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Heidi:

Hello and welcome to this month's RLW, Read Listen Watch from RoofersCoffeeShop. My name is Heidi Ellsworth and we are here today to talk about being prepared for OSHA. What an amazing topic as we look at next week being Safety, Stand Down from OSHA. So we are all about safety today and in the next couple of weeks as we are every single day of the year. But before we get started, I want to remind everybody that this is being recorded and it will be on demand within the next 24 hours on RoofersCoffeeShop, under the RLW, Read Listen Watch section of the site. And if you have any questions, the chat is open. We will be taking questions towards the end of the presentation, but please feel free to chat, share your name, where you're from, and what kind of business you have. So we'll get started right now.

I am very excited to welcome Kyle Rea with Adams and Reese to talk today about being prepared for OSHA. Such an important, important topic. And so I would love Kyle to welcome you to this month's RLW sponsored by Adams and Reese. And I would love it if you could introduce yourself, tell everybody a little bit about you and Adams and Reese.

Kyle:

Thanks Heidi. Really appreciate the time, the opportunity to be with everybody today. As you mentioned, I'm an attorney. I work here with Adams and Reese. We are a large law firm. I personally am primarily a commercial litigator. Specializing in construction law, really includes all facets of construction law and litigation. But one of the areas that I primarily practice in is OSHA defense. That really entails me representing contractors before OSHA area offices, the Department of Labor. Before I kind of became more of a commercial litigator. I was a prosecutor for five years, tried a bunch of cases ranging from drug trafficking to violent crimes. That really afforded me kind of a whole bunch of courtroom experience. I use that every day, sort of the benefit of my clients. Personally, I come from a family of contractors. My grandfather was a general contractor, uncles are electricians.

My father's an engineer. So I've kind of been intertwined in this world for quite a while. So sometimes people say, "Well, how do you go from being a criminal prosecutor to being in construction law?" Well, that's pretty much how I just kind of fit and I pride myself in being able to understand what it is my clients do, what they go through on a daily basis. And OSHA inspections unfortunately, in some circumstances are one of those things and we do our best to guide them through that process. If unfortunately the time comes where one pops up.

Heidi:

Right now for every roofing company, every construction company out there, there's really nothing more important than getting their employees home safe and to really as a company be ready for OSHA. So let's talk about that, Kyle. What is important to be ready for that OSHA visit and during that OSHA visit? So let's start with the very basic three keys up front, Kyle.

Kyle:

And just to branch off of that, my goal today is really to take everybody from the initial stages of an OSHA's investigation all the way through the citation process. So as you indicated, we want to get everybody home safely, but we also want to understand how we handle a situation if we ever have OSHA showing up on a job site. We have certain rights. Going back to my time as a prosecutor, everybody's familiar with Miranda warnings, right? Well, you also have rights in the context of an administrative action involving OSHA, the Department of Labor and things of that nature. So we need to understand how we can defend ourselves and our companies against OSHA violations and inspections and things of that nature. If you've been through this process before, some of this may not necessarily be entirely new,

but the goal is, and my hope is that we can provide some tips and tricks and pointers to kind of assist in the future should the need arise.

I do want to point out before we get into these three points right here, there are some states that are governed by state OSHA plans. So generally the baseline are federal OSHA regulations, which are founded in the Code of Federal Regulations. And that's kind of the starting point. But states are permitted and allowed to develop their own state plans that kind of go above and beyond that. Certain times you might see certain regulations in Alaska for example, obviously they deal with certain things that maybe, I'm personally down here in Florida, contractors in Florida don't deal with, right? So there's certain things in their state plan that have to address those sorts of things. So just as we move through this, I hope our listeners can kind of keep in mind that some provisions may differ, but the federal guidelines are that baseline. And at least in the roofing context, we're going to be talking about things like fall protection, ladder use safety regarding those types of things.

All right, so understanding that, we've kind of got these three keys to an OSHA visit that I like to focus on, and I'll touch on these as we sort of move through the presentation. But you're going to hear me say we want to be calm, we want to be polite, and we want to document everything. So we'll start with the first one, being calm. Being calm is very important because it allows us to try to gather our thoughts and understand what it is that's going on. It's very easy when a compliance officer arrives on site, especially if perhaps they've already seen a violation occur to feel as if they're attacking you, kind of going after you and going after your company. And so you may not be the calmest person in the world. So take a deep breath, kind of take a step back, understand why it is that they're there, what they're looking into, and try to maintain that calm demeanor as you're communicating with them, especially during the initial kind of inspection phase.

That kind of goes hand in hand with being polite. We don't want to jump down a compliance officer's throat when they're there. We don't want to make their life a living hell. We don't want to be overly difficult, overly aggressive or anything of that nature. And again, I understand sometimes that's very easy to do, especially in the context of one of these OSHA's inspections. But it's going to do you wonders, trust me, if you are very, very polite but also be firm in that. Be firm in your calmness and your politeness because you do have certain rights that you are allowed to uphold and they know that. However, and again, let's bring it all the way back around to my experience. I mentioned the Miranda warnings. There's no such thing. There's nothing like that in the context of an OSHA inspection administratively. So they have no obligation to tell you what your rights are.

It's really incumbent upon you to know what those rights might be and then assuming you know what they are, you can [inaudible 00:06:47] them and you can put them forth when the compliance officers may be on one of your job sites. And if you are confident in that and you know what those rights are, you can set them forth and rely upon them to make sure that the investigation and the inspection goes in the right direction. And then the last thing here is just simply documenting everything. We're going to talk about a lot of documentation that you can have set forth, establish as you sort of move through trying to make sure that your company is best prepared to deal with potential safety inspections and things of that nature. A lot of things you may already be doing, you might be working with your compensation carriers to develop safety plans, third party consultants to develop safety plans, random site inspection, equipment audits, things of that nature. Things that you really should already be doing.

If not, this is probably a great reminder that you might want to look into getting some of these in place. But those documents are really going to be the key, especially when you're talking to me, an attorney, talking about what I like to see my clients have in place when I'm preparing them for potentially a response to an inspection. I like to see these documents being in place to allow us to set forth a pretty solid defense. So that's really the goal here.

