

Strategies for Avoiding Multi-Employer Liability

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The past influx of federal construction project funds has brought increased scrutiny from OSHA when it comes to multi-employer liability (i.e., holding more than one employer liable for workplace safety violations stemming from the same jobsite). It appears the enhanced scrutiny is not going away any time soon,

“*Many contractors are trying to figure out how to avoid being deemed ‘controlling employers.’*”

especially considering recent government concerns that many general contractors may have improperly classified employees as independent contractors in order to avoid paying employment taxes and other employee costs.

While OSHA’s multi-employer liability policy originated in the context of the construction industry, it is not limited to general contractors and their subcontractors. As evidenced by OSHA citations recently issued against two Wisconsin companies, such liability also can be asserted against both a temporary staffing agency and a host employer (when injuries are

sustained by a temporary worker on assignment elsewhere).

It’s still somewhat of a gray area, as various state and federal courts have rendered different verdicts in regard to which entities are liable for workplace safety violations. Ultimately, a growing number of jurisdictions are agreeing with OSHA’s view that more than one employer can be liable for workplace deficiencies when they share control and responsibility for worker safety.

The bases for multi-employer liability were both explained and upheld in what remains a prominent case in this area, *Secretary of Labor v. Summit Contractors, Inc.* In that case, the 8th Circuit held that a “controlling employer” can be liable for workplace violations even when it did not create the hazard in question, and even when its own employees were not exposed to the hazard. If a contractor “controls” a jobsite hazard, it may be cited under OSHA’s multi-employer liability doctrine.

This often comes as a surprise to employers in the construction industry. Many general contractors are under the impression they are protected against such action when an incident or violation occurs involving a subcontracted worker, when in reality they are not. This impression often stems from a misunderstanding of the definition of an “employee” under the IRS test.

In other cases, general contractors assume that a signed master contract, which seemingly assigns all employee safety responsibilities

to a subcontractor, covers all liability questions. However, in the current regulatory climate, it often does not. Master contracts are not the only factor OSHA considers, and even if one spells out that subcontractors are solely responsible for their own employees, OSHA may not see it that way.

If an OSHA inspector concludes that a general contractor could reasonably be expected to detect and abate a workplace hazard because it exercises control or sufficient supervisory capacity over the jobsite, the general contractor may face liability—even for hazards encountered only by its subcontractor’s employees.

Contractors often inadvertently increase OSHA liability exposure for a subcontractor’s safety violations. Contractors face increased scrutiny for such violations if they:

- employ an incompetent subcontractor;
- retain control of a subcontractor’s activities or retain supervisory capacity and control over the worksite;
- have extensive knowledge of applicable safety standards and could reasonably detect violations; or
- know or have reason to believe that a subcontractor has prior OSHA citations or ineffective safety policies.

To mitigate liability, many contractors are trying to figure out how to avoid being deemed “controlling employers.” They are looking for advice on how to best make sure they have qualified people working

on their sites while not getting so involved in the subcontractor's activities that they are deemed to be "in control" of them, and thus liable for any workplace violations they may cause.

Pre-Hire Risk Management Strategies

Contractors should consider the following factors when selecting or engaging subcontractors:

- experience modification rate;
- work history;
- bonding problems;
- OSHA citations and incident rates;
- safety programs (e.g., confined space, trenching, falls, lockout/tagout); and
- substance abuse programs.

A common strategy to address risks and liabilities posed by hiring independent contractors is to incorporate safety-oriented provisions into the subcontractor's agreement for services. Contractors should ensure that the agreement adequately defines the subcontractor's:

- scope of work;
- duty to comply with federal, state and local health and safety requirements, including but not limited to OSHA standards, building codes and local ordinances; and
- duty to comply with all of the employer's requirements that are beyond the minimum OSHA requirements.

Post-Hire Risk Management Strategies

After a subcontractor is hired, contractors should consider other

ways to address risks posed by the actual work as it unfolds. To start, select competent project management. Provide leadership by setting positive examples and clearly communicate that safety will not be compromised for production.

When it comes to emphasizing job safety:

- conduct pre-bid and pre-construction meetings to discuss safety issues and policies;
- reaffirm the importance of safety at each scheduled job meeting;
- require subcontractors to conduct inspections and safety meetings, as well as comply with contractual safety standards; and
- advise subcontractors of noted violations and of the contractor's intention to terminate the contract upon uncured breaches of contracted obligations.

It's also important to positively reinforce safe behavior and express intolerance of unsafe behavior. On the positive side, include zero lost-time accidents in the contractor's project goals, with rewards for meeting the goal, and build incentives into the subcontractor's agreement for services for on-time completion with no accidents. Establish a jobsite safety committee with representation from all contractors, and promote good housekeeping on the construction site.

On the negative side, be sure to write up safety violations, back-charge for violations that the contractor corrects, implement

a progressive monetary penalty system for repeat violations, shut down work for uncured noncompliance or inherently dangerous work, and suspend or terminate the contract for uncured issues.

Other methods of minimizing risk include:

- requiring that the contractor be named as an additional insured on the subcontractor's general liability policy;
- requiring hold-harmless agreements;
- verifying the subcontractor's insurance coverage;
- taking photographs to document safety problems; and
- investigating all accidents.

Also, remember not to loan equipment or vehicles without designated operators, repair a subcontractor's equipment or vehicles, borrow equipment, supply or pay for the subcontractor's materials, hire the subcontractor's employees or include the subcontractor's employees in the company's workers' compensation insurance.

For more guidance on employer liability, visit the specific website of the state Department of Labor in which the firm manages construction projects. Additional information can be found on the websites for each of OSHA's 10 regions. [CE](#)

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