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Effective Methods of Managing Contractor Safety to Minimize Risks and Legal Liability

Adele L. Abrams, Esq., CMSP
Law Office of Adele L. Abrams, P.C.
Beltsville, Maryland

Since its establishment in 1970, the federal Occupational Safety and Health Administration ("OSHA") has implemented an enforcement approach that creates tension between employers, general contractors and subcontractors. Too often companies give little thought to such critical issues as which employer has primary responsibility for compliance with mandatory standards, and which controls hazards at a worksite and directs the activities of the workforce, until after an inspection has occurred and citations have been issued.

OSHA may issue parallel citations to general contractors (construction) or prime employers (general industry) and their subcontractors for the subcontractor's alleged violations. As discussed below, the April 2007 *Summit Construction* decision[1] by the Occupational Safety and Health Review Commission has imposed some limitations on OSHA's authority to hold construction companies responsible for subcontractor violations, but that case is currently on appeal before the U.S. Court of Appeals, 8th Circuit. In addition to costing companies significant money in civil penalties – currently, OSHA civil penalties can reach $70,000 per violation -- OSHA's dual citation policy often pits one employer against another in litigation, which can carry over to breach of contract claims in a civil litigation arena. It also carries ramifications for tort actions arising from the death or personal injury of a non-employee at the worksite, because there may be no worker's compensation shield from such litigation.

The Mine Safety and Health Administration ("MSHA") also has authority to cite both mine operators and contractors for violations of the Mine Act and its implementing regulations, and the U.S. Court of Appeals' (DC Circuit) July 2006 ruling in *Twentymile Coal*[2] held that MSHA has unreviewable discretion in this matter. Therefore, even if a mine operator has no knowledge of a contractor's violation and no significant involvement with the contractor's activities, it can be subject to a maximum civil penalty of $220,000 per citation, as well as possible criminal prosecution under the Mine Act's strict liability doctrine.

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[1] *Secretary of Labor v. Summit Contractors, Inc.*, OSHRC No. 03-1622 (April 27, 2007).
[2] *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151 (D.C. Cir. 2006).

Significantly, both OSHA and MSHA citations can be introduced in some state tort actions to prove "negligence *per se*." This legal theory simplifies a plaintiff's burden of proof on the "breach" element of a prima facie negligence case. Negligence *per se* allows the plaintiff to prove the defendant's "breach" of a duty of care by showing simply that the defendant violated a statute or regulation that (a) covers the class of activities giving rise to plaintiff's injuries, and (b) was designed to protect the class of persons to which plaintiff belongs.[3] Therefore, it is imperative that general contractors take appropriate action to manage subcontractor risks from the outset and ensure that the companies who will provide services pursuant to a contractual agreement are aware of applicable federal/state safety agency compliance obligations, have employees who are trained and supervisors who are competent, and that demonstrate a commitment to safety and health through appropriate safety and health management programs.

Failure to forge a safety partnership prior to initiation of work, and a lack of clear role delineation and legal responsibilities and status can mean disaster for the general contractor, complicate worker's compensation and insurance claims, and even result in criminal prosecution.

Coordination of Safety Responsibilities At Multi-Employer Construction Projects

As a general rule, any OSHA or MSHA standards that require development of written programs, certifications, or specific employee training or competency should be carefully reviewed as they may contain requirements that place additional importance on the prequalification of contractors and subcontractors, or have multi-employer worksite ramifications with respect to coordination of the various employers' programs and procedures.

For example, to comply with 29 C.F.R. § 1926.20(a)(1), all employers who perform any part of a construction project must ensure that no employees must work in surroundings or under conditions which are: unsanitary, hazardous, or dangerous to health or safety. This is not a duty that can be delegated to another party or contracted away. In addition, specific safety and health standards contain mandates to share information with contractors and others who may be present at the worksite. Even in the absence of a specific standard, if hazards exist that are known to one or more employers at a worksite, the prime employer/general contractor and its subcontractors may all be cited for failure to provide a safe and healthful work environment, as mandated under OSHA's "General Duty Clause."[4]

In addition to including specific and general safety requirements in contracts used between prime employers and contractors or subcontractors, it is critical to communicate this information to each worker at the jobsite in a consistent and uniform manner. The information communicated should cover basic safety and health rules and regulations, as well as specific requirements for the jobsite. The communication is most effective when verbal instructions are supplemented by a

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[3] See *Scott v. Ford Motor Company*, 229 F.3d 1143, 229 F.3d 1143 (4th Cir. 2000) (finding negligence where defendant furnished a ladder that did not comply with OSHA requirements).

