FACT SHEET

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THE DISTRIBUTION OF SAFETY RESPONSIBILITY AT MULTI-EMPLOYER WORKSITES

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The concept of "ordinary care" demands that individuals exercise the degree of care that an ordinary prudent (cautious and careful) person should exercise under the same or similar circumstances. Certain statutory obligations supplement (but do not supersede) the common law responsibility of persons to exercise ordinary care for the safety of others. One such set of supplemental statutory obligations is addressed by and derived from 29 USC Parts 651, et seq (also known as the Occupational Safety and Health Act).

Under section 29 USC Part 654(a)(1), every employer is obligated to *furnish to each employee employment and a place employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.* Further, under section 29 USC 654(a)(2) of the Act, each employer is obligated to *comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.*

Initially, the Act defines an "employer" as "a person engaged in a business affecting commerce who has employees." This has been clarified to mean every employer engaged in commerce having one or more employees. Under regulations applicable to the construction industry, an "employer" is defined by 29 CFR 1926.32(k) as "a contractor or subcontractor within the meaning of the Act and of this part."

It must be recognized that these OSHA terms are strictly limited to use by OSHA for purposes of applying their particular set of minimum workplace standards. These OSHA terms indicate that certain parties have responsibility for safety at various worksites but do not delineate all parties having such responsibility. Clearly, premises owners, self- employed construction project managers, and the manufacturers and suppliers of industrial equipment used in various workplaces, for example, who may not themselves be directly subject to OSHA standards on worksites where they provide products or services, must also share in the responsibility for jobsite safety. It is impossible to argue otherwise (that these parties have no obligations for worker safety) if construction workers are to be reasonably protected from anticipated jobsite hazards.

Under the safety and health standards promulgated by the Secretary of Labor under Section 107 of the Contract Work Hours and Safety Standards Act (relating to contracts entered into with the federal government), 29 CFR 1926.16(a) states in part that *the prime contractor and any subcontractors may make their own arrangements with respect to obligations which might be more appropriately treated on a jobsite basis rather than individually,* thus by agreement relieving one or more parties from the actual, but not the legal, responsibility. However, *in no case shall the prime contractor be relieved of <u>overall</u> responsibility.*

29 CFR 1926.16(b) states in part that *the prime contractor assumes <u>all</u> obligations prescribed as employer obligations under the [applicable] standards, whether or not he subcontracts any part of the work.*

29 CFR 1926.16(c) further states that *to the extent that a subcontractor of any tier agrees to perform any part of the contract, he <u>also</u> assumes*

responsibility for complying with the standards in this part with respect to that part. Thus, the prime contractor assumes the entire responsibility under the contract and the subcontractor assumes responsibility with respect to his portion of the work. With respect to subcontracted work, the prime contractor and any subcontractor or subcontractors shall be deemed to have joint responsibility (emphasis added).

While 29 CFR 1926.16 itself may strictly apply under OSHA regulations involving construction work subject to the Contract Work Hours and Safety Standards Act, it does express implicit *authoritative guidelines (rules)* for all construction work in the same sense that while provisions contained in the Federal Manual of Uniform Traffic Control Devices may strictly apply only to public highways, such provisions must be recognized as required in similar circumstances on public property (such as at shopping malls) under the common law obligation to utilize authoritative guidelines in the exercise of ordinary care. Likewise, if a person "runs a stop sign" in the parking lot of a shopping mall and causes injury to another driver, the investigating police officer may be barred from issuing a citation (as the violation occurred on private property). This, however, does not negate the fact that the driver running the stop sign failed to follow a principle of good practice, and must be accordingly held responsible for the failure to exercise ordinary and reasonable care for the safety of others.

Correspondingly, while it may be relevant to an OSHA compliance officer whether or not a contractor is subject to the Contract Work Hours and Safety Standards Act in order to determine the compliance officer's authority to issue a particular citation under that subpart, this determination is not relevant and does not determine whether the *principles* of 29 CFR 1926.16 apply to all construction work under common law obligations to exercise ordinary and reasonable care under the same or similar circumstances. That is, at the very least, 29 CFR 1926.16 is an authoritative guideline of good practice to be followed by prudent construction worksite managers exercising ordinary care to achieve jobsite safety for construction workers.

The principles of good management expressed in 29 CFR 1926.16 logically not only apply to all construction worksites, they apply to all worksites. The principles are immediately logical and consistent with good management *in the factory* and *in the office*. Rephrased, no one would argue that *to the extent that any supervisor at any level in the chain of management agrees or is assigned the task to perform any part of a work project, he or she also assumes responsibility for completing the work assigned while complying with reasonable standards with respect to the work. Thus, the manager assigning the work assumes the entire responsibility for the overall project and the supervisor to which the work has been assigned assumes responsibility with respect to his or her portion of the work. That is, with respect to work performed by the supervisor receiving the work assignment, the manager assigning the work and the supervisor performing the work that has been assigned shall be deemed to have joint responsibility for the proper completion of that work.* It must be self-evident that this is merely a universal principle of **all** workplaces.

There can be no doubt that the principles of good management embraced by 29 CFR Part 1926.16 are in fact applied by OSHA to all multi-employer construction and non-construction worksites upon examination of the guidelines for the issuing of citations that are clearly outlined in OSHA Directive CPL 2-0.124 – *Multi-Employer Citation Policy*.

