

# Statutory Duty of Safety Care to Subcontractors

## U.S., Canadian & U.K. Perspectives

By Vladimir Ivensky

**E**mployers involved in multiemployer field projects often have a vague understanding of their duty of safety care to subcontractors and other project parties. This creates confusion in safety management strategies and can lead to erroneous actions. This is not surprising; OSH-related legislation and regulations related to this topic are confusing and open to interpretation, particularly in the U.S.

The topic of duty of safety care to subcontractors and other project parties is important in determining the safety strategy for companies operating at multiemployer project sites. Enhanced clarity on this subject will improve project safety management, optimize resource allocation, clarify safety roles and responsibilities, reduce safety-related liabilities and produce safer work sites.

This article provides a review and a brief comparison of safety-related legal and regulatory framework for the statutory duty of safety care owed to subcontractors and to other parties on multiemployer projects in the U.S., Canada and the U.K. This article reviews several important U.S. state supreme court cases to illustrate the differences in establishing the existence of statutory duty of safety care to a sub-

contractor in various states. In addition, the article explains that the U.K. and Canadian provincial acts and regulations provide more clarity on principal (hiring) employer statutory duty of safety care at multiemployer sites than do the U.S. OSH Act and regulations.

When default statutory duty of care does not exist, companies that hire subcontractors have an option to avoid retained duty of care by avoiding contractual and actual control over a subcontractor or any other project party. Overall, more regulatory clarity is needed in the U.S. with respect to statutory roles and responsibilities of all parties involved in multiemployer projects. Some U.K. and Canadian regulations can be used as models.

In any case, the selected project-specific safety strategy should be discussed with the legal, commercial and safety departments during the pre-bid phase before signing contracts with the client and with subcontractors, and project personnel should be trained in that strategy.

### Basics of Subcontractor-Related Safety Liabilities

Each organization that hires a subcontractor or operates in any capacity at a multiemployer project site faces liability exposures that if not recognized, evaluated and controlled can lead to significant losses. Safety-related losses are especially critical to prevent and eliminate as they relate to workers' well-being. From a legal standpoint, a loss can be in the form of a legal claim or a lawsuit, regulatory citation and fine, lost business opportunity, reputational damage, and, in rare cases, criminal prosecution.

Safety practitioners and anyone involved in business or project management, particularly those who potentially put employees, subcontractors or the public at risk, should be aware of their role-

#### IN BRIEF

- OSH risks related to subcontractors are significant business risks encountered by contractors that employ other contractors.
- Mitigating these risks is an important task of a hiring contractor's management team, which should recognize statutory, contractual and control-generated duty of safety care to subcontractors.
- This article discusses the statutory duty of safety care to subcontractors and other project parties at multiemployer projects, comparing perspectives from the U.S., Canada and the U.K.

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specific legal obligations, responsibilities and risk exposures.

It is important to distinguish between criminal and civil proceedings (Table 1). Legal cases may share the same courts, but they have different goals, purposes and results (Storm, 2012). One major difference in the U.S. is the need for the proof of actual harm in civil litigation; that is, the plaintiff must prove that s/he suffered injury or loss as a direct result of the defendant's breach of duty. In addition:

[T]he plaintiff in the civil case must establish that the defendant was under a legal duty to act in a particular fashion and must demonstrate that the defendant breached this duty by failing to conform his or her behavior accordingly. (Tort Law, 2015; <http://legal-dictionary.thefreedictionary.com/Tort+Law>)

#### Criminal Safety Offenses in the U.S.

Failure to comply with statute law may constitute a criminal offense, but it can also be used in civil actions as a basis for compensation. Historically, safety-related prosecutions in the U.S. have involved cases in which the employers were alleged to have falsified documents and lied to OSHA in conjunction with violations related to an employee fatality. That is, the cover-up was worse than the crime (Schwartz & Conn, 2012). On average, OSHA currently refers 10 to 14 cases per year for criminal prosecution but criminal OSH cases may be prosecuted without OSHA referrals.

#### Safety & Civil Law in the U.S.

The civil law legal foundation of subcontractor-related losses may include liabilities arising from statutes (acts and regulations), torts of negligence and contracts (Figure 1, p. 40).

Legal liability is the responsibility mandated by law "for an act or failure to act." It means that action perceived as controlling a risk exposure, can, in some circumstances, create additional liabilities instead of reducing them. The reverse is also true: Failure to act, in other circumstances, can create liabilities. As Steve Jobs said, "Deciding what not to do is as important as deciding what to do."

Regarding duty of safety care at multiemployer project sites, it is important to recognize statutory duty, common law (duty retained by control) and contracted duty in order to design an effective safety management strategy and program. This article concentrates on statutory duty review.