[4] OSHA's so-called "General Duty Clause," which was Section 5(a) of the OSH Act, requires each employer to "furnish to each of his employees 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 to his employees." 29 U.S.C. § 654 (a)(1).

written contractor/employee handbook that includes both safety and health information and other site-specific material (such as contact telephone numbers and addresses for key personnel, PPE requirements, rules on alcohol/drugs/smoking/eating at the worksite, and emergency procedures). It is recommended that the prime contractor obtain written documentation of the receipt of the handbook from the subcontractor and/or each individual at the worksite.

Some of the most critical standards requiring coordination of contractor programs and activities include: OSHA's hazard communication standard (29 C.F.R. §1910.1200); confined space standard (29 C.F.R.§1910.146); lockout/tagout standard (29 C.F.R. §1910.147); process safety management (29 C.F.R. §1910.119 and § 1926.64); asbestos standards (29 C.F.R. §1926.1101); hazardous waste operations and emergency response (29 C.F.R. §1926.65);[5] steel erection (29 C.F.R. Part 1926, Subpart R); and, rules governing hazardous air contaminants such as lead (29 C.F.R. §1926.62).

In addition, Section 107 of the Contract Work Hours and Safety Standards Act (Construction Safety Act), which deals with federally-funded projects, requires as a condition of each contract for construction, alteration, and/or repair, including painting and decorating, that no contractor or subcontractor contracting for any part of the contract work shall require any laborer or mechanic employed in the performance of the contract to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health or safety, as determined under construction safety and health standards promulgated by the Secretary of Labor by regulation.

OSHA and MSHA Enforcement Actions Involving Subcontractors

OSHA's multi-employer worksite policy states that more than one employer may be citable for a hazardous condition that violates an OSHA standard, except for those citations issued under OSHA's General Duty Clause. A two-step process is used to determine whether more than one employer shall be cited: (1) determine whether the employer is a "creating, exposing, correcting, or controlling employer"; and, (2) conclude that, if the employer falls into one of these categories, it has obligations with respect to OSHA requirements. The extent of the actions required of employers varies based upon which category applies.

The "controlling employer" is the one with "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." OSHA explains that the controlling employer "must exercise reasonable care to prevent and detect violations on the site.

The "correcting employer" is one 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. Often, the controlling and correcting employers are a single

[5] This standard requires, among other things, that the employer's or general contractor's written safety and health program shall be made available to any contractor or subcontractor or their representative who will be involved with the hazardous waste operation, as well as being accessible by employees, their representatives, OSHA and other government agencies with regulatory authority over the worksite.

entity. The applicability of the "controlling employer" designation may be linked to the contractual arrangements between employers and their contractors. The controlling employer's level of "reasonable care" will depend in part on whether it "enforces the other employer's compliance with safety and health requirements with an effective graduated system of enforcement and follow-up inspections."

OSHA policy defines a "creating employer" as the party that "caused a hazardous condition that violates an OSHA standard." Such employers are citable even if the only exposed employees are those of other employers at the worksite. The specific example used in the policy is a host employer whose workplace has airborne chemical levels that exceed the PEL because the host fails to take adequate control measures.

By contrast, an "exposing employer" is one whose own employees are exposed to the hazard. This category can include both the primary employer and contractor-employers. If an exposing employer did not create the condition, it can still 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. Even if the exposing employer lacks authority to correct the hazard, it can still be cited if it fails to (1) ask the creating/controlling employer to correct the hazard; (2) inform its employees of the hazard; and/or (3) take reasonable alternative protective measures and remove its employees from the hazardous area.