Part X (Roman numeral X), Section A of CPL 2-0.124 titled *Multi-Employer Worksite Policy* reports that on multi-employer worksites (in all industry sectors), there are two steps to determining whether or not one or more employers should be cited for a safety violation: (1) determine whether or not each employer at the worksite is a ***creating***, ***exposing***, ***correcting***, or ***controlling*** employer (an employer *can* be more than one type), and (2) determine whether or not each employer's actions were sufficient to meet the obligations required by OSHA Directive CPL 2-0.124 for the type(s) of employer that it is determined to be. There are separate responsibilities and levels of care for each of the four types of employers.

Creating Employer. A *creating* employer is an employer that causes (creates) a hazardous condition that violates an OSHA standard. A *creating* employer can be cited for violating an OSHA standard even if its own employees are not exposed to the hazard.

Exposing Employer. An *exposing* employer is an employer whose own employees are exposed to a hazard. An *exposing* employer is citable if it: (1) knew of a hazardous condition or in the exercise of reasonable diligence should have known of such a condition, *and* (2) failed to attempt, within its powers and authority, to correct the hazard or protect its employees.

If the *exposing* employer does not have authority to correct the hazard, it is citable if it does not: (a) ask the *creating* or *controlling* employer to correct the hazard, (b) inform its employees of the hazard, *and* (c) take reasonable alternative protective measures that *are* within its ability to control. An *exposing* employer may also be citable in imminent danger situations if it does not remove its own employees from the job to avoid the danger.

Special Note: Only an exposing employer may be cited under the General Duty Clause of the Occupational Safety and Health Act.

Correcting Employer. A *correcting* employer may (or not be) a separate employer at the same worksite as an *exposing* employer that is responsible for correcting a hazard. A *correcting* employer situation commonly occurs when an employer is given the responsibility of installing and/or maintaining safety equipment and devices. The *correcting* employer must exercise reasonable care in discovering, preventing, and within its powers, correcting hazards.

Controlling Employer. A *controlling* employer is an employer that has general supervisory authority over the worksite, including the power to correct, or require others to correct safety hazards. Control can be established by contract or by practice. Even when the contract states that an employer does not have such a right, control can be established when the employer's responsibility is broad enough so that its contractual authority necessarily involves safety.

A controlling employer must exercise reasonable care to detect and prevent violations (safety hazards) on its worksite.

The extent of the measures that a controlling employer must implement to satisfy this duty of reasonable care (for others) 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 that affect how frequently and closely a controlling employer must inspect its worksite (and the work of others) to meet its standard of reasonable care include:

(a) The scale of the project.

(b) The nature and pace of the work, including the frequency with which the number or types of hazards change as the work progresses.

(c) 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.

(d) More frequent inspections are normally needed if the controlling employer knows that the other employer has a history of non-compliance, or if such history of compliance is not known.

(e) 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 being a consistently high level of safety compliance, coupled with regular jobsite safety meetings and safety training.

Further, in evaluating whether or not a controlling employer has exercised reasonable care regarding the discovery and prevention of violations (safety hazards) at its jobsite, consideration should be given to whether or not the controlling employer:

(a) Conducted periodic safety inspections of appropriate frequency.

(b) Implemented an effective system for promptly correcting discovered hazards.

(c) Enforced the other employer's compliance with safety requirements with an effective, graduated system of enforcement and follow-up inspections.

An employer may be classified as more than one type. Some common classification dualities include: (1) A creating, correcting, or controlling employer will often also be *exposing* employers, with consideration being given to *exposing* employer responsibilities before evaluating other potential roles, and (2) exposing, creating, and controlling employers can also be *correcting* employers if they are authorized to correct hazards.

Returning now to the language of 29 CFR 1926.16, it will be noted that the OSHA citation guidelines for multi-employer worksites affirm that the principles set forth in 29 CFR 1926.16 express universal rules for assessing safety related responsibility at all construction and non-construction multi-employer worksites. That is, the citation criteria are direct corollaries of 29 CFR 1926.16 and merely restate the same principles in a different form.

Further, while recognizing the regulatory authority of OSHA and its standards, it is important to emphasize that the significant but limited treatment of a subject under OSHA should not define the limit of ordinary care under common law. That is, while compliance with OSHA regulations may be an indicator of whether or not a party is exercising ordinary care, compliance with the primary principles of good practice beyond the limited specified applications or scope of OSHA standards should be concurrently assessed, as such would relate to the dictates of ordinary care. The limited coverage of OSHA standards is in fact acknowledged by OSHA in their statements that the standards adopted by OSHA in 29 CFR 1910 and 1926 are minimum requirements and do not address requirements for all types of industries and operations.

OSHA acknowledges that various *recognized* authoritative references that address *recognized* workplace hazards may include (1) general scientific, engineering, and technical literature, (2) literature published by national safety organizations, (3) professional society standards and recommended work practices, or (4) national, industrial, or trade association standards. However, in this regard, OSHA has lamented that "unfortunately, some employers ignore these major safety references that may have more stringent requirements than OSHA."

Select References

Occupational Safety and Health Administration, 29 USC Parts 651, et seq.

McMillan, Allen C., Acting Assistant Secretary of Labor, Occupational Safety and Health Administration, U.S. Department of Labor, personal communication, May 16, 1989.

Occupational Safety and Health Administration, *Field Operations Manual*, OSHA Instruction CPL 2.445B CH-3, June 15, 1992.

Occupational Safety and Health Administration, OSHA Instruction CPL 2-0.124 – *Multi-Employer Citation Policy*, December 10, 1999.

Occupational Safety and Health Administration, 29 CFR Part 1910, Safety and Health Standards for General Industry, 2000.

Occupational Safety and Health Administration, 29 CFR Part 1926, Safety and Health Standards for Construction, 2000.