Heidi:

We hear that all the time, document, document, document, and it is just so critical for taking care of that risk ahead of time and not getting yourself in trouble. So let's talk about that important key of documentation.

Kyle:

So I think number one, when we're talking about OSHA, we're obviously talking about health and safety is the safety manual and we want to make sure that we have a safety manual in the appropriate language. That's probably the most important thing that I will say today, right? You certainly don't want to have a crew that speaks a second language that's not English. OSHA ask you for all your documentation and then you turn around and you give them a bunch of English documents. But it's very apparent by their interviews with the crew that they don't speak any English whatsoever, nor do they read English. And if they can't speak or read English, then what good is a English safety manual going to do? So having those safety manuals in not only English to sort of act as the base, but also any additional languages that your crew might speak. Here in Florida, that's Spanish, but you might be in a different area of the country.

It could be Polish, it could be Russian. I mean it could be a multitude of things. You just want to make sure that you have it correct. A lot of times people ask me, "Well, how do I that?" How do I make sure that I have something in English or Spanish if I don't speak it, maybe my foreman speaks it and they relay it to the crew. There's plenty of services, especially in today's day and age, where you can simply upload a document and they will translate the document into that language for you. That's a great way to do it. So if you are currently operating with only an English manual, use one of those services and have them translate it for you. It's really as simple as that. Beyond the safety manual, it really should be everything that we are using to establish that we enforce our safety policies.

And so that includes disciplinary records, which is really just evidence showing that we enforce these policies. And if we catch somebody slacking off, let's say they're not tying off, let's say we're using anchor points and they're not tying off where harness is, things like that. That we're catching them and then we're disciplining them. A lot of times with our clients we see a three-strike policy. So it's a verbal warning, written warning with suspension, termination. And you kind of go down that line and eventually maybe it's four strikes, maybe it's five strikes, but eventually you're telling these guys, "Look, we can't have you breaking the rules and it's for your own good." We want to make sure that you go home safely every day. It's also for the safety of all of the other employees that are there. If someone's not following the rules, their violation of the rules could potentially endanger those other employees that are on the job site and are following rules.

You can also include monetary penalties in some of these plans and programs that you might develop to discipline employees that don't follow the rules. But really the important thing is to have something in place. Obviously it's compliant with your state's wage and hour provisions, wage and hour laws. But something there to say, we take this seriously and if the rules aren't followed, there are repercussions to be had. We also want to have evidence of ongoing training beyond that safety program. So these are going to be your safety audits on equipment and job sites that I talked about before. We want to show that you're checking in on crews, making sure that the equipment that they're using is in good working order, using and retraining third party individuals that might be on one of your given job sites via those third party consultants that I referenced.

Use those individuals to kind of teach and improve the safety program. And then internally, maybe just with your foreman, have toolbox talks. When they show up to a job site on any given day, have them sign into those toolbox talks, maintain those records. Those are the documents that we're talking about,

right? Document, document, document. So you have something to show to OSHA that you're doing all these things and every single day we're talking safety. This isn't a fly by night. Every year we have one safety talk stand down and that's all we rely on that for the remainder of the year. While I think a yearly safety get together meeting is important, and I think that that's a good thing to do, it's not enough, and especially so because a lot of times you're bringing on employees. There are new employees, I mean in some contexts weekly. You might have somebody on the job every single week that's never been out there before and those individuals need to have requisite training before being thrown up on a roof.

And if you're relying solely on that one yearly training session, then it could realistically be 11 months until that person receives full requisite training on any given topic. So make sure that they've got what they need and then fill in the gaps with these toolbox talks. Talking about the safety manual, one important thing is to make sure that you're having the employee actually sign off on receipt of the safety manual. Within that safety manual, you should be looking for things like the issuance of all necessary equipment that individual might need to do his job. So a lot of times this is a bucket, right? It's a bucket full of stuff, harness, lanyard, ropes, whatever may be necessary for that person to do any given job that they're working on. They've been provided with it. And then they understand in the event that any of this equipment deteriorates to the point that it needs to be replaced, what the process is to get the replacement equipment.

And I think most importantly, making sure that the company is the one issuing this equipment. We're not relying on the employee to provide their own equipment. While you can do that in certain circumstances, you would still have an obligation to bring it in and make sure it complies with all of your internal processes and procedures, make sure it's in good working order. Candidly, it's just going to be simpler to provide the equipment and have really all the equipment be similar in nature. I know there's a lot of different systems that individuals can use as far as ropes and lanyards and things like that are concerned, but if we have a general understanding of the type that's being used on our job sites, it's going to help our forum and especially in the context of situations where we might be using a warning line and again, document, document, document, document.

Please document all of this. You really shouldn't be doing any of this without having supporting documentation. And then I think the last thing is just OSHA 10 and 30 courses, I think, are incredibly important as part of that sort of yearly training that I gather a lot of our listeners probably do. I heavily suggest having all labor employees get their OSHA 10s, supervisory level employees really should be getting OSHA 30s. And then to the extent that you've got a main safety guy, they can look into doing some of the 500 and 510 level courses.

**Heidi:**

So all of this, this is great stuff. This is everything that should be done ahead of time. So hopefully you'll never get a OSHA visit or an OSHA citation, but if you do, let's talk about that. Let's talk about how the OSHA's inspections start.

**Kyle:**

So you'll see here there's really three ways that an OSHA's inspection can start. A complaint might be filed by a concerned or nosy homeowner in the residential context. It can be somebody driving down the road in the commercial context and maybe they look up there and they know something about OSHA or they know that these guys should be tied off and they're not seeing that or they don't see a warning line system. Everything under the sun, you can imagine. People are nosy and people feel like they know more than anybody else and they will call it in. It happens every single day. But in the context of a complaint, it can also be your own employees. If one of your employees feels as if the safety program is insufficient, they could actually levy a complaint to OSHA. OSHA takes those very seriously, as you can probably

imagine. If they get a complaint from an employee, especially if it's relatively detailed, it might include photos, it might include video, it could include audio recordings.