At some point, most employers will fall within the controlling, creating, exposing or correcting employer category and face possible prosecution by OSHA for the sins of another employer. Therefore, advance planning is critical in order to demonstrate that due diligence was applied in selecting contractors and/or subcontractors for a particular project.

In the 2007 *Summit Construction* case, OSHA's multi-employer citation doctrine was found inapplicable in construction cases, based on a reading of 29 CFR §1910.12 (a), which states that an employer engaged in what is defined as "construction work" may be cited only for a violation of construction standards that exposes "*his employees*" to the prohibited hazard. Section 1910.12 (b) defines "construction work" as "work for construction, alteration, and/or repair, including painting and decorating." OSHA has appealed the OSHRC decision, and a decision is pending. However, even if upheld, this case is limited in scope to federal OSHA matters involving construction worksites. For all other general industry employers, the multi-employer doctrine remains intact. Moreover, state plan states are free to ignore OSHRC precedent in favor of their own common law precedent.

MSHA's policy is to issue citations and, where appropriate, orders to independent contractors for violations of applicable provisions of the Mine Act, standards or regulations. The Mine Act's definition of a mine "operator" includes "independent contractors performing services or construction" at mines. Therefore, even if a construction company is doing construction work at a mine, they will be regulated under 30 CFR Parts 1-199, and not under the OSHA construction standards in 29 CFR Part 1926. Moreover, contractors performing work at a mine will be subject to some form of training, ranging from site-specific hazard training to full-blown "new miner training" that may be up to 40 hours in duration if the contractor will work underground.

Although MSHA holds contractors responsible for compliance with mandatory standards, and the Mine Act's strict liability doctrine, MSHA often will increase negligence against the mine

operator arising from contractor violations because the mine operator is more familiar with the requirements of the agency. As noted in the *Twentymile Coal* decision, both independent contractors and mine production-operators are responsible for compliance with all applicable provisions of the Act, standards and regulations, and MSHA's enforcement determination is unreviewable by courts, although the gravity, negligence, fact of violation and proposed civil penalty can be challenged according to the procedural rules of the Federal Mine Safety and Health Review Commission (FMSHRC) – the independent agency that adjudicates MSHA citations.

MSHA's Program Policy Manual states that enforcement action against a production-operator for a violation(s) involving an independent contractor is normally appropriate in any of the following situations: (1) when the production-operator has contributed by either an act or by an omission to the occurrence of a violation in the course of an independent contractor's work; (2) when the production-operator has contributed by either an act or omission to the continued existence of a violation committed by an independent contractor; (3) when the production-operator's miners are exposed to the hazard; or (4) when the production-operator has control over the condition that needs abatement.

Tort Liability and Labor Law Considerations

Basic agency principles state: "Since the relation of master and servant is dependent upon the right of the master to control the conduct of the servant in the performance of the service, giving service to two masters at the same time normally involves a breach of duty by the servant to one or both of them." However, a "person may be the servant of two masters . . . at one time as to one act, if the service to one does not involve abandonment of the service to the other."[6] In light of these agency theories and the doctrine of *respondeat superior* (which holds an employer responsible for the negligent acts of his/her agents), it is imperative for companies to determine clearly which individuals at a worksite will be legally considered their employees, and which are clearly contractors as a matter of law. Too often confusion results when OSHA or individuals assume that one company controls a worksite and all persons working there, simply because that company's equipment was present. Only after litigation ensues is the confusion resolved – at great expense!

<u>Determining Employee Status</u>

There are two general tests for determining whether a person is a contractor or an employee. The first is the common law "right to control" test. The courts consider whether the employer retains the right to control the manner and means by which the result is to be accomplished, or whether control is reserved only as to the result sought. The second approach is the "economic realities" test. The courts consider the following factors:

1. The hiring firm's right to control the means and manner of the individual's work;
2. The worker's investment in equipment, tools, and facilities;
3. The worker's opportunity for profit or loss;
4. The permanency of the relationship between the worker and the employer;

[6] Restatement (Second) of Agency Section(s) 226, at 498-499 (emphasis added).

