone out there to really understand knowing their rights when it comes to OSHA inspections, documentation, and all of that. So, thank you. And I say, let's get started.

Trent Cotney:

Sounds good.

Heidi Ellsworth:

Okay. Okay. So Trent, let's just start out and talk about OSHA inspections. What should people know?

Trent Cotney:

Sure. So, the one thing that I want to hit home in our conversations today is everybody that's attending this, and everybody that's listening, we all want our employees to go home safe and sound every night, right? I mean, that's always the goal. And I've always said that every penny that you spend on safety is a penny well spent. One of the things that I really want to hit home in the next hour or so, is just to have people understand that there is a safety component to OSHA, right? But it's also very important as an employer that you understand how to mitigate risks for purposes of your liability. And what I'm really going to hit it on is what rights you have as an employer. The things that you need to know, and the things that you need to understand. So, when an OSHA inspection happens, and I see we've got a lot of familiar faces that I know well on the line here, some of you guys are in different states, right?

They may have state plans instead of the federal OSHA guidelines. But the standards are going to be similar, if not more stringent. We're all familiar with the requirements that OSHA, or the state plans have, and the importance for keeping your employees safe. But what a lot of contractors miss, Heidi, is that it's not just about employee safety, okay? If you get an OSHA fine, we have several now that are in six figure plus range, right? And it doesn't matter how big you are, a six figure fine can detrimentally impact that bottom line. Injuries that happen on site, especially serious injuries, and God forbid, fatalities, that brings a lot of problems with it. I mean, we do, I would say several dozen fatality defenses every year. And when those happen, there are issues with insurance, whether it's workers comp, or maybe some other insurance has been impacted. There's issues with press, and how your reputation appears to those that maybe watching a news program where it says, "Hey this contractor had a vitality on the job site."

Heidi, you never know who's watching those videos, right? It could be your competition, it could be your potential customers. The other thing is just understanding the impact that has on your employees, on their morale, on the professionalism of the company. And then obviously, one of the things that you really have to watch out for long term is from a business perspective, how does this affect your job cost internally as it may relate to things like insurance and other factors, and how it may factor your ability to give business in the future. To give you an example, we had a contractor that was recently cited with a willful citation. And for those of you that don't know willful is you don't want that. That's one of the highest level citations you can get. And it basically says that there was the equivalent of some knowing conduct on the part of ownership that led to that. So, this particular contractor did a lot of federal work and would've been prevented from bidding on certain projects if that citation had remained. And that's one of the things that-

Heidi Ellsworth:

Wow, [inaudible 00:04:50].

Trent Cotney:

Yeah, a lot of [inaudible 00:04:52] contractors don't understand that it's not just about stroking a check, it's not just about employee safety, there's all these different things that kind of go into the makeup of how to properly defend against an OSHA citation, or an inspection if it happens.

Heidi Ellsworth:

Yeah. And just to add to that, I want to... You bring up such a great point on reputation management because in today's world also, retention, and hiring, and getting employees, and keeping them, and if they're looking online to see what kind of safety records companies have, and how do they take care of their employees. So yeah, it's some of those things you don't even think about until it's too late.

Trent Cotney:

Yeah. And recently, OSHA announced that it was going to expand it's electronic record keeping requirements. So, part of the issue is that your competitors, your customers, your future customers, at some point, depending on your size, they may have access to your 300, your 300 A, your 301 logs, and they can see exactly how safe a company you are or are not. So-

Heidi Ellsworth:

Yeah.

Trent Cotney:

... that's in rule making right now, but if that continues to expand, that's something that we obviously need to keep our eye on.

Heidi Ellsworth:

Yeah. Well, as we're looking at the really kind of staying in front of these inspections, and being proactive when it comes to OSHA, let's talk a little bit about the key documentation that contractors should have out there for their companies.

Trent Cotney:

Yeah. So, you guys have heard me speak before, right? Doesn't matter what I'm talking about, I always say the same thing, the party with the best paper wins today. And this is absolutely the case when it comes to defending against OSHA citations. So, one of the key things that you need to do, and for our listeners, if you don't take anything away from today's talk, go back to your office and make sure that you start back filling your documentation, because that's going to be the difference in being able to successfully defend against a OSHA inspection, okay? So, the first thing that everybody needs, and we all know this, is you need a good safety manual, right? You got to have a good safety manual if you've got employees that speak another language, I put Spanish here, but it could be any language. You got to make sure that safety manual is translated into the language that they speak.

Right? Because the idea here, Heidi, is you got to be able to instill that you've got a culture of safety. You got to be able to explain what your safety protocols are downstream. The next thing that you really need to do with your safety manual is make sure that it's consistently updated. So, I see Wendy Marvin made a comment on here, and regardless of whether you're in Washington, or Oregon, or California, or any of those states, I guarantee you, while we're talking, there's going to be another rule that's been enacted, right?

Heidi Ellsworth:

Yeah.

Trent Cotney:

So, it's very important that any time that you've got... If you're in one of those state plan areas, or if you're in an area that may have some significant regulation, you want to make sure that you're updating your safety manual to reflect that, and that you're training on that because OSHA will hone in on that. If you don't have the latest requirements for the silica standard, or hydration, or heat injury and illness, or signs of impairment for marijuana usage, or opioid usage, all those key things are incredibly important. So really, really recommend that. Next thing, Heidi, is in your safety manual, you probably have a disciplinary program, right? And looking at the participants, you guys are all real smart. You've got something in there that talks about an oral reprimand, a written reprimand, a suspension, termination, or you can accelerate it depending on the gravity. But here's the key thing is, and this is the example that I like to give. If you've got the biggest problem in construction right now... Well, it's the materials issue. But assuming that wasn't the biggest problem, it's skilled labor, right?

Heidi Ellsworth:

Right.

