



When OSHA Comes Flying In

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Commercial drones are becoming more common on construction sites, as employers monitor and inspect their own sites for safety and related issues. These drones allow employers to capture images of particularly difficult or dangerous places on the jobsite, such as towers, bridges, and scaffolding. They can also assist employers in broadly surveying and mapping large jobsites.

Employers aren't the only ones taking advantage of the new technology. Recently, at the AGC Mid-year Safety Meeting, OSHA Assistant Regional Director Josh Flesher stated that OSHA is planning to deploy drones for the same reasons employers are—to assist in safely inspecting jobsites, especially hard-to-reach areas of the sites.

Here are a few key considerations as employers think about what OSHA drones might mean for them:

- OSHA inspections may become more thorough. As touched on above, drones may allow access to parts of the jobsite that were previously less subject to close inspection. Employers should take the time to make sure that all parts of the jobsite are ready for when OSHA calls.
- In a typical inspection, an OSHA inspector arrives on site and has a brief opening conference with representatives of management to explain the purpose and scope of the inspection. If an inspector plans to use a drone and an employer thinks that the drone may cause a safety hazard to workers who are working in the ordinary course of business on the jobsite, the employer should notify the inspector as soon as practicable. If the owner site doesn't allow the use of drones, the inspector should likewise be notified.
- The opening conference will be followed by a walk-around of the facility. The use of drones could serve as an expedited walk-around or enable OSHA to inspect areas of the jobsite that are usually difficult to access. Employers are generally entitled to participate in this walk-around, to walk next to the inspector, and to take the same or similar pictures that the inspector takes. But it's not yet clear whether employers can or will be allowed to fly a drone alongside OSHA's drone to take the same pictures or whether OSHA will otherwise share with the employer the pictures it takes with its drone. Employers may simply want to ask the inspector what the protocol is, here.
- OSHA has no present plans to conduct pre-opening conference inspections using drones at this time—and for good reason. As it stands now, an OSHA inspector is generally permitted to issue a citation for an open and obvious violation he observes while traveling past a jobsite; but that inspector is generally only permitted to come onto a jobsite with permission from the company, with a subpoena, or in a case of imminent danger. The use of drones near or above a jobsite without permission or a subpoena would cause substantial constitutional issues.

There are other open questions about OSHA's drone use, as well. In addition, it's not clear that OSHA's use of drone technology will be subject to the Federal Aviation Act or Texas property or privacy law regulating drone use—or whether such laws would meaningfully restrict OSHA from inspecting jobsites with drones.

In any case, employers should be prepared for more detailed inspections—and shouldn't be surprised if a drone is flying in their jobsite during an onsite inspection.