And these are things obviously that OSHA will use and utilize to prove their case once they decide to go to a job site or place of business, whatever it may be, and actually open and initiate that inspection. And then basically when they get one of these complaints, whether it be from nosy neighbor or one of your internal employees, they essentially assign a compliance officer to inspect it. Sometimes you actually might just get a letter that says, "Hey, we received a complaint. We want you to check into this. We want you to look into that." It's what they call a UPA letter. It's essentially a complaint notice that says, "You need to look into this. You need to provide us proof that you actually did look into it and then certify that you posted a copy of this letter to all of your employees."

That's probably best case scenario. You can internally handle this situation and more likely than not, there's not going to be a formal complaint or inspection open, but that's not what happens every single time. Sometimes you get one of these complaints and they actually do decide to assign a compliance officer and the compliance officer actually goes out to a job site, especially if it's not residential and it's a job that's going to take quite a while to finish. They'll feel pretty confident that despite the fact that the complaint came in two days prior, you're still going to be out there. Obviously in the residential context, they do have to deal with the situation where, "Well, yeah, we got this complaint two, three days ago. Odds are jobs done, we're not going to go find anything." Perhaps in that situation, you might see the UPA letter instead.

But nonetheless, you have to understand that complaints are a real way that one of these inspections can start and perhaps the most concerning quite frankly, because it's the one that can't necessarily be expected. In that same vein, probably the second one is a visual inspection, and this is really OSHA driving by your job site. So it can be based on one of those complaints or it can simply be one day they decided to drive around and that's actually something that they do. So they'll assign a compliance officer and say, "All right, today we want you to go drive around. We are understanding that there's a lot of construction activity going on in a given area. Drive around and see what you see." And if they're able to readily ascertain that there's a violation just simply by driving down the road and looking out their window, they can then stop and they can open an inspection.

So especially in the roofing context, obviously this comes up a lot because it's very easy to tell what is going on on a roof because it's in the open air. You're not confined to the interior of a building. It's a lot of times very apparent if guys aren't utilizing fall protection or if a ladder's not tied off or something like that. All right. The last one though that we have here is a serious injury or fatality. Some of you may know this, but you actually do have an obligation and requirement to report a serious injury or fatality to OSHA. So serious injury has to be reported within 24 hours of your knowledge of the incident. Fatality is eight hours within your knowledge of the incident. And so you actually affirmatively understand that there's been one of these incidents and you report it to OSHA. There's various ways to do that.

If it's during business hours, you can just call your area office and report it. I personally, actually, like they have an online form that you can fill out. I like the online form because it doesn't require that you provide a ton of information to OSHA, nor does it require that you put a whole bunch of stuff in writing. You could be awfully vague about what it is that you are reporting so long as you actually report what the violation is. And from my context as an attorney, it allows me to sort of explain away anything that you might say or do that may not necessarily be great in the context of trying to defend your case, but you still obviously do meet your reporting requirements by utilizing it. So I prefer that if you want to take something away from my opinion on the matter, I would say use the online form if you ever have to unfortunately report one of these events.

Basically once they receive the online form, it gets submitted to the specific area office, which governs the area where the incident may have occurred. They'll then assign a compliance officer just like with the initial complaint, and then you'll likely hear from them. They'll either show up to the job site soon

thereafter, maybe one, two days, maybe same day, and they'll reach out to you via phone. If it is a residential project and the job's over, you might see them show up to your office, knock on the door and say, "Hey, I'm with OSHA and we got a complaint about this job and we want to talk to you about it." And we'll kind of talk a little bit more about what you might do in that context if they do decide to show up.

**Heidi:**

Well, and like you said at the very beginning, I mean using that online form kind of make you stop and take a breath and remain calm and it's documented that-

**Kyle:**

Correct. [inaudible 00:20:31] And you'll get a nice little email receipt saying you did it. So you don't encounter the situation where they say, "Oh, this never happened." So it's good in that regard as well.

**Heidi:**

You have what you need. Well, so along that lines then, in preparing for this, so we kind of know how they can get started, but what are some of the items what contractors should be looking at right now to prepare for OSHA inspections?

**Kyle:**

I'd say before you can even sniff an OSHA inspection, you should really have protocols in place for, I would say, greeting a compliance officer on any of your job sites, really to ensure that compliance officers are immediately intercepted. That way you have who you want talking to a compliance officer, so I'm sure a lot of people can probably imagine it's very easy to have a situation arise where you may not, maybe a very good employee, but everybody knows what I'm talking about. It's not the person that you want talking to the federal government. So be sure whoever's in charge of a given job site kind of understands how to handle a compliance officer showing up. That doesn't necessarily mean that they have to know the ins and outs of OSHA inspections and everything that we're talking about here today, but it means that they understand, "All right, what does my employer expect me to do in this situation?"

Who is it that I'm supposed to reach out to? Who is it that I'm supposed to call? Is there somebody specifically that oversees our company safety program? If so, that's probably the person that needs to be aware that there's a compliance officer on our job site, call them and then they'll know what to do from there." And that's really as simple as that. And then hopefully they're not talking to OSHA too much and you guys have had conversations internally about what's expected via our safety manual. What do we do when the government shows up? What do we say? What do we not do? What's expected of us? Once again, these are all important things that we can actually kind of stem the tides a little bit and make sure that we're not doing or saying anything we shouldn't be saying, which again, will greatly help your attorney in the event that you have to retain counsel for an inspection.

So just make sure that they understand what's going on. If we are in kind of a more large scale commercial job and there's a secure entry point or security guard or something like that, I would say even if that's not necessarily your employee. It might be wise to try to check in with maybe your GC or the owner and just kind of make sure that that person understands what they might be expected to do if a compliance officer shows up. We'll talk a little bit about this later, but you do have the right to request a warrant in the event that a compliance officer shows up on one of your job sites. In certain circumstances, a owner or a GC might want to utilize that. They might want to delay entry to a job site for safety concerns. So it's a little kind of silly to think about, but they are a individual and they're rolling into your job site.