Trent Cotney:

We still can't find anybody to do the work, right? So, with skilled labor, if you've got somebody good, if you've got a really good foreman, or superintendent, or project manager, and they don't put on fall protection, are you really going to fire them? Are you really going to do that? If they're your best producer, are you really going to follow your disciplinary policy and write them up, or fine them, or suspend them? And the answer is usually no. And the problem with that, Heidi, is that when OSHA comes and they start looking at that documentation, they're looking for consistency of application.

Consistency of application. This applies to all employee situations. Okay? The one thing that you've got to remember is that if you start treating people differently, you're going to get into trouble, okay?

Heidi Ellsworth:

Yeah.

Trent Cotney:

Disparate treatment, regardless of whether it's with OSHA, whether it's wage an hour, whether it's anything, that will get you into trouble. So, great example is if you pay Peter under the table, but you pay Paul via payroll, you're going to have problem. Same applies to OSHA. If you are disciplining the person that you just got off work release, but you're not disciplining the person that is your best producer, that's going to hurt you down the road for asserting some of the defenses that we'll talk about, okay? Next thing I want to mention is evidence of ongoing training. So, one of the things that you got to have is you've got to be able to show that you're investing in ongoing whether it's toolbox stocks, on current topics it can be the basics out of properly [inaudible 00:10:44], put on a harness top, a ladder, PPE.

It could be something a little bit more advanced calculating swing radius, or underlayment slip safety, or whatever it might be. But the key is you got to get sign off sheets, right? If you don't get the people to sign off that they were there, it's going to be very hard to prove that when the time comes. Document, document, document, okay? Big believer in safety audits as well. And there's really two kind that I like to see. One is equipment safety checks. So, you always do that before you get out to the job site, okay? Don't take that freight rope and throw it in the truck because OSHA will assume that you're still going to use it. So, the key is check that stuff in the morning, have a document, or use software that says that you've checked it, and then that way you've got something that you can show OSHA, okay? Next thing is you want to do unannounced safety audits, then it's not going to be useful for you if you're announcing when you're going to come.

Heidi Ellsworth:

Yeah.

Trent Cotney:

So, what you want to do is go out to a job site, and hide in the bushes, or pretend you're OSHA, and take photos and then meet with your team and say, "Look, here's what you did good. Here's what you did bad, okay?" And it's funny you guys may appreciate this. Some of you are probably wondering, "Well, Trent, isn't that just going to make me look bad if I find a bunch of stuff that's wrong?" The answer is only if you don't correct it, right? So, OSHA wants you to go out and find the bad stuff. But the key is, you got to take the time to retrain. So you need self-serving documentation that shows that you retrained. So, here's a great example. You go out to a job site, you see the ladders not tied off, okay? You bring your foreman, and your three crew members down. You say, "Look, go tie this ladder off." You bring them back in either before work, after work, during work, whatever, you do a retraining session on how to tie off a ladder. It sounds stupid, but that's what you do.

You get them to sign off a sheet, and there you go, you got it, okay? That's great evidence that someone like me would need to defend against an OSHA citation. Last thing I'll mention, Heidi, and I know I'm talking a lot here, but-

Heidi Ellsworth:

No, it's good.

Trent Cotney:

... you really want to invest in your people. And look, I was a business owner for 10 years, right? I still own businesses. And I often got... I had the mentality, I wondered myself, does it make sense to invest in employees? What if they end up leaving, right? And the realization that I came to is that there's really two reasons that you want to invest in your employees. One is you show them that you care about them. So, it may help in retention, okay? The second is, even if they do leave, you're elevating the profession, right? You want these people to be safe. So look, I've got an OSHA 10, I got an OSHA 30, I got the [inaudible 00:13:44], if I can get them, anybody can get them, right? So, the stuff's online. You can sit through courses, you can do it at your own pace, have your superintendent, your foreman, your key people, make sure they get these types of credentials, because these credentials are going to help show that they were properly trained if and when the time comes, okay?

Invest, invest, invest. It's really worth it because not only will it make your employees feel better, but it's going to help you hopefully save dollars down the road.

Heidi Ellsworth:

Yes.

Trent Cotney:

Andy Stags just jumped on and he mentioned that associations offer OSHA training as well. Absolutely. Obviously I belong to a lot of different roofing associations as to you, Heidi. A lot of great resources there.

Heidi Ellsworth:

Yeah, they do. And we do have questions coming in for the chat. Thank you. That is so awesome. Some of them will address as we go, but we're also going to save some of these for the end. So, don't think that we're ignoring it, we'll capture all these questions as we go. And one thing I just wanted to also note, Trent, is when you said sign off on a piece of paper, or use some software. There's a lot of great software out there that actually tracks this all the time. So, contractors definitely should be asking, not only the software they already are using about any safety features, but also, looking possibly at safety software too.

Trent Cotney:

Yeah, absolutely. So, tons of great safety apps out there, they make life easy. My recommendation is that if you're going to use a safety app, make sure that you've got someone that is overseeing it, right? So, let's say you have a safety director. One problem that I ran into with the roofing contractor is they had their people on site take photos of like installation of anchor points, and tie off of ladders, or whatever, and send it to the safety person, safety director. And they were signing off on it without really looking at the photos. Well, I get these photos, and there's like three or four empty drill spaces on the acre point. The ladder is... I mean, I see blatant violations that the safety director signed off on. That's damning evidence. So, if you can't, what I always recommend is if you're concerned, don't take the photos to begin with.

Heidi Ellsworth:

Yeah.

Trent Cotney:

But the software as good. Some other interesting questions that came up here that I want to touch on briefly, Heidi, is-

Heidi Ellsworth:

Yes. Yes.

