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Understanding OSHA's Multi-Employer Citation Policy

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Understanding OSHA's Multi-Employer Citation Policy



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Learning Objectives

By the end of this session, participants will be able to:

1. Review OSHA's Multiemployer Citation Policy and how it is typically applied to worksites.
2. Discuss how the policy may be used in court after a serious incident has occurred.
3. Identify the steps OSHA expects employers to take to protect employees on the worksite when hazards are created by other employers.
4. Examine if the policy is correctly followed on worksites they control.

Purpose

The purpose of this presentation is to clarify the multi-employer citation policy as described in OSHA Instruction CPL 2.103.

From 1971 to 1994 OSHA almost exclusively cited the employer of the employees exposed to the hazard. In 1994 the MECP document was created from recommendations from a workgroup of OSHA solicitors. The document was reviewed by Jim Stanley, Deputy Asst. Secretary and signed by Joe Dear, Asst. Secretary for OSHA. State Plans were asked to adopt. The document was updated in 1999 and signed by Deputy Asst. Secretary Davis Lane.



Why is this document important?

- Meeting your obligation under the OSHA standard **and** this policy to:
 - Your employees
 - All employees on your site if you're the GC/Prime/Controlling Contractor
 - Employees of other employers exposed to hazards you created
- Being able to defend your actions in a lawsuit. This policy sets the expected standard of care depending on your defined role



Why is this document important?

- Explains the employer's obligation when:
 - Your employees are exposed to hazards created by other employers
 - You manage a site or have subcontractors working under you and have responsibility as a controlling contractor.
 - You have contracted to correct, or assure hazards have been and remain corrected, on a worksite.



When does OSHA apply this policy?

- OSHA does not always apply this policy on every construction site inspection or in every multi-employer situation.
- It is commonly followed, or consulted, when investigating a fatality or employee complaint on a multi-employer worksite.
- When the failure by one of the employers, as defined by the policy, is blatant.
- May vary with the experience of the compliance officer.
- The contents of this document do not appear in the citation. It may be referenced in the documentation.



Multi-employer Worksite Policy

What OSHA says: On multi-employer worksites (***in all industry sectors***), more than one employer may be citable for a (single) hazardous condition that violates an OSHA standard. A two-step process must be followed in determining whether more than one employer is to be cited.

Note: These are employers beyond the employer of the exposed employee, who is almost always citable.



Step 1

Step 1: Determine whether the employer is a **creating**, **exposing**, **correcting**, or **controlling** employer. An employer may have **multiple roles**. Once you determine the role of the employer, determine if a citation is appropriate (NOTE: only exposing employers can be cited for GDC violations).

Note: Multiple Roles-Most often the creating and exposing employer are the same and this document is consulted to determine if the controlling contractor acted appropriately.



Step 2

Step 2: If the employer falls into one of these categories, it has obligations with respect to OSHA requirements. Step Two determines if the employer's actions were sufficient to meet those obligations.

The **extent of the actions required of employers varies** based on which category applies.

Note that the extent of the measures that a **controlling employer** must take to satisfy its duty to exercise reasonable care to prevent and detect violations **is less than what is required of an employer with respect to protecting its own employees.**



Employers Defined

Creating Employer: The employer that caused a hazardous condition that violates an OSHA standard.

Exposing Employer: An employer whose own employees are exposed to the hazard.

Controlling Employer: An employer who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them. Control can be established by contract or, in the absence of explicit contractual provisions, by the exercise of control in practice.

Correcting Employer: An employer who is engaged in a common undertaking, on the same worksite, as the exposing employer and is responsible for correcting a hazard. This usually occurs where an employer is given the responsibility of installing and/or maintaining particular safety/health equipment or devices.



Creating Employer

The employer that caused a hazardous condition that violates an OSHA standard. Employers must not create violative conditions. An employer that does so is citable even if the only employees exposed are those of other employers at the site.

Example: Employer Host operates a factory. It contracts with Company S to service machinery. Host fails to cover drums of a chemical despite S's repeated requests that it do so. This results in airborne levels of the chemical that exceed the Permissible Exposure Limit.