But if there's activity ongoing at the job site and you have some sort of policy in place to restrict entry during that time for whatever reason, just because they're with the federal government doesn't change the fact that you've got a safety policy and program in place that's restricting entry at that time. So if you are restricting entry, they count and you can say that. You can say, "I'm sorry, you can't come in right now. We should be done with this phase in about an hour and a half, at which point in time we're happy to let you in, but right now it's not safe." They'll appreciate that, right? They appreciate that you have a program in place to address these types of concerns and that can certainly arise in certain circumstances. So if that's the case and you have somebody designated to handle the access egress, things of that nature.

I would say do it and make sure that that person does their job and doesn't just look at the badge and say, "Well, I'm going to let you do whatever you want," because that's not necessarily what you have to do, what you're required to do or what you're really expected to do in the context of any of these OSHA standards that we're talking about. In that vein and making sure that we have somebody that can sufficiently greet the compliance officer.

I think listeners would probably be surprised how often a compliance officer just shows up on a job site and they start walking around, jotting down notes, measuring things, taking pictures without anybody saying a word to them. And when somebody shows up, they do actually have certain requirements that they have to stick to once the inspection actually begins in the context of their communications with the employer. If they've already had an opportunity to do a whole bunch of measurements and probably watch you commit a whole bunch of safety violations. They're already going to have you, right? They're going to be able to stick it to you based on the things that they've seen. Whereas maybe if you shut the job site down and confronted them, they might not have been able to secure certain measurements and kind of go beyond the scope of what their initial inspection might have been if you sufficiently intercepted them.

What they really need to be able to do is to approach the compliance officer and say, "Sir, ma'am, our company policy is for me to reach out to my safety director, safety manager. Give me a minute, I'll contact them and they'll travel here." If you could just simply kind of wait for them to arrive, we certainly appreciate your patience, and they'll typically wait 90 minutes to two hours for that to happen. They have a guidebook and that's essentially what their guidebook says that they are supposed to do. And then if you do that and your foreman understands, or your employees understand that that's what they're supposed to do, in that 90 minutes to two hour period, you're going to then have somebody on the job site that actually knows their stuff, who knows your safety manual in and out, probably knows where SDS sheets and things like that are located, and that's the person that you want that to interact with a compliance officer.

And I always say this in every single presentation I give, make sure you have a backup plan. Make sure that there is somebody other than that safety director who also knows how to handle this because it's just like when it rains, it pours. So it always happens this way that the one time that you have a safety inspection from a compliance officer, your safety guy's on vacation or he's sick or something like that's happened. So there needs to be a backup and hopefully everybody knows who that backup person is, whether it's president, vice president, somebody in the company, HR director, whoever it may be, that also understands the safety program and could also handle compliance officer arriving on a job site.

**Heidi:**

I think a lot of people forget about that part, the backup, because you're right, and it may not even be as big as vacation. It could be just they're on another job site and so someone else needs to cover. Along with that, so when we're preparing for those inspections, let's talk about that inspection process. What should people be looking for throughout that process?



Kyle:

So once the compliance officer's there and you have the safety director present, the question is then what do you do? So the compliance officer has to present their credentials to the person that's in charge of the site. They may have done that to the foreman, but they should also really be doing that to your safety director when they show up on the job site. And this is really basically they're going to show a fancy badge, an ID card that says, yes, I am in fact who I purport to be. I'm an OSHA compliance officer, and I work for the federal government. They're then going to have to explain the nature and the purpose of the inspection of what they call an opening conference. And this is where I was talking about the scope of the inspection. You are actually entitled at that point in time to know what the scope of the visit is, why they're there, what they're looking into.

If they received a complaint, they have to tell you at this point in time that they received a complaint, and you can ask to review the complaint. And within that complaint, you're going to be able to gather exactly what the scope is and you can limit the compliance officer to that inspection scope. And I mentioned maybe restricting access in certain circumstances, if the circumstances dictate. Make sure at this point in time that if you're going to go into a hazardous area, make sure that the compliance officer is wearing the appropriate PPE to enter the job site. A lot of times this stuff has to be fitted to an individual person. If the compliance officer doesn't have requisite equipment to enter your job site, don't let them. You shouldn't be providing them with something that might give them the ability to go into one of your job sites but may not necessarily comply with the standard.

This person's there to enforce the standard, make them adhere to the standard. And again, I think they appreciate that in that context. When you present them with the situation where they say, "Look, it's not safe for me to let you do this. Why would I let you do this?" And again, there's a calm way to say that. There's a polite way to say that, but there's also a firm way to say that and say, "I know what my rights are, I know what my obligations are and it would not be safe, and then it would not be smart for me to allow you in this particular area." And maybe there's a better way to do it. Maybe in that circumstance it might be simpler to walk into a particular area and walk through, let's say there's a bunch of machinery. You can walk through the fabrication facility, whatever it may be.

Maybe we can just walk around, maybe we can leave the building, go outside, walk all the way around and get to where the compliance officer needs to go for the area that they're looking into without going to these areas that might be problematic in having them access. And also a good point in saying that is the compliance officer's not going to find a violation in that area either because they did not have the ability to access it. Sort of in that same vein. I mean, they have no right to go anywhere other than the area that they're looking at too. So you can actually just, even if it's a mile walk, you could say, "This is the best way to get there. We're going to go this way." Walk with them for a mile, and you get all the way where you're going and they conduct their inspection underneath the scope of the opening conference that they outlined for you.

I mentioned before, you can, when an OSHA compliance officer arrives, let's say it's your job site and there's not a GC or a architect or something like that overseeing the job. You can demand that they obtain a warrant. It's not something that we normally advise. In the context of these inspections, a lot of times what we're trying to do is be cooperative. And the reason for that is because I think most area directors, compliance officers, they will tell you on any given job site, they can probably find 20 violations. And that's just the reality. It's very hard to comply with every single OSHA standard from a technical perspective, even if you mean well, and even if you are doing the best you can possibly do. They tell me this every single time I have a chance to speak with them. They can find violations. It's very easy for them to do.