#### Statutes

Statutes include federal and state OSH acts and regulations (federal and state OSHA in the U.S., Canadian provincial OSH acts and regulations, U.K. construction, design and management regulations) and local ordinances, labor laws, and workers' compensation laws and regulations.

**Table 1**

## Comparison of Criminal Prosecution & Civil Litigation in the U.S.

Feature	Criminal	Civil
Initiator of a lawsuit	Federal or state government	Plaintiff (individual or company)
Goal	Prosecute the criminal	Compensate the plaintiff
Alleged wrongdoer	Defendant	Defendant
Attorney for the initiator	U.S. Attorney or state prosecutor (in the U.S.)	Private attorney
Attorney for the defendant	Private attorney or public defender	Private attorney only
Proceedings called	Criminal prosecution	Civil litigation
Requirement for the proof of actual harm	No	Yes

*Note.* Adapted from Criminal Law, by L. Storm, 2012, Nyack, NY: Flat World Knowledge.

Clearly written legislation and regulations are the easiest way to establish whether the statutory duty of care exists. When ambiguous, the statutes leave room for interpretation. Failure to comply with the statute law may constitute a criminal offense but can also be used in civil actions (Figure 1).

#### Torts

When the civil litigation involves an injury, the injury action is called a *tort*, a term derived from the Latin word *tortuous*, which means wrong. A tort is a "wrongful act of omission, other than a crime or a breach of contract, for which the remedy is usually monetary damages" (Baranoff, 2005).

#### Contracts

Contracts with both a client and a subcontractor can impose a duty of care to subcontractors or other project parties (in a case of retaining such a responsibility).

The common denominator of legal liability is duty. When a defendant has no duty of care to the plaintiff, the defendant is not liable for damages. When duty exists, some level of care must be delivered to satisfy that duty to control the liability and serve as a proof of no negligence. That level of care is often referred as a reasonable care or a standard of care.

In rare cases, labor law may impose an absolute liability on general contractor or property owner (e.g., New York Labor Law 240, "Scaffold Law"). Absolute liability means that negligence on a part of an owner or general contractor need not be proven and the plaintiff's negligence is not admissible to find the general contractor or property owner liable. Under the absolute liability system, an owner's and a general contractor's liability is

based purely on their project role and does not depend at all on their diligent actions.

The legal duty of care in the safety-related negligence lawsuits seeking monetary damages (compensation) can be established in statutes, common law or contracts. The proof of existence (or not) of the duty of safety care, therefore, becomes a critical element of safety-related litigation. When duty of care is established, the expected defense is to prove that reasonable care was provided via efficient safety programs.

Let's examine two major categories of cases:

1) **Statutory interpretation cases.** These cases may be brought by employers hiring subcontractors, against citing regulator (OSHA, 1999). The main purpose of such cases is to prove that statutory duty to a subcontractor does not exist under a particular regulation and to contest controlling employer citations for subcontractors' safety violations. Examples include *Secretary of Labor v. Summit Contractors Inc.* (2007) and *Hughes General Contractor Inc. v. Utah Labor Commission* (2014).

2) **Negligence tort cases.** These cases may be brought by parties seeking monetary damages against companies that hire subcontractors for injury or damage suffered as a result of the defendant's alleged breach of duty of care owed to the plaintiff based on a common law (duty retained by control), a statute or a contract.

In some instances, these case categories may be merged as a statute interpretation may be required in order to establish whether the statutory duty of care exists in a particular case. The legal interpretation of a particular act or regulation as not creating a statutory duty of care toward a subcontractor. For example, the Utah Supreme Court's decision in *Hughes v. Utah Labor Commission* (2014) that OSHA's (1999) multiemployer citation policy is not applicable in Utah and that OSHA cannot cite

general contractors there under "controlling employer" doctrine does not necessarily indicate that a general contractor in that jurisdiction is immune from the duty of care to a subcontractor. The hiring contractor may have no default statutory duty yet can retain that duty with a contract or with controlling actions.

### Statutory Safety Duty

Statutory safety duty may be defined in OSH regulations or derived from court case decisions, and legal interpretations of legislation, regulations and common law. That duty can be further classified as: 1) statutory safety duty of a hiring (principal) employer to a subcontractor; and 2) statutory duty of a designated employer to project-wide safety.