Analysis

Step 1: Host is a creating employer because it caused employees of S to be exposed to the air contaminant above the PEL.

Step 2: Host failed to implement measures to prevent the accumulation of the air contaminant. It could have met its OSHA obligation by implementing the simple engineering control of covering the drums. Having failed to implement a feasible engineering control to meet the PEL, Host is citable for the hazard.

Note: The employer whose employees were exposed are often cited as well because few will meet their obligations as defined by this policy.





The Exposing Employer

An employer whose own employees are exposed to the hazard.



Step 2: Actions Taken:

If the exposing employer created the violation, it is citable for the violation as a creating employer (and as the exposing, this is 90% of all citations issued).

If the violation was created by another employer, the exposing employer is citable if it:

- (1) knew of the hazardous condition or failed to exercise reasonable diligence to discover the condition, and
- (2) failed to take steps consistent with its authority to protect its employees. If the exposing employer has authority to correct the hazard, it must do so.



Step 2: Actions Taken (Continued)

- If the exposing employer lacks the authority to correct the hazard, it is citable if it fails to do each of the following:
 1. ask the creating and/or controlling employer to correct the hazard;
 2. inform its employees of the hazard; and
 3. take reasonable alternative protective measures. In extreme circumstances (e.g., imminent danger situations), the exposing employer is citable for failing to remove its employees from the job to avoid the hazard.

Note: Given these conditions it's almost always possible to protect your employees from hazards created by others.



Example

Employer Sub S is responsible for inspecting and cleaning a work area in **Plant P** around a large, permanent hole at the end of each day. An OSHA standard requires guardrails. There are no guardrails around the hole and **Sub S** employees do not use personal fall protection, although it would be feasible to do so. Sub S has no authority to install guardrails. However, it did ask **Employer P**, which operates the plant, to install them. **Employer P** refused to install guardrails.



Analysis

Step 1: Sub S is an exposing employer because its employees are exposed to the fall hazard. **Step 2:** While Sub S has no authority to install guardrails, it is required to comply with OSHA requirements to the extent feasible. It must take steps to protect its employees and ask the employer that controls the hazard - Employer P - to correct it. Although Sub S asked for guardrails, since the hazard was not corrected, Sub S was responsible for taking reasonable alternative protective steps, such as providing personal fall protection. Because that was not done, Sub S is citable for the violation.

Note: What about Employer P? OSHA doesn't answer this question.



The Correcting Employer

Step 1: Definition: An employer who is engaged in a common undertaking, on the same worksite, as the exposing employer and is **responsible for correcting a hazard**. This usually occurs where an employer is given the responsibility of installing and/or maintaining particular safety/health equipment or devices (e.g. installing guardrails).

Note: This is NOT the employer who is expected to abate the hazard for the purposes of an OSHA citations. All citations issued must be abated and documentation provided to OSHA.

If the correcting employer executed their duties (action and frequency) well, they're not likely cited.



The Controlling Employer

Step 1: Definition: An employer who has **general supervisory** authority **over the worksite**, including the power to correct safety and health violations itself or require others to correct them. Control can be established by contract or, in the absence of explicit contractual provisions, by the exercise of control in practice. Descriptions and examples of different kinds of controlling employers are given.

These examples include host employers (e.g. mfg. plant), general/prime contractor, construction manager, architect, engineering firms.



Step 2: Actions Taken:

A controlling employer must exercise reasonable care to prevent and detect violations on the site.

The extent of the measures that a controlling employer must implement to satisfy this duty of reasonable care is less than what is required of an employer with respect to protecting its own employees.

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



Factors: Reasonable Care Standard

Factors that affect how frequently and closely a controlling employer must inspect to meet its standard of reasonable care include:

- The scale of the project;
- The nature and pace of the work, including the frequency with which the number or types of hazards change as the work progresses;
- How much the controlling employer knows both about the safety history and safety practices of the employer it controls and about that employer's level of expertise.