It's what they do on a daily basis. And if you make their life difficult and you require that they go get a warrant and then come back, especially if you're rude in doing so. If you don't really have a basis for

demanding the warrant, they very well may come back to your job site in a circumstance where let's say they only saw a ladder violation and you may have only been facing one citation item. You could see 8, 9, 10 citation items just because they're frustrated and ticked off that you made them do it. So even when we are involved as counsel, we try to be cooperative in that regard. We provide documents, things like that. We'll talk a little bit about what that entails.

So assuming that you're not really going to tell them to F off and get a warrant, it does sometimes still make sense to postpone the entry of the compliance officer, which is something that I was sort of touching on before. And that may not only be because of a safety concern in the roofing context especially. You can envision a scenario where, let's say you have a rainstorm coming in and you've got to get the roof dried in and it's not. And if you don't do it's going to cause immense damage to the underlying structure. And then all of a sudden you are dealing with a colossal headache simply from a contract perspective. That may be a circumstance or a situation where you may want to delay the inspection. You can say, "Look, I understand I can technically demand a warrant. I'm not trying to make your life difficult here, but we have this contract issue at play.

We really have to get this done. And if we don't, you can certainly envision all the problems that we're going to have." Be careful in those contexts though, because if you're doing that, it probably means that you're continuing work. And if you continue work and a violation occurs during dependency of the work, reality is the compliance officers probably sitting there. And again, in the roofing context, they can probably see everything that's happening. We're inside a building, they can't. And so it's a little bit simpler to simply say, we'll let you in two hours. And when we're talking an hour or two hours, three hours, most compliance officers are going to be okay with those waiting periods because it's going to take them longer to get a warrant and they're going to have to come back. And so as long as you sort of play ball a little bit and say, "Look, I understand this is not typical.

I understand this is not normal protocol, but here's what we have going on." They're human. They will work with you in certain contexts, and if they don't and they say, "That's not good enough for me." You can be polite, you can be calm, you can be firm. You can say, "Well unfortunately, in that circumstance I will have to require that you've obtained the warrants. I'm happy to call you when we're ready for you, even if you haven't already gotten the warrant and you're welcome to come back at that time." And that's generally a pretty good way to handle it. And so even if you sort of have a hothead compliance officer, as long as you, I would say document it, right? Document, document, document. Document what happened, sort of notate why it is that you made those decisions. And then that's information that you can actually share with the area director at a later date.

In the event that you start, let's say you get a citation and you're negotiating out potential resolutions of those citations, you can explain to the area director why that may have been done. And again, they're human and they'll understand, and I think your counsel can make a pretty good argument as to why that occurred. And furthermore, again, you're adhering to your legal rights that you have in these OSHA inspections. So once you actually get the credentials, and let's say you're ready and you're going to allow the inspection to occur, that's really when the compliance officer is going to step in and perform what's called the walk around inspection. So this is the time where they're going to go in and actually walk the job site normally with you to try to check in job sites, see what's going on. And as we move through this stage, what we want to be doing and what we want to tell our safety director, whoever it is that's there to do, is really just copy the compliance officer.

So they need to be notating everything that they're making notes about, photographing everything that they're photographing, taking their own independent measurements of anything that the compliance officer is measuring. And I think importantly on the measurements, because measurements come into play so often, especially in the roofing context, is when you pull out a measuring tape and you're measuring something. Take a photograph of where the measurements start and where the measurements end. Because in the context of these inspections, one inch can mean the difference

between a citation and no citation. So a lot of times, let's say you have a measuring tape and it's maybe bunched up at the beginning of the tape where the measurement is purporting to have begun. You're actually adding 1, 2, 3 inches there that should not be there. And so not only would you independently measure it yourself, but you would try to photograph the measurements that the compliance officer has taken.

We've actually had this happen before where our client was able to sufficiently document that the measurement was improperly taken, and as a result we were able to get a citation thrown out. And that's very important. And in that context, obviously there were subsequent measurements and things of that nature, but we never would've known about the issue and that the measurement was off had it not been for the client doing a very, very good job at documenting exactly what it was that the compliance officer was looking into on that given day. And those are the things that, look, it's unlikely that you're going to have counsel with you at this point in time. You could have the best attorney in the world, but if they're at trial or they're in another hearing, they may not be available and they may not be able to take your call during these two to three hours where this inspection's occurring.

So it's really incumbent upon you as the employer to sufficiently document absolutely everything at this stage. Again, assuming that you haven't required that they obtain a warrant to do that. So that's extremely important. I would say during these inspections, the compliance officers, they're trained to try to get you to agree with everything that they're doing and everything that they're saying when they're on a given job site. I think what's important to understand is anything that you say and anything that you do during these inspections, they can be used against you in litigation. So we don't really want to agree with anything they say. Again, we can be firm and we can be calm, and we can be polite during these conversations. We can talk about things like the weather, we can talk about how the local sports teams are doing, things like that. No problem.

That's not going to get you in any trouble. But when you start to actually talking about the context of the inspection, you can find yourself in a little bit of hot water. So the best response that you can give in those circumstances is to say, "I understand that's your position on this particular issue, I understand that's what you're saying. I disagree." And what I normally tell my clients to do, if there is something that they're claiming is a fact and you're disagreeing with that fact, make a note about it. And not only should you make a note about it, you should require that the compliance officer also make a note in their file about it. So ask the compliance officer and say, "I need you to note in your report in your file that you said this and I told you I disagreed with it," for whatever reason it may be.

And they are required to include that in their report. And then if you have a note that says, "I told you to do X, Y, and Z," and they fail to do it, then we can then suggest later on that their report may not be a complete and fair and accurate representation of the inspection that happened that day. So those are very important things. Otherwise, they're going to rely on that report essentially as the gospel up until the point of your taking of depositions and things of that nature. And while I would love to tell you, I want you to contest these things and go all the way through deposition, litigation, things like that, it's a heck of a lot cheaper if you can nip these things in the bud prior to then, and the sufficient documentation really can get you there. And the Department of Labor and the secretary's office, they're, in some circumstances, reasonable, right?

