

The Property Line: Navigating Warehouse Safety and Compliance Risks

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Welcome to The Property Line, a commercial real estate podcast brought to you by Seyfarth Shaw's Real Estate department. The Property Line is a brief discussion of current market trends, bringing you insights from our acclaimed national team of real estate attorneys. Each episode focuses on a key takeaway for the busy real estate professional. Now, on to this week's discussion.

James O'Brien

Hello and welcome back to The Property Line. My name is James O'Brien, and my co-host today is Eric Greenberg. We're both partners in Seyfarth's Real Estate practice, and today we're joined by Brent Clark, a partner in Seyfarth's Labor and Employment Practice and co-chair of the firm's Workplace Safety and Environmental Group. Brent is here to discuss the ways in which both federal and state health and safety regulations may impact real estate users, particularly operators of warehouses and other industrial properties. Welcome, Brent. Thanks for joining us.

Brent Clark

Thank you very much for having me. Much appreciated.

James O'Brien

Well, it's great to have you here, and it's good to discuss, you know, some real law outside of the real estate context that might affect real estate people. So are there any recent developments that warehouse operators should be taking into account from a safety and health perspective?

Brent Clark

Yes, James, there are. One of the main things and developments that has occurred the last several years for warehouse operators in particular, is an OSHA enforcement program. It's called a national Emphasis Program that has been focused on warehouse operations. Just for a quick moment, so everybody understands who and what OSHA is, we've probably heard it all our lives, but OSHA technically stands for the Occupational Safety and Health Administration. About half the states in the country are regulated by federal OSHA. The other half the states have their own, what we call state programs or state plans. So for example, Virginia. Virginia would have its own Virginia OSHA program, but the regulations and standards largely mimic each other. There's very few variations, and so OSHA enforces Occupational Safety and Health for the workers who are involved in the warehouse operations.

Typically, you would think of the owner or the operator of the warehouse, but it also includes any third parties who may be involved in the warehouse. So trucking companies that come in and deliver, contractors who come in, that can be janitorial maintenance, anyone who's kind of touching the property, that then becomes what we call a multi employer worksite. So this national Emphasis Program that is indeed targeting warehouses. It's not small warehouses, but it is anyone who OSHA considers a warehouse. What it does is OSHA then creates a list of the various warehouses within the jurisdiction of that office, and then they randomly select the warehouse for inspection. So normally, you're going to get inspected if there's been an accident that you had to report to OSHA, there's been a complaint of a safety violation, but this provides a basis where OSHA can literally select you or interesting and then they come in and they sort of turn you upside down about your warehouse operations.

So they they're going to look at all of your safety and health programs that relate to the warehouse. For most folks involved in these operations, you're going to have powered industrial trucks, because you're going to be using different forms of powered industrial trucks. Well, like everything OSHA, there's a specialized standard for that. And then you get into all the equipment associated with running a warehouse. You get into conveyors, you get into balers, that bale leftover cardboard and paper. You get into the HVAC systems, you get into all of these related issues for which you have to have a safety and health program. So these are, these are what we call fair. They're not, we've got a term of what we call wall to wall inspections, which is the worst kind of inspection from an operator's perspective. But they're close to wall to wall, because it is targeting on all warehouse operations. So that means our warehouse operators are at increased risk of inspection, which means even if they were getting their resources balanced properly before the NEP, they probably need to take another look at their programs and try to get themselves more prepared and ready for inspection. Bottom line, the NEP moves you up the list, and you're likely to get inspected. So that's where that lands.

James O'Brien

Now, before, I know, Eric, you have a question, but before you jump to it, I mean one thing we were talking about a little bit offline, is that owners of these buildings can also be implicated in so far as, you know, you talked about a multi employer site, where the trucking company or somebody might be the multi employer just to point out to the audience, if you're a landlord and you're in charge of the maintenance of things like HVAC or the structure of the building, and those are the issues that are causing safety problems, you could be sucked into this too. So you want to make sure your tenants are compliant as well. But any event, I know you had to follow up, Eric.

Eric Greenberg

Brent, thank you for that response. It seems there's quite a lot just in the national Emphasis Program for operators and users to think about. Beyond the NEP, are there other significant developments in safety and health areas that may impact warehouse operators as well?

