

OSHA RULE

Multi-Employer Worksite Policy

an unpleasant safety surprise

By Luke J. Farley and Dixie T. Wells

Most contractors and subcontractors understand that the federal Occupational Safety and Health Act (OSHA) requires virtually all employers to maintain safe workplaces for their employees. In most instances, who is an “employer” and who is an “employee” are straightforward questions. But in the construction context, a longstanding OSHA rule known as the “multi-employer worksite” policy complicates the issue.

This policy changes the basic requirement that an employer is only responsible for the safety of its own employees. Instead, on a “multi-employer worksite”—like a construction project with a general contractor, multiple subcontractors, and even the owner’s separate contractors all working together at the same time—one employer can be cited for a safety violation even if the employee exposed to the hazard worked for a different company. Several employers can be cited for the same single violation.

For the multi-employer worksite policy to apply, the general contractor or subcontractor must fall into one of four employer categories created by OSHA—a “creating,” “exposing,” “correcting,” or “controlling” employer. An employer may fall into more than one category. The remainder of this article explains each category and offers some tips to avoid a citation under the multi-employer worksite policy.

1 CREATING EMPLOYER

A “creating” employer is the simplest of the four categories. A creating employer actually

creates a hazard that violates a safety standard. This category reflects an employer’s basic obligation under OSHA—not to create hazards for its employees. It differs from the standard approach in that the creating employer need not have created the hazard for its own employees. If an employer on a multi-employer worksite creates a hazard to which the employees of another company are exposed, the employer can be cited.

To avoid a citation as a creating employer, a contractor or subcontractor should adhere to all applicable safety regulations.

2 EXPOSING EMPLOYER

An “exposing” employer is an employer whose employees were exposed to a hazard created by another employer. (If an exposing employer also created the hazard, it will be cited as a creating employer instead.) However, mere employee exposure to a hazard is not enough to warrant a citation. An exposing employer will only be cited if it had actual knowledge of the hazardous condition or did not use “reasonable diligence” to discover the condition and did not take steps within its authority to protect its own employees. If an exposing employer does not have authority to correct the violation, it must do three things to prevent a citation: (1) ask the employer creating the hazard to correct the condition; (2) inform its employees of the hazard; and (3) take reasonable alternative measures to protect its employees.

To avoid a citation as an exposing employer, a contractor or subcontractor should be reasonably familiar with the condition of the area where its own employees are working. If the employer observes any violations, it should make a request in writing that the violation be corrected immediately and follow up to determine whether the request has been honored. The employer should also take reasonable alternative steps to protect its employees, such as suggesting they avoid the area where the hazard is located and document such instruction.

3 CORRECTING EMPLOYER

A correcting employer is an employer engaged in a “common undertaking” with an exposing employer and is responsible for correcting a hazard. Most often, a correcting employer is one responsible for installing or maintaining particular safety measures. For example, a carpenter hired to install and maintain safety guard rails in a building project could be a correcting employer, because its task focuses on meeting a safety standard. A correcting employer must take reasonable steps to prevent and discover safety violations and meet its obligation to correct the hazard. A correcting employer is not responsible if it could not reasonably have known about a violation.

To avoid a citation as a correcting employer, a contractor or subcontractor hired to perform certain safety tasks should be reasonably diligent about inspecting its own work (such

as the guard rail example above) and making sure any deficiencies are corrected.

4 CONTROLLING EMPLOYER

A “controlling” employer is an employer with general supervisory authority over the worksite, including the power to correct safety violations itself or require others to correct them. An employer’s right of control can be based on the language of its contract with other employers working at the jobsite (for example, a subcontract giving the general contractor the right to direct a subcontractor’s work). A right of control can also be based on how two employers interact with each other on the job—whether one in practice controls the other. Often times, the general contractor on a project is deemed a “controlling” employer.

A controlling employer must take reasonable steps to detect and prevent violations on the site. A controlling employer’s obligation to take reasonable steps is less than what is required of an employer when it comes to protecting its own employees.

This means that the controlling employer is not normally required to inspect for hazards as frequently or have the same level of knowledge of the applicable standards or trade expertise as the employer it has hired.

To avoid a citation as a controlling employer, a contractor should conduct periodic safety inspections and implement a system for promptly correcting hazards and enforcing safety requirements with a reporting system, graduated enforcement, and follow-up inspections.

CLOSING THOUGHT

For many general contractors and subcontractors, it will come as a surprise that they could receive an OSHA citation even when someone else created the hazard or someone else’s employee is exposed to a hazard. But that risk exists under OSHA’s multi-employer worksite policy. Employers can minimize their risk under the policy by being aware of safety conditions at the jobsite and taking a reasonable, proactive approach to addressing violations, regardless of whether they created the condition. ■

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