They understand that and they look at the facts of the case independent from any of their other cases. So the kind of, I guess, in that same realm of trying to make sure that we don't put our foot in our mouth and say something we shouldn't say during the walk around inspection is they love to use this thing that I call the dead air trick. So they're walking around, they're taking notes, they're taking photographs, and maybe they're not saying anything, right? Well, people have a tendency to not like quiet, they don't like it when nothing's being said. They think that they're being judged. They think that the compliance officer must have found a million violations, and that's why they're not saying anything. And then this happens in depositions all the time too. People start spewing everything that they can possibly think of. And that

becomes, again, statements and testimony that can then be included in the compliance officer's report and you end up saying something you probably shouldn't have said.

So kind of keep that in mind as you're doing one of these walk around inspections as well. Nothing's off the record. Everything that you say, everything that you do during these walk arounds is going to be part of the report, and I think we need to understand that. And then the final thing that I would sort of point out in this regard is that client officers are evaluated on a few things. The amount of inspections that they perform in a given year, the number of violations that they document, and then the percent of those inspections that actually resolve in what are called serious, willful and repeat violations. So those are your more problematic citation items. Fall protection happens to fall into that category. So in the roofing context, it's always something that we're looking out for. So does usage of hardhats, eye protection, ladder usage, which we mentioned before.

Those are all things that can be classified as serious violations and so these are things to take seriously. During the inspection process, OSHA is also entitled to perform interviews of your employees as well as your supervisory level personnel. And so during these interviews, and I think very important to understand, quite frankly, is that supervisory level employees, anything that they say, anything that they do can be imputed upon the company. And what that means is they are deemed to be the eyes and ears of your business. And that's basically everything from foreman level on up. And those individuals, those foremen level and on up employees or individuals, are entitled to have counsel present for any OSHA interview that they've performed. And you should take advantage of that because it gives your counsel an opportunity not only to sit in on those interviews, but they can also prepare these individuals for interviews.

So like I mentioned before, I understand these individuals may not be the most sophisticated people, and that's fine, that's no problem. Every company has a wide range of different people and personalities and characteristics, and we can work with that. But if you don't sufficiently prepare these individuals for an OSHA interview, they're going to do the very same things that I just mentioned. They're going to ramble and ramble and ramble, and they're going to tell OSHA things that you don't want OSHA to know about. They're going to say things that quite frankly aren't true. You can do all the best training in the world and they show up and they say, "I've never been trained on fall protection." Well, we know that's not true. We can turn around and we can provide documentation, but it still looks bad. It looks bad that they didn't understand that they had been trained on a very simple and basic topic.

And then that's not even accounting for the more complex topics that OSHA might get into in any given inspection. So we want to make sure that they're prepared. We want to make sure they understand what it is they're supposed to do on a job site, what their job requirements are, what their obligations are, and just make sure that they quite frankly, understand what's going on. They may not even understand what's going on, and we can kind of help them understand. We're not telling them what to say by the way. The most important thing about these inspections interviews is telling the truth and dealing with the facts as they may come, but you can prepare people for it and they can be ready to answer questions in the correct fashion and not give away information that they shouldn't otherwise be providing. So that's very important.

And I think just as a general tip for these interviews, OSHA loves to try to get you to guess, provide estimates, really shouldn't be doing that. It's very similar to depositions like I mentioned. So if you've ever had a deposition, you've imparted a deposition, you've ever been a party to a deposition. I would just say carry over a lot of those tips and pointers that your attorney in that circumstance probably gave you. And you can apply it to these OSHA interviews. Very similar in nature. At the end of one of these interviews, well, let me backtrack just a bit. So you're probably saying, "Well, how is my counsel going to be present for an interview if they're not there?" You could actually postpone it. So they can say, I want to talk to so-and-so. You can say, "Well, we have counsel that handles these sorts of things.

We will have them reach out to you and they'll schedule the interviews accordingly." And that's really part of the whole inspection process. And they have no problem with that. They understand that they will not expect you to actually sit down and perform an interview on the initial date of whatever inspection it is that they're conducting. So you have that opportunity to also buy yourself some time and do those prep sessions that I mentioned. At the end of one of these interviews, they normally will ask you to sign a statement. So during the interview, they'll write down every single thing it is that you're saying. My advice is always not to sign it, while you will not be able to retain a copy of it, if you do not sign, it'll be part of what they call their investigative report file. You don't need it, trust me.

Especially if your counsel's there, they can take their own notes and if you sign it's a pretty tacit admission of everything that's included within the document in the report. So my advice is almost always do not sign the document. There's no benefit in doing so. And normally if you have your counsel there, they will say, it's the advice of counsel not to sign the document. You then won't sign it. OSHA takes it. They're on their merry way. And that's another one of those things they're very used to. They understand that it is your right not to sign the document. You do not have to sign it, despite the fact that they may heavily suggest you do, you do not have to sign the document. And I would suggest not doing it. All right, and then I'm going to try to quickly get through this, Heidi, but another tool that OSHA can use as part of this process is document production [inaudible 00:45:17] request documents from you.

And so what this normally looks like is it looks like a piece of paper or document that they email you that says, "Here are the following documents and things that we want from you." Normally they're going to ask for copies of your safety manual, training records, the contract for the job in question. But probably the most important one that I always tell people is they can ask you for a copy of your 300 logs. So if you have over 10 employees, you're mandated to maintain your OSHA logs, your 300 logs, your 300, your 300As, and your 301s, and they can actually request that you send those within four hours. So they can say, "I need these and I need them in four hours." And if you don't provide them in four hours, it's a technical violation and you can get a citation for it.

So everything else normally will carry with it an additional timeframe to provide. Normally they'll give you a week, you can ask for an extension, they'll normally give it to you. But those 300 logs, they don't have to give you an extension and they can demand them within four hours. All of those things are things that you should be keeping and maintaining in your files so you should have them readily available. But normally people do not have the current year's log completed. So you will have to generate the current year's log and then ultimately send that to OSHA. So you will have a little bit of legwork to do there and just understand you got four hours to do it, and when they say four hours, they mean it because it's in the standard. So keep that in mind and make sure you're keeping your logs.