Trent Cotney:

So, Jeff talks about, he's in California, and he talks about subcontractor liability. I've done entire presentations on this. So, as a prime roofing contractor, I believe that you should do whatever you can to keep anybody that works for you or under you safe. One of the things that you got to be worried about with Cal/OSHA, and with OSHA in general, is multi-employer site liability. Which means that if you are the controlling contractor for purposes of safety, that you could be liable, okay? So, there's a right way to do it, and there's a wrong way to do it. And one of the things I like to do is really spell it out in the subcontract agreement, but you can participate, you just need to be very careful about how you do it. In other words, you don't want to be giving them stuff with your logo and hardhat on it. You don't want to be up there correcting their violations. You want to tell their foreman, or superintendent how to correct it and have them do it. But great question.

The other question is from Wendy and she asked, "Do I ever see a situation where employees will take partial liability for OSHA violations?" I'd love to do that. We do OSHA work up in... It's OHS up there in Canada, there is partial liability for employees up there. Do I ever see in the US? Absolutely not. The union pool is too great. I saw it firsthand. Do not think it will ever happen, okay? Could be wrong, but I wouldn't put money on it. So-

Heidi Ellsworth:

Yeah.

Trent Cotney:

... just wanted to answer the [inaudible 00:17:36].

Heidi Ellsworth:

Yeah, no, I love it. That's great. Okay. Well, then let's keep on going then with the inspection process because-

Trent Cotney:

Sure. So-

Heidi Ellsworth:

... a lot of questions around that.

Trent Cotney:

Yeah. Yeah. So, you got your basic documentation in place, right? One other thing I want to mention is the use of third party consultants. I don't know about you, Heidi, but when I sit and I talk to the people that work for me, I can tell that most of them aren't paying attention to me. But if I brought in somebody else, if I brought in John Kenny, or somebody else to come talk to them, they're going to pay attention to him, right? Because that's not me. It's just like, when I'm talking to my son, I know he is not listening to me.

Heidi Ellsworth:

Yeah.

Trent Cotney:

So, that's the idea is you want to... Sometimes if you bring in a third party, your people are more likely to pay attention to them because they're not going to automatically dismiss you. It's also great to show that you're investing, right? So, the other thing is if you are an involved in an OSHA inspection, the inspection process itself is where you really need to focus, okay? And I'll say this again, okay? After you get the citation, the facts are already there, right? They're already set forth, there's only so much magic you can work. It's the inspection process. That is where you put your best foot forward. So, you really need to focus and pay attention to what I'm going to say here, because it's going to end up saving you some money, okay? First thing that you need to understand, regardless of it's Cal/OSHA, OSHA, North Carolina OSHA, I see some people from Oregon, Washington here, no matter where it is, they got to come out and they got to show their credentials.

They got to say, "I am with OSHA," or whatever the equivalent is, "And here are my credentials, and I am here because of X. I was just driving by and I saw four people on a roof without fall protection." It is imperative that you get them to say that, because that puts that inspection in a box. And that means that they are there for that reason, and that reason only. And obviously, Heidi, if it's a fatality, it's a wall to wall investigation, they can do whatever they want. But if this is a situation where it's just a routine inspection, they can't go inside and start investigating the electrical outlets if they just came for purposes of seeing four people on a roof, right? It boxes them in. Now, let me take a step back. You always need to be truthful with OSHA. Always tell the truth. Cooperate, but know your rights, and be civil. Don't ever be aggressive. It's never going to help you.

I'm that way with every single government agency that I deal with, I'm always very respectful, but I assert my rights, and there's no issue with doing that. So, after the OSHA inspector comes out, they're going to say, "Hey, I am so and so, I am with OSHA, I am here because of X, Y, and Z," Okay? That's very important. The next thing that I like to do, and I do an advanced level course on standard operating procedures for OSHA inspections, okay? You have to have an SOP in place because what you want to do, is you want to make sure that whoever's in charge of that job is calling the home office, and is saying, "Hey, can you wait long enough for me to get the safety director or management out here?" Because if I do that, those people are going to be more adept at being able to handle the situation, than someone who hasn't experienced anything like that before.

So, oftentimes, OSHA will wait 30 minutes to a couple of hours to get somebody out there. And that's a great opportunity for you to get a member of management on the job site. They will conduct what's known as a walk around inspection. So, the walk around inspection is basically where they go through the project for purposes of investigating the reason they are there. So, again, if they are there to inspect

the roof, and access points to the roof, that's the scope of their walk around inspection. It doesn't mean that they can investigate the meth lab that you got in the back of the building, they're solely for that purpose, right? So, if for some reason they want to go beyond that, then you need to say, "Hey, that exceeds the scope of this inspection. I don't believe you got the capability to do that. Why don't we focus on what's what the issue is at hand, but from a liability perspective, I can't have you walking around this property because I don't have the insurance to cover you, and I know the owner doesn't want that either."

So, that's a way where you can say, "Hey, I don't want you walking around this because I don't want to get li I don't want to be liable for something." What you do is you approach it from a liability standpoint, and you say, "I'm concerned about if something happens to you on this job site where you're not supposed to be, that's not going to be good," right? And you got to play a little bit of politics there to navigate that. That's a good way to do it. So, something else that I want to make sure that everybody understands is your right as it relates to having to talk to OSHA. Now, first of all, OSHA, you can refuse access to any job site, okay? A lot of people don't realize that. You can refuse access. You can say, "Nah, you can't come in here. There's five dead bodies in the back. I'm sorry, you can't come on here."

Now, they can go and turn around and get an OSHA warrant, right? They can go to a court and get a warrant, and come out and get access, but that's very hard to do, okay? I don't recommend denying access to OSHA. Let me just say that, okay? Not a good way to start off.

Heidi Ellsworth:

No.