### Statutory Duty to a Subcontractor in Safety & Health Acts: U.S., U.K. & Canada

While regulations provide a technical foundation to the safety profession, OSH legislation provides a legal structure and management foundation, establishing roles and responsibilities of various parties, and establishing the mechanisms for enforcement, appeals, penalties, judicial review, reporting, regulatory inspections and investigations, recordkeeping and similar factors. The laws provide the rules of the game for the safety management systems in various jurisdictions. The General Duty Clause well known to safety practitioners in the U.S. is found in Section 5(a) of the OSH Act. It states:

- a) Each employer—
  - 1) shall 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;
  - 2) shall comply with occupational safety and health standards promulgated under this Act.

### U.S. OSH Act of 1970

The OSH Act of 1970 discusses the general duties of employers and employees in Section 5; no other categories (e.g., property owners, prime contractors, subcontractors) are discussed in the act.

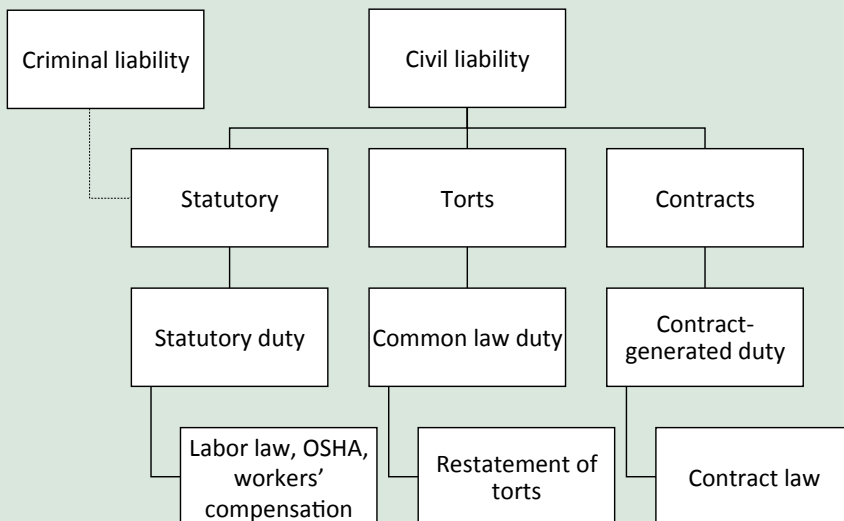
OSHA 29 CFR 1910.12(a) establishing the construction industry standards (29 CFR 1926) states that "[e]ach employer shall protect the employment and places of employment of each of his employees engaged in construction work by complying with the appropriate standards prescribed in this paragraph." This is similar to the general duty clause and is a subject of continuous legal debate on the topic of inclusion of subcontractors in the definition of *employees* under the act and regulations.

### U.K. Health & Safety at Work Act of 1974

General duties are discussed in the U.K. Health and Safety at Work Act of 1974 in significantly more detail than in the U.S. OSH Act. The U.K. legislation

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**Figure 1**  
**Legal Safety Liability Basics**



also includes and defines more parties than employers and employees, namely duties to “persons other than employees”; “duties of persons in control with premises”; “duties of manufacturers”; and some other duties. The following subsections are included under general duties:

- General duties of employers to their employees.
- General duties of employers and self-employed to persons other than their employees.
- General duties of persons concerned with premises to persons other than their employees.
- General duty of persons in control of certain premises in relation to harmful emissions into atmosphere.
- General duties of manufacturers as regards articles and substances for use at work.
- General duties of employees at work.
- Duty not to interfere with or misuse things provided pursuant to certain provisions.
- Duty not to charge employees for things done or provided pursuant to certain specific requirements.

#### U.K. Construction (Design & Management) Regulations of 2015

In the U.K., multiemployer construction sites are regulated under the Construction (Design & Management) (CDM) Regulations (HSE Executive,

2015), arguably (in the author’s opinion) the best developed and the most detailed regulations of its kind. This act provides a clear framework for multiemployer project safety organization and logistics from the inception phase to project completion.

The latest edition took effect April 6, 2015. The 2015 regulations require the appointment of a principal contractor, responsible for safety management at the construction phase, and a principal designer, responsible for project safety coordination at the design phase. In addition, the 2015 regulations place legal duties on virtually everyone involved in construction work. Those with statutory legal duties are referred as duty-holders and they include clients (owners), principal designers, principal contractors, contractors and workers.

#### Canadian Provincial OSH Acts

In Canada, the statutory safety duty of a hiring employer to a subcontractor is well established. As in the U.K., a special statutory project-wide safety management role is assigned to one company on multiemployer construction projects in Canada (referred to using terms such as *prime contractor* and *constructor* depending on the province).

Three key statutory safety roles exist in Canadian OSH regulations/legislation:

Table 2 summarizes statutory safety duty of a hiring company to an independent contractor under various U.S., Canadian and U.K. regulations and court interpretations.