5. The skill of the worker required in performing the work; and,
6. Whether the service rendered is an integral part of the employer's business.

In addition, the IRS' "20-factor" test for distinguishing between contractors and employees should also be part of the general contractor/employer's analysis to determine the status of individuals at the worksite. These factors are:

1. Instructions;
2. Training;
3. Integration;
4. Services Rendered Personally;
5. Hiring, Supervising and Paying Assistants;
6. Continuing Relationship;
7. Set Hours of Work;
8. Full-Time Required;
9. Doing Work on Employer's Premises;
10. Order or Sequence Set;
11. Oral or Written Reports;
12. Payment by Hour, Week, Month;
13. Payment of Business and/or Traveling Expenses;
14. Furnishing of Tools and Materials;
15. Significant Investment;
16. Realization of Profit or Loss;
17. Working for More than One Firm at a Time;
18. Making Service Available to General Public;
19. Firm's Right to Discharge; and,
20. Worker's Right to Terminate.[7]

If the general contractor "guesses wrong" and fails to withhold tax or provide other benefits (e.g., overtime pay) mandated by federal and state labor laws, and the IRS determines that a purported contract worker is, in fact, deemed to be an employee of the company or general contractor, significant monetary penalties could ensue. Criminal penalties are also available where willful conduct to evade taxes can be proven.

Statutory Employer Laws, Subrogation and Indemnification of Claims

Often states enact so-called "statutory employer" laws or the "borrowed employee" doctrines, which minimize tort exposure of employers, facilitate subrogation of worker's compensation claims, and ensure that injured or deceased workers are compensated for their losses regardless of their direct employer's insurance coverage. Statutory employer laws ensure payment of medical expenses and lost wages (often without the need for prolonged litigation) while shielding the general contractor from third party tort liability. In many states with such doctrines, the exclusive remedy against statutory employers is workers' compensation insurance. Although the wording of such laws vary from state to state, the basic focus is on whether the general contractor or subcontractor's employee is performing work that is a part of the owner's trade, business or occupation, or whether the subcontractor's employee is performing work that is not part of the

[7] Internal Revenue Service, Rev. Rul. 87-41, 1987-1, CB 296.

owner's trade, business or occupation, but is part of the work that the general contractor agreed to perform for the owner.

Issues to consider when determining if a statutory employment relationship exists include:

1. The nature of the business of the alleged principal;
2. Whether the work was specialized;
3. Whether the contract work was routine, customary, ordinary, or usual;
4. Whether the alleged principal customarily used his own employees to perform the work, or whether he contracted out all or most of such work;
5. Whether the alleged principal had the equipment and personnel capable of performing the contract work;
6. Whether those in similar businesses normally contract out this type of work or whether they have their own employees perform the work;
7. Whether the direct employer of the claimant was an independent business enterprise who insured his own workers and included that cost in the contract; and
8. Whether the principal was engaged in the contract work at the time of the incident

It is important to note that the specific task being performed by the individual employee at the time of the accident is not controlling; rather, the entire scope of the contract work must be considered.

When a claim is subrogated, one party is substituted in the place of another with respect to liability. For example, an insurance company can "step into the shoes" of the party whom it has compensated and the insurer can sue any party whom the compensated party could have sued. The flip side of this concept is indemnification, where one party agrees to reimburse another upon the occurrence of an anticipated loss. In essence, through a contractual agreement, all or part of a loss shifts from the individual or company who is only technically or passively at fault to another who is primarily or actively responsible. In such instances, the presence or absence of an OSHA citation against the prime contractor and/or its subcontractors can be critical in determining whether indemnification provisions are triggered.

Sometimes the issue becomes more complicated because the law of a state recognizing the statutory employer doctrine may govern companies' contracts, while the work is performed in a different state that lacks such statutes. It is generally held that, if a damage suit is brought in the forum state by the employee against the employer or statutory employer, the forum state will enforce the bar . . . of a state that is liable for workers' compensation as the state of employment relation, contract, or injury. Thus, an understanding of "choice of law" principles can be pivotal in determine a construction contractor's liability for workplace injuries and fatalities.