Trent Cotney:

Don't ever recommend doing that. The next thing that you need to understand is OSHA can't compel you to talk during the initial inspection, right? They can't sit you down and detain you. They can't force you to talk to them. Now later, they can send out a subpoena. They can do more things like that, but they can't physically detain you, okay? Here's another thing is you should never, ever agree to show them how to do something. I have a lot of OSHA inspectors come out and say, "Well, show me how you would put on this harness." That's the equivalent of a trap. Say, "Nah, that's not how it works. I'm not..." So, Heidi, this is a real world story. This is absolutely true. So, you guys know the syllabus standard, right?

Heidi Ellsworth:

Mm-hmm.

Trent Cotney:

When OSHA was promulgating that rule, apparently, they reached out to a lot of area directors and they said, "We need you guys to get information." I was representing a contractor, a large roofing contractor that had multiple citations that we were navigating. And the assistant area director contacted me and said, "We would like to go out to one of your client's job sites, have them cut tile so we could measure silica." And I just simply responded, "No." That was my response. "No." And they responded back and were like, "Well, we disagree, blah, blah, blah, we're going to go get a warrant." And I said, "My address is so X, Y, Z, you can ask for me, I look forward to receiving it." And that was probably eight, nine years ago, I'm still waiting on it. Because I knew they couldn't do that.

Heidi Ellsworth:

Yeah.

Trent Cotney:

They can't push you to put you in a situation where you're going to commit a violation. It doesn't work that way. So, if they ask you to do things like that, that's beyond the scope of their capability, you've got the equivalent of a constitutional right that says you don't have to do that, okay? The next thing that you need to understand is that there's a big difference between what a supervisory level person can say, and what a non-supervisory person can do during an employee investigation, right? So, when OSHA comes out to a job site, they have the ability to talk to employees that don't have any supervisory capability. So, this is just crew, right? Your men and women that are on a crew, if they don't supervise others, OSHA can talk to them without management present, when without council present. Now, the employee has the ability to ask for counsel, but rarely is that council the same council as management, right? And that never happens. So, what happens is OSHA goes back and they talk to this employee about anybody else.

And they always present a written witness statement, okay? In the age of everything electronic, we just talked about software apps, right?

Heidi Ellsworth:

Yeah.

Trent Cotney:

They pull out their notepad, and they give it to them, and they say, "Okay, sign this." Right? And there's never anything good on there, Heidi, it's always, "These guys suck. They're the worst at safety I've ever seen. They made me bury dead bodies..." Whatever it is, it's always horrible stuff. And they sign it because a lot of times, the crew members are scared, right? They're scared, and they're nervous, and OSHA will come up and they'll say, "Hey, I'm a federal agent and there's..."

Heidi Ellsworth:

Yeah.

Trent Cotney:

You'd be surprised. People are just very nervous. So, one thing that I want everyone to understand, and this happens a lot when you have Spanish speaking only employees, is that there is a lot of problems with OSHA and the interpreting side of things. We have experienced translation errors simply because there were different dialects that were spoken within Spanish. Now, I'm proficient. I'm embarrassed to speak, but I understand it pretty well. We had a situation where a couple of superintendents were being interviewed in my office. We had management present as well as myself. Management was fluent. And the [inaudible 00:27:12] the investigator, she came from Puerto Rico, but the two superintendents were from Mexico. And we were talking about the installation of a tile roof. And there was a term of art that was used that I recognized immediately. But the compliance officer mistook it, and her interpretation of what was said would have been the equivalent of a citation. I caught it, management caught it, but had we not been there, that miscommunication could have been cataclysmic, right?

Heidi Ellsworth:

Yes.

Trent Cotney:

So, always request that either a translator be present, or that the employee has someone there that they feel is competent to translate for them. It could be another person, another superintendent, whatever it is. Don't just rely on OSHA's person that may or may not know anything, right?

Heidi Ellsworth:

Yeah. Yeah.

Trent Cotney:

So, the next thing that I... So, we talked a little bit about nonsupervisory personnel, right? Can't have counsel present. Supervisory personnel, superintendents, project managers, foreman, directors, officers, you have the right to say, "I will not talk to OSHA until counsel and a member of management is present." And, or right? So, that is a right that must be asserted. You don't get a Miranda warning. You don't get the right to remain silent, you have the right... They won't tell you any of that, right Heidi? That's not the kind of thing. Even though there are potential criminal penalties involved, they won't tell you any of that. So, you have to know this right. And if you have a superintendent on that job site, it is really ownership that must tell the superintendent to assert that right. It is not really the superintendent's right, okay?

Heidi Ellsworth:

Okay, okay.

Trent Cotney:

And the reason is that anything that the superintendent says, it's going to be implicated on ownership, okay? This is where willful violations come in. If the superintendent says, "Yeah, I knew I was supposed to be the safety monitor, but I went and had a beer by the truck instead," it doesn't matter that the vice president, president, didn't know anything about that, it's going to be imputed to them because they are ownership. Supervisory personnel, you must assert the right to counsel, okay? The other reason is I can tell you it's night and day, okay? The difference between somebody talking with me there, and without me there much, much different Heidi, as you can imagine.

Heidi Ellsworth:

I can imagine. Yeah.

Trent Cotney:

So, the reason is they have an opportunity to really think about what they're going to say. They've refreshed their recollection on their training. They're not nervous because they got somebody there to protect them, right? And that's the key thing, is you want to slow everything down to the extent that you can while cooperating.

Heidi Ellsworth:

Mm-hmm. Okay.

Trent Cotney:

The other thing that I really recommend, Heidi, is if OSHA comes out to your job site, never continue doing work, okay? This is not an operations thing, this is not a safety thing, this is risk mitigation. I had a... This'll date me a little bit. This was 22, 23 years ago at this point, I had a underground utility contractor where we were representing digging a ditch on the side of the road. The closing conference was occurring, and one of the crew members jumped into the ditch to grab their lunch [inaudible 00:30:44] and scurried out of it. That was another \$5,000 [inaudible 00:30:46] that they had been cited for lack of a trench box, the slop ingredient was wrong, all this other stuff. Had there been nobody on that site, there wouldn't have been anybody to do anything wrong, right?

