

Insights, News & Events

“WHAT’S THAT BUZZING OVERHEAD?” DON’T GET STUNG BY AN OSHA SAFETY INSPECTION DRONE

Publication
Sep 2, 2019

When the Occupational Safety and Health Administration (OSHA) issued a memorandum last year announcing that agency inspectors are now authorized to use camera-carrying Unmanned Aircraft Systems—or drones—to collect evidence during inspections in certain workplace settings, employers across the country should have collectively raised their eyes to the sky. This development means that OSHA inspectors are not only authorized to conduct in-person inspections of your workplace, they can fly remote-controlled aircraft above your worksite to track down safety violations. While most would agree that workplace safety is of the utmost importance, the use of drones to inspect a worksite raises new concerns for employers.

PRIVACY CONCERNS ARE ALL THE BUZZ

One area of concern with OSHA's drone use is your Fourth Amendment right to object to the expansion of an overbroad inspection. For instance, will your objection to drone use be the end of the story, or will OSHA then seek a search warrant?

According to the OSHA guidance memo, inspectors must “obtain express consent from the employer” prior to using a drone. If the employer objects to the drone’s use, then the aircraft won’t fly, according to the guidance memo. Keep in mind that you have a Fourth Amendment right to require OSHA to obtain a search warrant. Understand, however, there is a risk of becoming a target for multiple and frequent future investigations when sending an OSHA inspector away

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from your doors—or, in this case, away from your airspace. That said, the better option if facing an OSHA drone inspection might be to allow the drone's use, but to work with the agency to limit the inspection.

Industry Focus

Construction

Currently, when you grant an OSHA inspector entry for a limited inspection, such as one responding to an employee complaint, you may object to expansion of the inspection to other areas of your workplace. For instance, you may allow the inspector to enter but can object to the inspection of certain portions of your workplace beyond the scope of the complaint.

Moreover, you can limit certain aspects of the inspection, such as the taking of photographs or videotaping of areas which happen to reveal trade secrets, or questioning employees while they are working. While this option seems to avoid the Fourth Amendment problem, only time will tell. Keep in mind, also, that the inspection could still be broadened if the inspector spots a hazard in "plain view" while using the drone camera.

WHO'S THE QUEEN BEE? SORTING OUT WHO'S IN CHARGE

Other concerns involve the question of who OSHA considers to be "in charge" at a multiple-employer worksite. As stated above, OSHA's guidance memo requires express consent from an employer prior to drone use. Under OSHA's Multi-Employer Worksite Citation Policy, more than one employer may be citable for a hazardous condition that violates an OSHA standard.

For instance, at construction sites, it is common for several subcontractors to be working under a general contractor. Can a general contractor give consent for drone use during an inspection involving a worksite involving multiple employers? Who actually owns the airspace above that worksite and therefore has authority to grant consent? And what happens to the video after an inspection—will it be obtainable by competitors or unions through a FOIA request? The unanswered questions seem endless.

The OSHA guidance memo also notes that Federal Aviation Administration rules require any OSHA region using a drone to designate a staff member as an "unmanned aircraft program manager" to oversee training requirements and other program elements. This includes ensuring that the

drone inspection is approved and that a qualified OSHA team is available to conduct the inspection before any flight operation begins. In addition, the National Fire Protection Association issued its first unmanned robotics guidance (NFPA 2400, Standard for Small Unmanned Aircraft Systems (sUAS) Used for Public Safety Operations) in December 2018. Thus, it is likely that you will see increased drone use in the future.

WHAT TO DO NOW?

Although OSHA has many questions to answer before sending drones over your workplaces, you should begin to address the use of drones in OSHA inspections now. Here are a few tips:

- **Prepare a response strategy.** Just as an employer should prepare a written strategy for an OSHA in-person inspection, the same applies to drone inspections. You should designate an authorized employer representative to sit next to an OSHA drone crew on the ground, the same as if the employee were accompanying the OSHA inspector during a walk-around inspection.
- **Don't be afraid to limit the inspection.** You should participate in the drone flight planning and not allow drones over your worksite if you disagree with the flight plan.
- **Be informed!** You should educate your organization on these new developments to ensure your key personnel at least know enough to prepare for future OSHA drone inspections. If an inspector shows up at your door requesting to conduct a drone inspection, know your rights.

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