Negligent Training and Supervision Issues

Many states increasingly make damage awards against companies based on the tort of negligent supervision or negligent training. Negligent supervision and negligent training cases presume that an employer is subject to liability for negligent acts of its supervisors and/or trainers where it knows or should have known that its employee's conduct would subject third parties to an unreasonable risk of harm. This may subject employers to tort action for the negligent actions of their employees that result in injury to a third party (including a subcontractor's employee).

Because of the increasing frequency of these tort actions, it is critical for all employers to document the training given to their employees, training directions provided to outside contractors and subcontractors, and to determine the line of supervision appropriate to each part of a particular project and each area of the worksite. Many OSHA and MSHA standards have specific training requirements, often involving operation of specific types of equipment. First aid training is mandated under 29 C.F.R. § 1926.50, while § 1926.21 requires that all construction industry employers (both prime and subcontractors) provide training to their workers on subjects including: recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury; safe handling and use of flammable liquids, gases, or toxic materials; and, how to work safely in confined or enclosed spaces. Mine operators are required to provide site-specific hazard training to all contractors who come onto a mine site and may be exposed to mining hazards, pursuant to 30 CFR Parts 46 and 48. Some may also elect to help contractors comply with more comprehensive new miner training requirements by letting the contract workers sit in on mine training classes for their own workers.

If a prime employer or mine operator elects to provide training to employees of subcontractors, he/she may be exposed to negligent training litigation if the employee subsequently is injured while performing a task involving hazards on which he/she was purportedly trained by the company's representative. Therefore, it is critical to document all training – whether in a form as simple as a signup sheet for "toolbox talks" or as complex as a written examination on the information presented. Preferably, prime contractors should require all subcontractors to provide their own government-mandated training to their workers and the "GC" or mine operator should "spot-check" such training, including review of training documentation and questioning of workers, to verify that the requirements are being satisfied. Wherever possible, however, prime employers should refrain from training non-employees (absent an indemnification agreement) because of the risk of negligent training litigation.

Assignment of Financial Liability Among Joint "Tort-Feasors"

Another factor that heightens liability concerns for general contractors, prime employers and mine production-operators is that an increasing number of states are adopting either the "Uniform Contribution Among Tort-feasors Act" or the Uniform Apportionment of Tort Responsibility Act. These model laws initially were promulgated when contributory negligence on the part of a claimant in a negligent tort action was an absolute defense against liability and a small contribution of fault by the plaintiff was enough to bar compensation for injury. The Acts address the questions of multiple liability when there is more than one tort-feasor responsible for injury, and provide for joint and several liability, with right of contribution in the event one tort-feasor pays another tort-feasor's share -- even when there is no action in concert. This permits an injured person to receive full compensation even if some tort-feasors do not actually provide compensation.

In layman's terms, the company with the deepest pockets (e.g., the general contractor) will often bear the entire financial burden for a plaintiff's injuries, even if they were not primarily at fault for the action or conditions that lead to the damages. As noted above, an OSHA or MSHA citation against a company may be all that is necessary to establish "negligence *per se*" and establish a basis for awarding such monetary damages to a non-employee arising from a workplace injury or illness.

Subcontractor Selection Criteria

As noted in the discussion above, the use of contractors and subcontractors involves legal risk – both from OSHA/MSHA enforcement actions arising from the misconduct of other employers at a multi-contractor worksite, and from third party tort claims where non-employees are injured or killed based on negligent conduct, supervision or training at the worksite. Therefore, unless a company prequalifies and selects its contractors and subcontractors wisely, it can be exposed to: government investigations, civil penalties, criminal proceedings, tort claims, and extensive defense and litigation costs arising from the misconduct or safety/health/environmental violations of subcontractors.

Selection criteria of all contractors and subcontractors should include safety and health considerations of the outside company's ability to conduct the anticipated services and work in a manner consistent with the safety and health practices of the contracting party and meeting safety and health regulatory requirements. The degree to which selection criteria are set should be commensurate with level of risk that the contractor's expected services and work will involve.