Brent Clark

Absolutely. Yeah, the next sort of big topic that comes to mind that operators need to take into account is, and I'll loosely call this, the area of ergonomics. Ergonomics is, it basically talks about the potential hazards that employees can face associated with material management. So if I have a forklift carrying a pallet of product, well, now I'm using an engineered piece of equipment, the employee just drives the forklift. But the moment, and lots of warehouses can't avoid getting into the picking operation where they somebody has to handle that material to some degree, and it depends on how automated the warehouse is, but the moment you have an employee lay hands on product, you now have the potential for an ergonomic issue.

Ergonomics is one of these more complex and slippery areas of safety law, because it involves individual humans. It involves muscles, tissues, tendons, and it involves what we call risk factors, which are, you know, it's obvious for anyone who's lifted too much at one point in time and pulled a back, that's a risk factor. The force of the weight that one is handling is a risk factor. Then you get into the posture of the person. What you know, where did the product start? Where did that? Did I lift it from the floor? Did I lift it from something called the Power Zone? Was I lifting it over my shoulder? Was I twisting when I was lifting all of those are risk factors for ergonomics, but it's more individualized.

To give you a classic safety and health example, if you were to put your finger in front of a saw, there's not anybody on earth who wouldn't sustain the cut from the saw. It's clear. It's objective. Ergonomics is different. People are different. So one person might be able to lift the product safely, just fine all day

long, but another person might not be able to. So ergonomics introduces a subjective level of risk into the in health. And so what's going on right now is several states have, for the first time in the history of OSHA issued ergonomic standards, and these ergonomics, so these are state OSHA programs, and these programs attempt to regulate this somewhat subjective area of safety and health. And what these generally, what these ergonomic standards do is require assessment. The folks who do assessments are actually known as, the better ones, are known as Certified Professional ergonomists. So they are CPEs. There's not a lot of them in the world, but our group works with them very closely, and have for the last three or four decades. But they can use different tools to assess the workplace. But just the very selection of the tool you're going to use to assess the workplace is fraught with judgment, and it's fraught with risk.

The example I like to give folks is back at the end of the Clinton administration, and I am dating myself when I testified before OSHA and Congress with respect to ergonomics, about, there was a proposed federal ergonomic standard. And at the time, OSHA used the tool, or wanted to use the tool developed by NIOSH. NIOSH is the National Institute of Safety and Health. So NIOSH has a lifting guideline. They developed it back in the 70s, 80s, and 90s, and federal OSHA was proposing to use this NIOSH lifting guideline. Well, that guideline essentially says any person lifting something over 25 pounds is risky and has this risk factor. And of course, that caused a lot of our warehouse operators to get very concerned. OSHA passed the standard we, as an industry, objected, and we convinced Congress to actually reverse, for the first time in the history of OSHA, reverse an OSHA standard that was about to become effective. So federal OSHA does not have an ergonomic standard because they lost that battle with industry, and it's a softer, more nuanced area of safety and health.

But nonetheless, just the advice I wanted to stop on with respect to ergonomics for warehouse operators, is given, and there are many tools, many different things beyond the NIOSH lifting equation, a lot of them have been developed more recently in the last decade or so. They're more sophisticated, they're better. But in general, we recommend the clients, they're going to have to do an ergonomic assessment. Do that under attorney client and work product privilege, because even those tools can lead to some answers that are uncomfortable about a company's operations and may suggest you need to have greater engineering controls, more lift tables to get the product off the floor, more conveyors, more automated systems, things of that nature. And you want to keep that privilege to the extent you can, from OSHA, from any third party that might be trying to sue you, until you, once you settle on a plan, that's going to be seen by how you change your operation. No good really comes of not having that underlying evaluation and assessment done under privilege. So that's our standard recommendation.

Eric Greenberg

Well, Brett mentioned the state focus. You mentioned the OSHA walk back in your recent anecdote. More recently, is there any looking at ergonomic hazards for warehouse workers on a federal level in other areas?