Heidi Ellsworth:

Right.

Trent Cotney:

So, the other thing is that if OSHA's looking for employees to interview, and they're not on the site, then guess what happens? You got to schedule another time, okay? So, I really recommend don't continue doing work because as one assistant area director told me, "I don't care how safe you are, you put me on any job in the United States for a day, and I will get at least one citation."

Heidi Ellsworth:

Wow. [inaudible 00:31:25], yeah.

Trent Cotney:

Right?

Heidi Ellsworth:

Yeah.

Trent Cotney:

That's all it takes is unhook at one point, and you're in trouble.

Heidi Ellsworth:

Yeah.

Trent Cotney:

A question popped up, can you send the employees home? You can do whatever you want to with the employees. The key thing is you don't want to sound the OSHA alarm, right? You don't want to have like the air raid siren, and everybody jumps off the roof, and into the bushes, and scurries away, you don't want to do that. But I often say, "Look, you guys take a break. I don't want you to... Because I am distracted with this OSHA investigation, and I can't focus my attention on you, why don't you take the

rest of the day off? Why don't you go grab lunch? Why don't you tell out of here?" Because that, trust me, that's going to help tremendously. The other thing that I like to do is you have got to create a central point of communication. You've got to be able to have that OSHA inspector communicate with one person, and the flow of information go through that person.

So oftentimes, when we jump in, everything that OSHA asks for, they're asking for a reason, okay? They're asking for documents, your OSHA logs, your disciplinary history. They're trying to defeat defenses, right? If they're asking to talk to people, they're asking for a reason. If you can get that information, have one person control it, you're going to be much better off. Question came up, and I think this is probably what we're talking about from Tammy, great question by the way, "How much detail is too much detail." Well, great example. On your OSHA logs, I've had some really dumb stuff on there. Like guy fell off a roof, because we didn't give him fall protection. What are you doing? You're killing me. Same with your reports to workers comp, right? That stuff's discoverable. Looks like the ladder wasn't tied off right, and it fell on top of him... Why are you saying that? Don't say stuff like that, right?

If it's good for you, put it in writing, if it's bad for you pick up the phone. So Tammy, if it's about safety, and it's about how much safety training you've done, and all that other stuff then yeah, write as much as you want to about it. If it's about how somebody got hurt on your dime, then less is more always. One thing that I like to do, Heidi, is when an OSHA investigation occurs, right? You may have four people working for you, but by the time that you get cited, those four people may be gone. So, it's very important, and work with your counsel on this, that you interview those people, and get them to sign sworn statements. Get them to sign affidavits, okay? And if you work with your attorney, and you send that to your attorney, then that can become attorney work product, attorney client privilege, okay?

Now obviously, I'm simplifying things, but we had a situation where there was about a... From start to finish, the citation was issued around the six month time period, which is the deadline. And then we didn't go to the final hearing for about another six months. By the time that happened, the crew left and went back to Guatemala, okay? And we hired a private investigator to try to go find them. They're still looking, right? You're never going to find them. So, the goal is get that information at the time that it happened, because oftentimes, it contradicts OSHA's written witness statements. And if you don't have anything else other than a contradictory written witness statement, it's better than having nothing, right?

Heidi Ellsworth:

Right.

Trent Cotney:

So, that is something that I have used many times. I often produce those at informal conferences to try to settle things to say, "Look, I know what your guy got, but my employee feels like they were strong armed here, and that's not really what they said. Here is an affidavit that contradicts that." Okay? Then the area director's stretching their head going, "This is going to be tough. What do we do with this?" Right? So back to the script here.

Heidi Ellsworth:

Yeah.

Trent Cotney:

At the end, they do a closing conference, right? And they'll say, "Hey..." The co shows, the investigators always try to be your best buddy. They're always like, "Oh, I'm just here because I just... I don't know. I heard you guys might be doing something wrong, and I just... I don't know. I don't know what I'm doing. Maybe you can tell me what you do on the job site?" And they'll buddy up to you. And even at the closing conference, they're like, "Well, I don't know what's going to happen here. You might be cited for this and that." So, the investigator's not your buddy. They're never going to be your buddy. Don't try to make friends with the investigator because they're tactics and techniques that they use to get you to spill information, always have your game face on. Again, it's all about safety, it's all about telling the truth, it's always about being cooperative, but they're playing a game, you need to understand what the converse of that is.

Heidi Ellsworth:

Wow. Wow. I mean, that's a lot.

Trent Cotney:

Yep.

Heidi Ellsworth:

So let's... Because I want to make sure we get such great information, Trent, I want to make sure we get through this. The citation action steps. How does that work?

Trent Cotney:

Right. So, one thing that I really recommend, look, it's not the people that are... There's some people that are a lot smarter than I am on this call right now, right? You guys aren't the people I'm worried about. It's the crew. It's the crew that does dumb stuff, they say dumb things. And it's not because they're not valuable, and all that stuff. It's because they're just scared, right? So, the best thing that you can do is train your crew on what happens during an OSHA inspection. I'm not talking about strong arming them, you don't want a whistleblower situation, you don't want to tell them, "Don't talk to OSHA," but just have them understand that it's part of construction, okay? It's going to happen. And here's what you do, let me refresh your recollection on all the training you've had. Don't be concerned. Here are the steps that you follow. Always tell the truth. You want to make sure that you hit that up, right?

But if you take that anxiety away, if you take that fear away, then you are going to have a much better result. A lot of times, people say dumb things. I've had crew members say I was never trained on how to operate a lull, right? When I'm looking at the toolbox talk where they were trained on how to operate a lull. And it's just, it's stupid stuff like that that they say, because they're nervous.

