OSHA’S Multi-Employer Worksite Doctrine Update: Civil and Criminal Liability

By Mark A. Lies II and Adam R. Young

INTRODUCTION
Multi-employer worksites have long complicated labor and employment law compliance, raising difficult questions as to which company constitutes an employee’s “employer” for purposes of federal and state law. The NLRB has taken a rigorous approach, targeting multiemployer worksites and finding alleged “joint employers” liable for labor law violations. The federal Occupational Health and Safety Administration (OSHA) is even more aggressive. For years, OSHA has advanced a policy at worksites, particularly construction sites, under which it can cite direct employers, general contractors, consultants, and temporary employers for a single safety or health violation. We can expect OSHA to focus this special enforcement agenda at multi-employer worksites, targeting temporary employees and subcontractors. Because of new regulations, employers on multi-employer worksites face increased fines, costly abatement responsibilities, and potential criminal liability.

OSHA’S ENFORCEMENT INITIATIVES
The presence of multiple employers, contractors, consultants, and temporary workers at the same workplace is increasingly common in construction, manufacturing and other industries. OSHA has long maintained a Multi-Employer Worksite Policy, the Agency’s enforcement position on multi-employer worksites. Under OSHA’s Multi-Employer Worksite Policy, more than one employer may be cited for a hazardous condition that violates an OSHA standard, so long as OSHA determines that they violated a duty under the Act. This can occur even when the employer being cited had no employees exposed to the hazard at issue.

The Agency will use a two-step process to determine whether more than one employer is to be cited. The first step is to determine whether the employer is a creating, exposing, correcting, or controlling employer.

» The creating employer, who created or caused a hazardous condition, may be cited even if the only employees exposed to the alleged hazard are those of other employers at the
site. At a construction site, an employer could be liable as a “creating employer” for negligent conditions it created, even if that employer has finished its work and left the work site.

» The exposing employer, whose own employees are exposed to the hazardous condition, may be cited if (1) it knew of the hazardous condition or failed to exercise reasonable diligence to discover the condition, and (2) it failed to take steps consistent with its authority to protect its employees.

» The correcting employer, who is responsible for correcting the hazardous condition, may be cited if it fails to meet its obligations of correcting the allegedly hazardous condition.

» The controlling employer, who has supervisory authority over the worksite and the power to correct safety and health violations or require others to correct them, may be cited if it fails to exercise reasonable care to prevent and detect violations on the site. In General Industry, the host employer is typically the controlling employer, while in the Construction Industry it is typically the general contractor. These employers carry a higher compliance burden than other employers. Accordingly, a general contractor with supervisory authority and control over a construction site will be expected to detect and abate OSHA violations.

If OSHA determines that an employer falls into one (or more) of the four categories under the Multi-Employer Worksite Policy, the second step is to determine whether the employer met its obligations with regard to preventing and correcting the violations. If not, OSHA will issue a citation to the employer under the Multi-Employer Worksite Policy.

POTENTIAL CRIMINAL PROSECUTION
It is important to note that the Multi-Employer Worksite Policy can also be utilized for criminal prosecution of employers if the following elements are present: (1) a fatality, (2) violation of a specific regulation, (3) the violation was willful and (4) there is a causal connection between the violation and the death. As OSHA continues its aggressive application of the Multi-Employer Worksite policy, employers should be wary as to potential liabilities for contractors, temporary workers, and other non-employees at their worksites.

In addition, OSHA is also intensifying its criminal prosecution of management representatives. The Department of Justice announced a recent criminal enforcement agenda on December 17, 2015, to seek additional liability against employers when there is a workplace safety violation having nothing to do with a fatality. The DOJ will seek criminal penalties under other criminal laws for lying during an OSHA inspection, making false statements in government documents, obstructing justice and tampering with witnesses which are felonies and can result in imprisonment ranging from 5 to 20 years and enhanced monetary penalties.

RECOMMENDATIONS
The re-invigorated Multi-Employer Worksite Policy has been another tool employed by OSHA in its mission to more aggressively enforce compliance with workplace safety and health laws and regulations. Employers who exert control over other employers must assess their potential liability as a “controlling employer” and develop appropriate administrative procedures and written documentation to demonstrate compliance with a controlling employer’s duties. Accordingly, it is recommended that all employers carefully evaluate the degree to which they control the means and methods of a subcontractor’s work and implement immediate actions to ensure the exercise of reasonable care in identifying and correcting violations, including:

» Carefully reviewing contractual language to identify which employer is responsible for OSHA compliance and degree of control the employer exercises over other employers and employees. While an employer cannot discharge its OSHA liability by contract, contractual language can be protective to the extent to which a particular employer limits its responsibility and ability to correct or abate dangerous conditions at a multiple employer site. We are attaching a contract rider that is meant to be considered as a template for drafting the safety for defining the safety of components of a contract with subcontractors.

» Reviewing the subcontractor’s safety-related documentation when working with a subcontractor, including personal protective equipment records and safety programs and policies, to ensure they are up-to-date and address the particular hazards (e.g., fall, electrical, excavation hazards) to which the subcontractor’s employees are expected to be exposed.

» When working at a multiple-employer worksite, the employer with supervisory responsibility must either inspect the worksite itself or ensure that inspections are being conducted by a subcontractor frequently enough to be able to identify and correct observed safety and health violations. This includes training on-site managers and supervisors to identify safety and health violations.

» The employer must also implement an effective system either for correcting any safety and health violations that it observed during these inspections or for ensuring that the subcontractor corrects any observed violations. This should include documenting the completion of any corrective action recommended.
» The employer should develop a system to ensure that subcontractors monitor their employees, correct violations, and report to the general contractor, the construction manager, or foreman.

» The employer should require the subcontractor to report injuries immediately, both to the proper regulatory authority (as applicable) and to the employer. The employer should maintain documentation of any worksite injuries to subcontractors’ employees, as well as any corrective action taken to address any hazardous conditions that led to the injury.

» An OSHA 300 log should be maintained at the work site to record work-related injuries and illnesses.

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