Brent Clark

Because we pushed them back 25, 26 years ago. But OSHA can regulate and does regulate ergonomics under what's called the general duty clause. So there is no standard, but it's a catch all, that's written into the act that says, where an employer has a recognized hazard that's causing serious injury or death – with ergonomics, it wouldn't be death – but serious injury, certainly that can happen. The employer has to address that recognized hazard through feasible means and OSHA, federal OSHA is dabbling again, back into the ergonomics arena, sometimes by using that NEP, that national Emphasis Program I referred to. In any federal ocean inspection, the first thing they ask for are your OSHA 300 injury and illness logs. All employers above 10 employees have to keep an injury and illness log in warehousing, and that log has to chronicle all work related injuries. So if you're having ergonomic

related injuries, which people, who you know have people handle material, eventually you're going to have those, OSHA gets those logs, typically within four hours of opening that. That's what the law requires. And so OSHA now has, in every inspection, regardless of why they're there, the roadmap to get into ergonomic issues if they want. And so that's the tricky part. And so yes, OSHA, they have a group of their experts. They're out in Salt Lake City. They typically call them in, and now you're off and running, and you don't want an ergonomics issue.

James O'Brien

Well, I mean, if OSHA does show up through the NEP program, or if state regulators come, if there is an inspection of your warehouse, do you have any tips for you know, you had mentioned earlier about certain things being kept employee client privilege, but you know when you're being inspected, or any best practices or tips for an operator or warehouse to help that process go better?

Brent Clark

Yeah, great question, James, the first thing, and this is going to sort of sound formulaic, and it is, but the first thing is to be, you know, get yourself ready for the inspection beforehand. Review your programs, do your audits, get yourself, make sure you've got an active and robust safety and health program. But beyond that, we recommend that clients have their own inspection policy or protocol. That can, again, can be attorney client privilege that just goes into a safety manual for managers eyes only, and it allows them to know the ins and outs of the basics of an OSHA inspection. For example, jurisdiction. If OSHA shows up and is there for a complaint on the dock, the loading dock, well, then that means OSHA is out in the maintenance shop, and the maintenance shop is the real part of most warehouses. You know. I'm doing maintenance on forklifts or equipment I've got, it's an OSA inspector's dream. Well, if they're there for something on the dock, we call that a limited scope inspection. It's technically, you know, by consent, and so my consent is going to limit them to the loading dock.

Crazy example is, if OSHA is in your workplace and they see a violation, the plain view doctrine that most lawyers learned in law school applies, which is, OSHA can investigate that violation. I've got warehouse clients where I tell them, put OSHA, take them out the front door, put them in a car, drive them around to the back of the warehouse, rather than let them walk through the warehouse. And we do that. I mean, I've done that with the last two weeks. So have a policy or a program, and that's just one example. It'll talk about interviews, it'll talk about documents, talk about photographs, talks about video. OSHA sometimes wants to take video. We put our hand up and say, you can take video, but we're not going to be recorded while that video is going because we don't have to allow ourselves to be recorded. So these, a policy or program with a lot of company in advance reduces your risk of violations on the back end, because you know your rights, you've thought it through, and you can hopefully get through that inspection with minimal interference and minimal risk.

James O'Brien

Yeah, I could see where, if you're unprepared, you could inadvertently open that inspection up to other areas of the warehouse that were not originally intended, just as you said, by just saying, like, oh, come along. We'll walk through here as a shortcut through the shop, and then, then all sudden, that's fair game, I would imagine.

Brent Clark

You nailed it. In fact, OSHA inspectors are trained, and they're very crafty. They will say, so what's over there? You say, well, that's our maintenance shop. Well, let's go over there. You know, I'm also a trial lawyer, so let's go over there is technically a question. And if you don't, if you don't, so no, no, no, no, let's, let's, you're here to look at this, you've now consented to expanding the search that is taking

place, which we call an OSHA inspection. So, yes, you want to know, you want to know your rights and be ready.

James O'Brien

Well, I mean, that's all great information. You know, we are at the end of our time, so I guess we'll wrap up there. Brent, thanks for joining us today and for sharing your insights. It's good to have you. And maybe we'll have a follow up sometime.

Brent Clark

No problem. James, Eric, thanks for reaching out, and hopefully this could be some help for our folks. Thanks.

James O'Brien

Excellent. Well, a special thanks to those listeners for tuning in, and please keep an eye out for future episodes and until then, be well.

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