Heidi Ellsworth:

Right.

Trent Cotney:

So, part of it is taking away that anxiety, that uncertainty, by explaining to them what happens during the process. If you are issued a citation, what will happen is you will get it in a mail or via email. When you get it, you need to verify the date to contest the citation, okay? Don't do the math in your head if this is a federal state, what happens is you got 15 business days from the day to receipt. Don't guess at what that date is, what I like to do, Heidi, is I contact the area office, I confirm the date, and then I send a follow-up email saying, "This is confirming that I have until May 26th to contest the citation. If this is incorrect, please notify me immediately. Thank you, God bless," okay? And that way, trust me, I've had to submit that as evidence because there've been plenty of times where they've said, "Nah, you missed it." Like, ah-ha, I haven't.

So, when you do that, after you get the citation, there'll be posting requirements. Usually you got to post it in a place that's visible, could be the job site, could be the kitchen read the instructions. That's pretty perfunctory. But here's the key thing is you need to schedule that informal conference, right? Most states require that the informal conference occur before you can test, okay? There are some states that differ a little bit, but the informal conference gives you an opportunity to potentially settle the dispute, okay? Here's some things that people need to understand, I'm skipping ahead a little bit, but is the informal conference is not confidential, right? It is not mediation. Meaning anything that you say there could be used against you. And you need to know that I have literally kicked roofing contractors under the table. Pretty hard too.

Heidi Ellsworth:

Yeah.

Trent Cotney:

Because they the OSHA investigators start using it as a deposition, start taking all this testimony, and that's not the point of it. The point of an informal conference is to put your best foot forward to try to get to see what they have. Like I go in and I like to play dumb. I'm like, "Hey, I'm just a dumb lawyer. Can you tell me what you... I don't understand where this is coming from. Do you have any photos?" Right?

Heidi Ellsworth:

Mm-hmm.

Trent Cotney:

And oftentimes, they will sit there and they will show me what they have, which helps me analyze the case better, okay? I couldn't get that through the equivalent of a public records request act, or freedom information act request. I couldn't get that. So oftentimes, I get that an informal. When I go there, here's something that I want everybody to understand. Don't focus on the money. The money is a trick, okay? They'll come in, and you'll have a \$12,000 fine, [inaudible 00:40:24] say, "We're going to give you 40% off because you are awesome, okay? And this is a one time deal, you better take it." That's fine, but the problem is that you then become an annuity, especially if you get cited for like a B13 violation, or a B10, or any of the ones that you might do every single day of your working existence, they're going to come back to you over and over and over again because they want that repeat. They want the big bucks, right?

So, pay attention to the citation, not the money. That's a hard thing for a lot of contractors to understand, but look to recharacterize, or eliminate those citations that are most likely to hurt you. That

is what I like to focus on, okay? So, great example is if you get hit with a fall protection violation, and you can change it to [inaudible 00:41:12] where life does, of course, that can't happen. But giving you that as an example, then, great. You're never going to get cited with that again, right? So generally, more specific is better than less. So, the more specific that you get on the citation, the less likely it is that you'll be cited for something similar in the future. So, you will a handful of violations, and focus on those big ticket items. If you can't figure out how to tie off a ladder, shame on you.

Heidi Ellsworth:

Yeah.

Trent Cotney:

Right? If there's a B13 violation on a presidential fall protection violation, anybody can get that from just taking off their rope to get to the ladder. That can happen almost every single day, right? And unintentionally, or intentionally. So, really focus on those things that are going to hurt. Then obviously, the money's important.

Heidi Ellsworth:

Yeah.

Trent Cotney:

But what a lot of people don't realize, Heidi, is there are special provisions that can be added to the stipulation that happens in an informal conference. You can add special language in there that says that it can't be used in any action other than OSHA. So, if you got bad guy lawyers out there, personal injury lawyers coming after you, it'll block that. You can get a payment plan. There's all these different things that a lot of people don't know about. But again, you got to ask. OSHA will never give you any of this information, you have to ask for it.

Heidi Ellsworth:

And have good counsel who knows to ask those and talk about it.

Trent Cotney:

You do.

Heidi Ellsworth:

Yeah, exactly. This question I think is from Andy, hello, Andy, it kind of fits in here. He said, "Should you try and settle or fight everyone to the end? Is there a happy medium, or all case by case?"

Trent Cotney:

So, this is going to be an unusual thing for a lawyer to say, but I believe this in any dispute, okay? You guys are business owners, right? And business always comes first. The fighting for principal is great. I love clients that want to fight for principal. I can handle that all day long. But the reality is that you need to put negativity behind you and move on. And what I like to do is I like to weigh the cost benefit analysis. Now, you may be in a situation where you have no other choice but to fight, like the contractor that had a [inaudible 00:43:32], right? And you got to take that to the conclusion and that's fine. But otherwise, what you're trying to do is you're trying to get the best deal that you can, see whether or not you can

live with it, and see if it might make sense to contest to go to that next level where you might have a different group of people to negotiate with, okay?

You really want to think about the future. The future is what really dictates. It's not, what's in front of you now, it's the likelihood of you getting hit with the same thing as a repeat, okay? They can look back up to five years. It's a long time, right? So, you really want to think about that because that can ultimately affect whether or not you settle now, or decide to kind of contest and move forward.

Heidi Ellsworth:

Wow. And that kind of takes us right to the discussion, and that is right in there, serious repeat and criminal penalties.