Factors (continued)

- **More frequent inspections** are normally needed if the controlling employer knows that the other employer has a history of non-compliance. Greater inspection frequency may also be needed, especially at the beginning of the project, if the controlling employer had never before worked with this other employer and does not know its compliance history.
- **Less frequent inspections** may be appropriate where the controlling employer sees strong indications that the other employer has implemented effective safety and health efforts. The most important indicator of an effective safety and health effort by the other employer is a consistently high level of compliance. Other indicators include the use of an effective, graduated system of enforcement for non-compliance with safety and health requirements coupled with regular jobsite safety meetings and safety training.



Note:

This sounds reasonable, but when most controlling employers start a new project, they are unlikely to have experience with the subcontractors on the project. Controlling Employers need plans to:

1. Conduct frequent and regular inspections
2. Communicate hazards and deficiencies to contractors and subcontractors
3. Require abatement/corrections of hazards and deficiencies
4. Take action against contractors and subcontractors who don't respond/improve.
5. All of this should be written and documented.



Evaluating Reasonable Care

In evaluating whether a controlling employer has exercised reasonable care in preventing and discovering violations, consider questions such as whether the controlling employer:

- a. Conducted periodic inspections of appropriate frequency Implemented an effective system for promptly correcting hazards;
- b. Enforces the other employer's compliance with safety and health requirements with an effective, graduated system of enforcement and follow-up inspections.



Types of Controlling Employers

Control Established by Contract. In this case, **the Employer Has a Specific Contract Right to Control Safety:** To be a controlling employer, the employer must itself be able to prevent or correct a violation or to require another employer to prevent or correct the violation. One source of this ability is explicit contract authority.

This can take the form of a specific contract right to require another employer to adhere to safety and health requirements and to correct violations the controlling employer discovers.



Control Established by a Combination of Other Contract Rights:

Where there is **no explicit contract provision** granting the right to control safety, or where the contract says the employer does not have such a right, an employer may still be a controlling employer.

The ability of an employer to control safety in this circumstance can result from a combination of contractual rights that, together, give it broad responsibility at the site involving almost all aspects of the job.

Its responsibility is broad enough so that its contractual authority necessarily involves safety. The authority to resolve disputes between subcontractors, set schedules and determine construction sequencing are particularly significant because they are likely to affect safety.



Architects and Engineers

Architects, engineers, and other entities are controlling employers only if the breadth of their involvement in a construction project is sufficient to bring them within the parameters previously discussed.

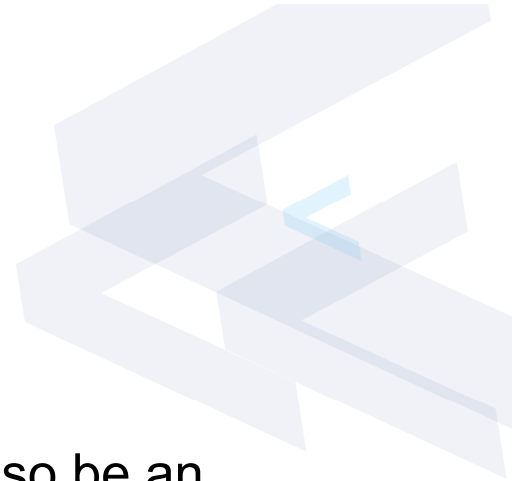


Control Without Explicit Contractual Authority

Even where an employer has no explicit contract rights with respect to safety, an employer can still be a controlling employer if, in actual practice, it exercises broad control over subcontractors at the site.



Multiple Roles



- A creating, correcting or controlling employer will often also be an exposing employer. Consider whether the employer is an exposing employer before evaluating its status with respect to these other roles.
- Exposing, creating and controlling employers can also be correcting employers if they are authorized to correct the hazard.
- Notes: If you created the hazard, you almost certainly have the ability to correct it. Multiple roles do not create multiple citations to the same employer but does create citations issued to multiple employers.





Thank you!