All right. And then the last thing on this list is the closing conference. So the statute limitations on these things is six months essentially, from the date that the inspection is open. So within that six month time period, they have to conduct the closing conference. They normally conduct it with the employer or their counsel. And at the closing conference, the compliance officer is essentially going to advise you of their findings. They'll probably let you know if they're going to issue any citations. If they are, what those citations might be. They then submit their report to the area director of the local officer working with, and then that's when you might see the citation come in the mail. And then I think now we're ready for the next slide.

**Heidi:**

No, that's good. There's so much here, Kyle, I think it's so important and we're getting some great comments and people that we'll get to with our questions here at the end. So let's go through the citation options.

Kyle:

So once you get a citation, you're going to see that you have a few options within the package that they send you. So you get basically a big manila envelope, and in that envelope is the citation and then they're broken down by item numbers and citation numbers. And those three options are essentially, like they say here, you can pay the fine. We usually don't recommend just simply paying the fine. The only circumstance where you may want to consider simply paying the fine is if they propose something called an expedited informal settlement agreement. And these are things where they say, "Look, these aren't overly serious violations or citations, and we're willing to simply provide a discount right off the top. And if you want to take that, you can simply sign here, pay it, and everybody will kind of be on their merry way." If they've got you dead to rights and you know it.

And in your talks with compliance officer, it doesn't seem like they're going to deviate from that. This might be an option. But again, that's really the only scenario where I would suggest doing that. I would say 99 times out of a hundred, I'm going to move on to the next thing. And the next thing is scheduling an informal conference. So both the informal conference as well as the contest of the citation, you've got 15 business days, and that's based on business days of the federal government. So it does take into account federal holidays, but be very careful with that. You'd be surprised. Things you think are federal holidays are not federal holidays. So I normally just docket 15 business days and stick to that. So 15 to get the informal conference done and settled though. So it's not just scheduling the conference, it's also reaching a settlement agreement that's signed by both parties within those 15 days.

A lot of times people make the mistake of scheduling the informal conference on the 15th day. They then try to get something negotiated out in the next couple of days. At that point in time it's too late. And what happens, the citation that was issued is deemed effective at that point in time. So all the amounts, all the items, all the citation numbers, those are all binding then and you're done. And you have no defense unless you can drum up a basis to file what we call a late notice of contest. And those are very difficult to establish. So we want to make sure that we understand what our 15-day deadline is and stick to it. So I'm normally the one that says, give me the earliest date possible for the informal conference. If it's in five days, that's fantastic. And then we've got 10 more business days to sit around and negotiate and talk about the language that we're going to have in any kind of settlement agreement if we're able to reach a resolution.

At these informal conferences, normally you're sitting down with either the area director or an assistant area director. You can talk about why you think a particular citation item is invalid. If you have counsel, they'll probably talk to them a little bit about legal defenses that you might have to one of these given items. And that's why I do think it's beneficial to have counsel involved at this point, even if you haven't had them involved prior. Because they are going to know some of the ins and outs of the legal defenses that might apply to set of facts at play. And then if you can't reach a resolution in during the informal conference, the next thing is to contest the citation. Contesting the citation again, has to be done within those 15 days. You send correspondence to the area office noting that you contest a multitude of things, the items, the value of the citations, and they then take that documentation and send it to the Department of Labor, secretary's office.

And at that point in time, you're in litigation with the federal government, essentially you're going to be subject to things like depositions, formal pleadings. And I normally don't go beyond that because at that point in time you got to have an attorney. There's rules of evidence that are applicable to this particular situation. You have to understand how these things work and what to do. And you certainly don't want to navigate those waters without counsel. But understand essentially, if you contest, that's what you're doing, you're saying, "All right, I am ready to litigate this case with the government."

Heidi:

So as you're looking at that too, and you're looking at the citation action steps that go along with that, let's talk about that. Because I want to make sure we have a little bit of time for questions.

Kyle:

So right, that kind of cuts into what I was saying with the citation when you receive it. I would say the most important thing is verify the date. Like I said, you're going to get that manila envelope, it's certified mail, and so you should know the date that you got it. And so the day that you got it, that's when the 15 days starts running. So you calculate the deadline based upon that. In your initial communications with the area office, when you're trying to schedule the informal conference, a lot of times what I say to do, have them send you an email verifying that this is the contest date. That way you have something in writing from OSHA saying, "We understand the contest deadline. It's April 15th and that's the date that everybody is using and operating under." Hopefully that matches the certified mailing envelope and things like that.

And you can utilize that as a fact in the event that they tried to suggest that the contest deadline is a different day, but you really should know what 15 business days is from the date of receipt. The only time that sometimes this comes into play is in the context of let's say they deliver it to a PO box or something like that, then we can start arguing and quibbling about whether you actually received it or not. But if it comes to your office and you receive it, note the date, put it on your calendar and go from there. And again, get everything scheduled ASAP. And then one requirement as well within the citation package is a requirement that you actually post a copy of the citation. You need to do this sort of in a common area. So if you've got maybe a lunchroom somewhere else that you posted your other OSHA posters in, post a copy of it for everybody to see. And then you need to actually post a copy of a separate form noting when the informal conference is going to take place.

And that way if there's, let's say you have union employees, they might have an employee representative, they need to be aware of when the informal is occurring that allows them to participate to the extent that they wish to.

Heidi:

Excellent, excellent. So there's some employees that just, you've done everything, all the documentation, you've put everything in place, but you still have problems. So let's just talk about that a little bit with employee misconduct.

Kyle:

So this is really probably, let's call it our most popular defense. And really what this boils down to is if you can show that you've got a safety program that includes the stuff we talked about before, work rules, training. You've got equipment designed to prevent the violation in question. You've communicated all of these rules to your employees. You're performing those safety audits. I would say that's probably the major one, these random site inspections and safety audits. And they got to be random. You've got to be showing up to these job sites and making sure that the violations are not occurring. You can't just be turning a blind eye to it. Candidly, I prefer the use of third party safety consultants that come in and do this. Somebody that doesn't have a connection to the business itself, they will handle all of the documentation for you.