Trent Cotney:

Yeah. So, just so everybody knows, you can get other than serious, serious repeat willful, okay? And one of the things that can... We handle a lot of very high profile OSHA defense cases, not just in construction, we do agriculture, we do MSHA mining collapses, we do general industry, manufacturing, you name it. And we see the worst of the worst, right? We handle the routine stuff, but we get the willfuls, we get the fatalities, we get ones where there are potential criminal penalties involved. And we've had ones where you might have seen a press release that sounds just awful. We've had cases like that recently, where the entire thing is thrown out. So, just because you see something in the press, doesn't mean that it's necessarily accurate. And recently, not during this administration, but the past when OSHA said that they were going to kind of discontinue some of the press release activity they were doing.

So, what you need to be aware of is anytime there's a vitality or serious injury involved, the chances for a criminal citation against ownership, criminal penalty aspect, increases dramatically. Anytime there is... If you hide evidence, right? Don't ever do that. Don't don't obstruct justice. Always produce everything that you've got. Always tell the truth, right? Because you will get into situations where that could be potentially be an issue. So oftentimes, what happens is these penalties come out, and there's a variety of factors that OSHA uses to determine the amount of penalty. Things like the size, the gravity, all these different types of things. So, the one thing that I want to hit home is don't take any... Even if it's just a serious citation, one of the lower level ones, there's always the potential for something more coming down the road, right?

That's always the issue is it's not just what's in front of you now, it's the fact that you become marked at that point, and that OSHA may come back and see you again to make sure whether you're doing what you're supposed to be doing. And if you're not, then you're looking at a [inaudible 00:46:42] of that, so.

Heidi Ellsworth:

Yeah. Wow, okay. Since you already touched on informal conference, I'm going to kind of keep going because we have things. And then Donna will be right back to your question here in just a minute. But before we get to that question, let's go ahead and do notice of contest.

Trent Cotney:

Sure. Yeah. So, what I'll do is I'll take the last few slides, and I'll talk about all of them right now so we can take questions.

Heidi Ellsworth:

Okay.

Trent Cotney:

Because I know there's a lot of great questions.

Heidi Ellsworth:

Yeah.

Trent Cotney:

So, I'm going to wrap up the whole thing. So, notice a contest. If you have gone to the informal, you don't like what they have to offer, and you want to contest the citation, it's very important that one, you provide notice in a timely manner, okay? If it's a federal citation, it's 15 business days from the date you received it. Second is you want to contest everything, okay? I can test the citations, I can test the dollar amounts, I can test the facts, seriously, I can test everything, okay? It's usually a one page, two page correspondence, send it via certified mail, send it via email, make sure they got it, okay? After the notice of contest has been issued, then OSHA will send you a formal administrative complaint, okay? The complaint is very similar to a federal complaint. You can respond with answering affirm of defenses, there are simple proceedings, there are complex proceedings, the reality is you always have an opportunity to settle. The difference is that usually you are involved with counsel for the other side at that point.

The solicitor's office, department of labor council is who you usually deal with. And sometimes, that's a good thing because I can talk to the other side about whether or not they've got the facts needed to prove this. I can talk to them about whether or not it makes sense to throw hundreds of thousands of tax dollars at this when it doesn't make any sense at all, right? So, that is useful on occasion. The one thing that I want everybody in it, Heidi, if you can forward to the unpreventable employee misconduct.

Heidi Ellsworth:

Yeah.

Trent Cotney:

There's one defense that I want to make sure... You guys are probably wondering why was Trump spending so much time on documentation. And the reason is, I think it's the next slide, yeah, there it is, is this, the unpreventable employee misconduct defense is the most successful and most often used defense. And it basically says, I told this employee to do X, Y, Z. They didn't do it. They didn't listen to me, okay? That's great. But you got to have certain documents to prove that. So, first is you got to have a written work rule in an understandable language. We talked about the importance of a safety manual, we talked about the importance of conveying that to your employees. You got to have evidence that the work rule was adequately communicated. So, how do you deal that? Through toolbox talks, through ongoing training, through all these different things so that you know that you're doing the right kind of thing. You got to have systematic and regular audits to try to identify these issues, okay?

We talked about the importance of doing both equipment and job site audits. And then a tiered system of discipline. So, you have to be able to... Oftentimes, OSHA will ask for the last three years of

disciplinary history. Everything from written and reprimands, to suspensions and terminations. So, the key thing is, in fact, I think on that lower picture, there's probably some OSHA violations. The key thing is that you want to make sure that you are actively engaged in disciplining people and writing it up in a way that supports your disciplinary policy so that you can show that. So, if you do all that, it gets you in the game to assert this defense. And if you're successful in the defense, citation's gone, okay? If you don't have any element here, if you don't have any of that documentation, you're not even in the game.

So, that's the key thing. I want to end with that, and then we'll switch to the questions is if you want to succeed in OSHA, you must have these documents. Because if you don't, if you can't do that, you're not going to be able to even put on the most common defense that we all see, okay?

Heidi Ellsworth:

Wow. And excellent. Wow. You went through those so just so everyone knows, those slides that Trent had up there that I kind of went through fast, we'll make sure, Megan Ellsworth our producer is on the back end. We'll make sure this PowerPoint's available on demand. So, if you want to see some of those slides for a little bit longer than how fast I went through them, we'll do that. But the questions just keep coming in. So, please put your questions in the chat. We have one from Donna right now. Trent, you can see it. Do you recommend for a-

Trent Cotney:

Yep.

Heidi Ellsworth:

... safety program for residential subs?

Trent Cotney:

Yeah. So, I think there's a lot of great programs out there. I work with a lot of different associations, I'm general counsel for a lot of different ones. There's a ton of great offerings that the associations have. There are a lot of great safety consultants out there. I know Henry's on the line, John's on the line, there's several others that can put on specialized training for residential. The key thing is focus on the things that they do on a daily basis. One of the things that you want to watch out for is something that is too complex. A lot of the times, when I'm sitting in an audience and I see crew members there, you want to be able to capture their attention on the stuff that they do on a daily basis. And the best speakers are those that have been there, done that, and understand what is required. So, really encourage that because I think that is sort of a great way to do it.