The creation and implementation of a contractor liability prevention program requires recognition of the legal theories outlined above, which give rise to these risks. Therefore, the following steps are critical to ensuring a safe multi-employer worksite:

1. Knowledge of the particular worksite's practices and procedures,
2. A diligent evaluation of the safety programs, practices and track record of the general contractor and all subcontractors involved in a project,
3. A company-wide policy for contractor utilization, written contracts that implement the policies and provide for enforcement, and,
4. Procedural guidelines for use in contractor selection, orientation, auditing and contract enforcement.

Risk assessment of planned contractor activities must be conducted to determine the degree of risk to which contractor activities will expose the contracting party's employees and property. It should be company policy to require proof of the subcontractor's Experience Modification Rate, OSHA 300 log (or MSHA 7000-1 Forms), citation history, and record of employee claims for discrimination (under both Civil Rights Acts and Section 11(c) of the OSH Act). Other considerations in contractor selection may, depending upon the nature and duration of the job, include: technical/professional certifications of contractor personnel; corporate involvement in trade organizations and professional safety organizations; licenses, permits and bonding; and verification of references.

This type of "due diligence" analysis will quickly reveal which contractors are falling short in their willingness or ability to ensure regulatory compliance and to provide a safe and healthful work environment.

Elements of a Safety Partnership Program

Although it is difficult for an employer or a general contractor to control all hazards at a worksite all of the time because construction sites are complex, dynamic work environments, when you add subcontractors and others into the mix, it further complicates issues and requires extra effort to maintain a safe and healthful work environment. The contracting party should determine its managing role with other contractors and adjust its safety and health training and oversight obligations accordingly. In order to minimize liability, the contracting party must establish a system of monitoring contractor activities on its premises. However, to best control risk and minimize legal liability, all companies active at a worksite must form a partnership of safety. The elements of a safety partnership program include:

1. Providing all necessary information about OSHA/MSHA requirements (and working cooperatively to guide a contractor/subcontractors toward sources of information),
2. Prequalifying contractors/subcontractors to ensure that they have sound safety programs and a culture of safety,
3. Providing appropriate site-specific training to contractors/subcontractors and ensuring that the contractor-employer has complied with any OSHA/MSHA training and programmatic requirements,[1]
4. Informing contract workers of health and safety hazards to which they may be exposed (as well as sampling results, where appropriate),
5. Ensuring that a communications system is in place to alert all companies at a multi-employer worksite of new hazards, equipment, changes in conditions, or other information that is critical to safe job performance,
6. Coordinating emergency procedures before commencement of work, including evacuation procedures and determination of who shall provide emergency services for contractor/subcontractor employees when required, and
7. Routinely checking to ensure that contractors/subcontractors are not exposing other employees to hazards.

Conclusion

Construction industry prime contractors have increasing liability exposure as the use of specialty subcontractors becomes ever more prevalent at worksites. If a subcontractor violates OSHA or MSHA standards, the prime employer (or mine operator) can be held liable if it failed to oversee activities and enforce compliance. If an injury or property damage results from the violative actions, the general contractor and its subcontractor(s) may find themselves named as joint tort-feasors in litigation brought by or on behalf of the injured party.

Moreover, these prime employers have tort exposure for injuries to subcontractor employees, absent a finding of “statutory employer” status, and may also find themselves charged with negligent supervision or negligent training. Because of the significant monetary risks involved, prequalification of subcontractors is a critical step prior to commencing any construction project. The general or prime contractor must ensure that the companies with which it contracts have similar pro-active cultures with respect to safety and training, and are committed to full compliance with all applicable laws and regulations. It is also essential that all employers at a

worksite work cooperatively to ensure program integration where this is required by law or is otherwise desirable to ensure the safety and health of all individuals at a worksite and of the general public.

By forging a partnership in safety among employers, accidents, illnesses, tort liability and unwarranted OSHA and MSHA enforcement actions can be avoided by all concerned.