

# 2019 Construction Conference Insights: Minimizing Liability When Accidents Happen

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**Three Ward and Smith attorneys discussed how construction companies could reduce their risk of accidents and limit their liability—an essential consideration for an industry where the work carries inherent risks.**

Attorneys Bill Durr, Jeremy Wilson, and Will Oden hosted a panel on accidents and liability during the 2019 Construction Conference, “Framing Your Business Agenda for the Future.” Bill Durr is a civil litigator with substantial experience in these matters. Jeremy Wilson leads the firm’s Personal Injury Practice Group, and Will Oden leads the firm’s Workplace Safety and Health Practice Group.

They began by discussing the boundaries between workers’ compensation insurance and liabilities that might not be covered by your workers’ comp policy.

“If there’s an employee who’s injured, it doesn’t matter who is at fault; workers’ compensation likely is going to kick in,” Durr said.

By contrast, third-party liability has to do with who’s at fault. “Most of the time you’re talking about negligence,” he said.

## **Workers’ Comp and Employment Law**

Oden, who handles both employment law matters and workers’ compensation issues, noted that employers’ interests “sometimes diverge from their insurance carriers.”

For example, in occupational health claims, involving asbestos, silica, or chemicals exposure, Oden said, you could end up represented by different attorneys for each period of time an employee worked for you during which a different workers’ comp policy covered the employer.

“Yes, they want to defend the claim,” Oden said. “But really what they’re trying to do is make sure the liability doesn’t fall on their time period.”

For companies, that can create risk. The insurer’s workers’ comp counsel may push to have some or all of the liability moved

to a period when the company was self-insured, or a period when the deductible was very high, to shift costs from the insurer to the company.

Oden cautioned attendees at the conference to make sure everyone is covered by a workers' compensation policy—even workers that you might consider contractors.

Employment law also often is involved in workers' compensation cases. “If there are any aspects to the case that involve employment, any issues regarding a disability, any issues regarding a protected category under Title VII—age, race, gender, national origin, etc.,” Oden added, “If you know a good employment attorney, I would submit it’s a good idea to always have one, even in the background, especially in complex workers' compensation claims.”

Regarding the potential misclassification of workers, “IRS, Department of Labor, all those entities have their own standards and tests they use, but what it all comes down to is control,” he said. “Most of the time, if it’s a close call, I’m always going to say treat them like an employee because it’s safer.”

In addition to workers' compensation, employers need to keep an eye out for negligence, which can be more complicated.

## **Don't Neglect Negligence**

Although workers' comp covers at-work accidents, it may not cover all accidents that happen at work. For example, Durr said, imagine a building inspector who visits your construction site and is hurt because a tool falls on their head.

Who’s responsible? The individual worker or subcontractor who left the tool sitting in that precarious location? The general contractor who’s managing the project and the site? The property owner who actually owns the project?

“It is not at all unusual to have multiple parties in a litigation,” Durr said. “I like to say that everyone within rock-throwing distance is going to be named in that lawsuit.”

When it comes time to seek compensation, that building inspector may sue any or all of the above entities. And each entity may have different insurance policies with different deductibles and liability limits; some may even be self-insured.

“Having as much coverage as a business can afford is important, especially if it’s a serious accident,” Durr said.

As a result, some businesses elect to purchase umbrella policies that provide coverage—\$1 million, \$2 million, \$5 million or even more—to handle claims above and beyond what a standard policy provides.

Durr also noted that it was important for general contractors to ensure their subcontractors are properly insured. He recommended regularly reviewing their certificates of insurance to be certain the coverage is still in force.

He also suggests, when insurance requirements are written into a contract for a project, confirming with your insurance agent that your insurance policy meets the contract requirements.

“Ask your insurance agent or your insurance carrier in writing,” Durr said. “Are the contract requirements, met by the insurance I have?” Be sure you receive a written response and retain that response in your file.

## **Turning to Autos**

“When something bad happens—there’s a car wreck—who’s responsible?” Wilson asked the group.

This scenario can get tricky: Maybe the vehicle is company-owned, or maybe it’s a personal vehicle. Maybe it’s being driven

outside of normal work hours, or maybe it's being driven outside of normal work hours but for a work-related task.

In North Carolina generally, Wilson said, auto insurance follows the vehicle. So, the insurance that will apply will be the insurance that covers that vehicle. Ideally, the auto insurer will resolve any claim, but Wilson said that sometimes an attorney can help make sure that process happens quickly.

If there is an accident—even a seemingly minor one—“go ahead and report it,” Wilson said. It's not uncommon for someone in a minor fender bender to later claim a serious injury.

“Sometimes, depending upon the policy you have, if you don't report something in a timely fashion, there might be a coverage issue,” he said.

Beyond simply purchasing insurance, companies can also lower their risk by following some common-sense practices, such as hiring good people and conducting background checks.

If the company owns a lot of vehicles, it might be worth the effort to bundle vehicles together and have them owned by a separate company or handled by a fleet management company. Clear company policies on when employees can and cannot drive also are helpful.

## **Don't Drink Extra Risk**

Wilson also spent a few minutes discussing the risks that alcohol can create. He acknowledged that companies can't eliminate all risks—after all, people have to run their businesses. And alcohol is commonly served at networking and other events that mix business and pleasure.

Nonetheless, he suggested minimizing the risk of someone drinking and driving, hurting someone, and then having the liability for that strike the business.

First, he said, set clear policies—and follow them—about alcohol on company premises and at work events.

“The worst thing you can do is have a policy but never follow it because that's going to be exhibit 1 if there's ever a lawsuit,” Wilson said.

If there is alcohol consumed at a work-related event—a company holiday party or dinner celebrating a big sale, for example—“be mindful that no one's overdoing it.”

If someone does drink too much, provide them a safe way home by calling a taxi or ride-share service.

Wilson also suggested having insurance for company events or delegating the responsibility to manage alcohol consumption to a properly insured caterer or restaurant.

“No one's telling you not to have fun with your employees or your coworkers,” he said. “But have your antenna up and be responsible ... and because we can't eliminate all risk, have the proper insurance.”

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*This is one of a series of articles summarizing key takeaways from Ward and Smith's 2019 Construction Conference. See additional articles:*

- Industry Expert Lays Out Prospects for Growth
- How to Lower Legal Risk
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