Rich asked a good question here. "What's regular when it comes to audits and inspections?" And that's a great question, Heidi, right?

Heidi Ellsworth:

Yeah. Yeah.

Trent Cotney:

So, if you do it too regular, then they can predict when you're going to do it. So with the equipment check, you should do that every morning, right? Every morning before you got out to your job,

everybody should check their equipment. It's just like if I'm a soldier and I'm going out to war, I'm cleaning my gun, and making sure everything's there, same kind of thing, right? It's just part of the process. If you are going out and doing random unannounced job checks, you should do them at least once a month, if not more, depending on what your capability is. One thing that I want to tell you is for those of you do commercial, and there's a handful of you here, use those daily reports as self-serving statements, right? You can put on a daily report to the safety audit today, check everybody. We talked about potential problems with skylights and falls there.

Some of the metal panels over these pearls look [inaudible 00:53:08], so we're putting up some extra plywood, making sure everybody's 100% tied off. All these self-serving statements are going to be great because there's going to be additional evidence and documentation you can produce to OSHA.

Heidi Ellsworth:

Excellent. And David just came in with, "When it comes OSHA inspections, does it matter whether it's a residential or commercial job site?"

Trent Cotney:

Oh, really? It doesn't matter what it is. I mean, there are different standards, obviously, if you're low slope versus steep slope, you've got different requirements. But OSHA's going to get you regardless of what it is. If you're in a high visibility area, you're an easy target, right? If you're doing a house in a gated community on a cul-de-sac where nobody's there and... It's going to be less likely. Regardless, the possibility of you getting inspected is there, so.

Heidi Ellsworth:

And then we have one more... And I think we have time for a few more questions. We have one from Jeff, terminating an EE after a severe safety violation where they were injured can be tricky due to employment laws, guarding against reprisal actions. Thoughts?

Trent Cotney:

Yeah. So, you always have to... It's a double-edged sword, right? If you are terminating someone for a safety violation, and it's a first time offense, right? Then you always run the risk of an OSHA whistleblower type issue, right? So, what I recommend, again, if you got a bad employee, you need to pay for the file, right? If they have a history of doing the same thing, and you have shown that they have a history of doing the same thing, and they do it again, that makes your case a lot better than just having a one time, they didn't do something right, and you fired them. Now, that being said, if it comes to safety or the potential risk of an employee suit, I'm always going to choose safety. If they did something that was so egregious that put you and everybody else at risk, you got to do what you got to do, right? And that's kind of how I look at things.

One of the other things I want to mention to everybody is obviously, I've written some books on this. If any of you guys want my book, please feel free to contact Heidi, or contact me. I'm happy to send it to you for free. I've got a stack of them over here that I keep. So, anytime I can help you guys, or educate on what the rules are, please let me know.

Heidi Ellsworth:

And just so everybody knows that book actually is available on the Adams & Reese directory. You can request it with the download, just fill out the form, and you can get that from Trent too. So, if you search his OSHA book, you'll find it on the site that way also. It's in a number of places. And of course, you can just email us. One last thing, Trent, that-

Trent Cotney:

Yep.

Heidi Ellsworth:

... and I think you've gotten a lot... I just want to say you've gotten a lot of praise here that this has helped a lot. And so, for everyone, this is the kind of stuff that would be great to have people watch on demand. And Trent is always available to get in touch with. You can get ahold of him through the directory also. So, any last thoughts, Trent, before we wrap up this very informative hour?

Trent Cotney:

Yeah. Look, I'm obviously very passionate about this. I'm a big believer. I really believe strongly in safety. I think it's incredibly important, but I also believe that there is a way to present things to help mitigate against potential OSHA liability. And the one thing I'm just a real big advocate is cooperate, be civil, but know your rights. Know your rights and assert them, right? These are the rights that you are given. Don't be afraid to assert them because they can make the difference between getting a bad citation and that mark on your record, versus not having one, so.

Heidi Ellsworth:

Excellent. Excellent. Thank you so much, Trent. Thank you. And thank you all for being here today, and for watching, we love bringing this kind of information, and we love having Trent on always. So, Trent, we appreciate you so much and everything you give back to the industry. Thank you.

Trent Cotney:

Same here. Thank you.

Heidi Ellsworth:

Thank you. We'd really like to invite all of you to join us again a month from now, the last Wednesday of June. We are going to have on the next RLW is going to be what's hot in metal roofing and walls. So, we're pretty excited about that. We're going to have some leading manufacturers talking about what's going on in metal. I know how much interest there is in that. So, I hope to see you all there. I do want to also let everyone know, and Trent kind of touched on this a little bit today. But tomorrow morning, we have our coffee conversations, and Henry Stakes, who's on the call today, thank you, Henry, I have on the webinar, is going to be our guest along with Steve Little, and John [inaudible 00:58:04] who are going to be talking about NCCER and apprenticeship training.

Don't miss it. 7:00 Pacific. You can register on the site. You all know where coffee conversations are. So, please join us tomorrow morning. It's going to be great. And as we mentioned, you can find... Henry, I love your comments. You can find Trent under Adams & Reese directory across. Also, Trent, writes for us

constantly under the RCS influencers. Thank you, Trent, and some great articles. So, if you're looking, just search Roofers Coffee Shop, and you're going to find a lot of information that you want. I thank you all for being here today. Please share this. It'll be on demand within 24 hours. And like I said, we're going to have Megan post this PowerPoint with it too. So, you'll be able to get a transcript, the podcast, or the video, or the PowerPoint all right here on Roofers Coffee Shop. Have a great day, everybody. Thanks again, Trent.

[Trent Cotney:](#)

Thanks guys.