If they find a violation, they'll note what it is, they'll send you a report about it. You can then use that report to discipline the employees in conjunction with the disciplinary program that we talked about before. And then you have all that pretty documentation that we can utilize to send to OSHA. And really

the point in all this is sort of what you indicated, which is to say, "We've done everything in our power to possibly prevent this stuff from occurring. And our foreman, he was off running to get materials and that's when OSHA showed up and when OSHA showed up, all these guys for whatever reason decided to stop using and wearing fall protection." The standards and the defense's account for the fact that there are situations where employers done everything they can possibly do, and yet for whatever reason, the employees have chosen to violate the safety standards and the rules.

And when that happens, it's actually a complete defense to the violation. It essentially goes to the heart of what we call the knowledge element of the offense. And so the company itself, essentially that stage does not have knowledge that the event occurred. And based on these types of things, you can get around some of these citations and violations. Note though, that this is only applicable to your baseline level sort of labor employees. When you have a supervisor on a given job site, again, we talked about that. It sort of imputes knowledge on the company itself. And because that foreman or supervisory level employees, the eyes and ears. If they're there with the employees and allowing all of this to occur, all these violations to occur, this defense is not going to apply. There is a separate supervisory misconduct defense that can't apply in certain circumstances, but that's generally only applicable if the supervisor is the one violating the rule.

And furthermore, the only one violating the rule and not violating it alongside one of your other employees. Because if he's violating alongside one of your other employees, then you get that imputation that I talked about. So it's a way to say, "Look, if I don't have a supervisor on the job site at a certain time for any reason, and these guys choose not to do what they're supposed to do, we have a defense." But really when you do have a supervisor out there, it's their job to make sure this stuff doesn't happen, and if they're there again, the defense isn't going to apply.

**Heidi:**

A last thing that we just wanted to make sure to hit on real quick is, and that's this new violation that's coming around with heat illness, real quick.

**Kyle:**

So OSHA's got something that they just call an emphasis program, and it's something that they focus on, and right now it just happens to be heat illness prevention. It's sort of a campaign that they're running. And so anytime that we're seeing a citation or an inspection come along, they're always asking about heat illness. So just make sure that you have some, especially as we kind of gear up into the summer. Make sure that you have programs in place to address heat exhaustion. And really what that boils down is we're providing our employees with adequate hydration, water, Gatorade. We're paying for it, we're providing it. We're not requiring that they bring their own, we're mandating breaks, we're providing access to AC in certain circumstances, shade. And we're not allowing the employees to say no. These are mandated things. No, you have to do this. This is the 15 minutes that we're reserving for shade, lunch, break, whatever it may be, and making sure that these guys aren't on a roof for 10 hours straight.

That can't happen, especially in the summer months. It's going to cause obviously heat exhaustion, which is what OSHA is trying to avoid. And then we need to make sure that our employees, especially our supervisors, are trained in understanding what the signs of heat exhaustion are. So slurred speech, getting woozy, and then making sure that these guys are wearing white clothing in the summer months, things of that nature. Just making sure that we're doing everything in our power to prevent people from succumbing to heat illness and exhaustion. And that really should be part of your written safety program. There should be a separate chapter in there for this.



Heidi:

Kyle, thank you. And I know there's so much information and we've been, you just packed it in. That was awesome. So good. And just real quick, and we're right at the top of the hour, but I did want to say there was just some really great comments in here about, first of all, saying that they thought the warrant was a great strategy and if indeed violations are present. They asked should they take that time to shut down the project, make corrections, kind of have employees leave?

Speaker 2:

So normally what I say is if you got a dead body in the building, you probably don't want to let OSHA in, right? If you've got a multitude of problems, there are circumstances where it might be appropriate to actually demand the warrant. I don't want my prior comments to be misconstrued to say you should never do it, but I think it should be used sparingly. I think if you have minor issues at play and you can direct the compliance officer to the given area, again, if we're on a roof, they really should only be accessing the roof. If we're talking, walking, working surface, let's say there's allegations of maybe a rusted out floor system, they might need to access the interior to check that out. But for the most part, they really should only be accessing the roofing system itself. And so in this context, it really is fairly simple to limit the scope of their inspection.

And I think in most situations, if you can limit the scope of the inspection, I think that will do you more good than demanding a warrant. Again, with the caveat of all those situations we talked about before where there might be situations where it makes sense to demand it, but trust me in saying that if you demand the warrant, it's going to take them off and they will come back and they'll come back with a vengeance and try to hit you with more violations. So I mean, if it's to avoid a million citations and you've got some serious cleanup to do, then maybe, but I would say it's a case by case basis unfortunately.

Heidi:

We have actually run out of time for questions, but there were a couple more in here, so I am going to make sure that these questions are going to get to Kyle. You can get a hold of us obviously at RoofersCoffeeShop, Heidi@Roofer'sCoffeeShop, and we can get you in touch with Kyle. Kyle, real quick, Adams and Reese, this is what you do all the time. How can they get ahold of you to get more information?

Kyle:

We're a full service construction firm. We basically handle everything under the sun that I've talked about here today, as well as contracts, civil litigation, to the extent that you need to make bond claims, lien claims. We do all of it under the sun. So anything you come up with in your life, we've encountered it before and we know how to handle it.

Heidi:

So great construction law firm, definitely someone who can help you with all these questions. We'll make sure to pass them on. I want to remind everybody that next week is National Safety Stand Down Week. Please participate on May 1st through the fifth by simply going to [osha.gov/stop-falls-stand-down](https://www.osha.gov/stop-falls-stand-down), with all the dashes. And you can get a lot of great information along with obviously at Adams and Reese and on RoofersCoffeeShop under the Adams and Reese directory. You can get in touch with them on that. Plus all of our safety articles, a lot of safety information that's coming through there. So Kyle, thank you so much for all your information. It was just amazing.

Kyle:

All right, appreciate it. Thanks, Heidi.

Heidi:

And thank you all for listening. We'll be back next month on May 31st, and we'll be talking to Westlake about stone coated steel. I'm very excited about this. This will be a great conversation. I appreciate all of you being on, and we will see you all next time. Thank you very much and have a great day.