**Table 2**  
**Statutory Safety Duty of a Hiring Company to a Subcontractor**

Jurisdiction	Statutory duty of care to a subcontractor?	Is this duty delegable?	Comment
Utah Supreme Court, Hughes vs. Utah Labor Commission, 2014	No	N/A	Court ruled that OSHA multiemployer citation policy is not applicable in Utah
Washington Supreme Court, Stute vs. P.B.M.C., Inc., 1990	General contractor has a statutory duty	No	Reasonable care is defined by Washington State Department of Labor and Industries
Texas Supreme Court, Redinger vs. Living Inc., 1985	No	N/A	Control generates a duty of care
California Supreme Court, Seabright Insurance vs. US Airways, 2011	Yes	Yes, to a subcontractor	---
NY Labor Law 240 (“Scaffold Law”)	Yes	No	Absolute liability. No reasonable care defense for general contractor or an owner for a subcontractor’s injury covered by the scope of that law
Federal OSH Act and regulations	Not defined	N/A	---
OSHA Multi-employer citation policy, 1999	Control generates a duty	No	Interpreted differently by various courts
U.K. HSE Executive, HSE regulations, 2015	Yes	No; each project party is a duty holder; duties are clearly established	Safety roles and responsibilities of each project party is clearly defined in the regulation
Canadian provincial regulations	Yes	Only from project owner to prime contractor in some provinces	Safety roles and responsibilities of project owner, prime contractor and employer are defined

Table 3 summarizes statutory project-wide safety duty under various U.S., Canadian and U.K. regulations and court interpretations, including a default duty ownership and delegation options.

**Table 3**

## Project-Wide Statutory Safety Duty of Care

Regulation	Statutory project-wide safety duty	Safety duty defaults to	Can delegate?	To whom?
Ontario, Manitoba, Nova Scotia, Quebec	Yes	Owner	Only in construction	Prime contractor
Alberta, British Columbia, New Brunswick, Saskatchewan	Yes	Owner	Yes	Prime contractor
Utah	No	N/A	N/A	N/A
Washington	Yes	General contractor	No	N/A
U.K.	Yes	Owner, principal contractor, principal designer, other parties	No	N/A

1) Owner: Typically, a default project-wide statutory duty role, delegable to the prime contractor.

2) Prime contractor (e.g., constructor, contractor, principal contractor), which is the contractor with overall project-wide safety responsibilities;

3) Employer.

The default project-wide safety responsibility at multiemployer sites in many Canadian provinces belongs to the owner. In many jurisdictions, that duty is delegable and it typically is delegated to the prime contractor. The proper way to delegate owners' safety responsibilities in Canadian provinces is a separate topic, deserving a lengthy discussion (and it is explained in detail in Canadian provincial regulations and guidelines).

One critical element in the statutory duty delegation process in Canada is a requirement for complete removal of a delegating entity from project control. Canadian provincial regulations and guidelines also delineate the safety roles and responsibilities of prime contractors.

The existing challenge is the lack of regulatory knowledge by some multiemployer project parties, such as property owners who may unintentionally accept the safety duty of a prime contractor (that belongs to them by default), and do nothing to satisfy or delegate the obligations. Simple lack of knowledge of "obscure regulation" can contribute to a tragedy. For example, in British Columbia:

[F]ormer premier Gordon Campbell failed to properly oversee safety measures at his Sunshine Coast vacation home . . . where a roofer fell to his death. . . . WorkSafe BC found that because Campbell hadn't designated any of the companies working simultaneously on the property as "prime contractor," the role became his by default. . . . WorkSafe says the prime contractor is responsible for "establishing a system or process to ensure compliance with health and safety requirements." (Weichel, 2012)

### Arguments on Statutory Duty to Subcontractors: U.S.

Cases related to statutory duty of care to subcontractors have been widely litigated in the U.S. The courts decisions on principal employer's duty of safety care to subcontractors in the U.S. have been based primarily on interpreting federal and state OSH regulations, U.S. Common Law (American Law Institute, 1965) and OSHA's (1999) multiemployer citation policy.

As noted, the duty of a principal employer to subcontractor safety is not clearly described in OSHA regulations. Under U.S. common law, the hirer of an independent contractor (a principal employer) does not have a default initial duty of care to the independent contractor. The duty arises with the retained control, when a "contractor is not entirely free to do the work in his own way" (American Law Institute, 1965). OSHA's (1999) multiemployer policy is consistent with common law in mentioning the controlling employer. Both hold that control generates the duty of care.

### Does OSHA Create a Statutory Duty to a Subcontractor?

Court cases deciding whether federal OSHA creates a hiring employer's statutory duty to a subcontractor can be classified as follows:

- Does OSHA's (1999) multiemployer citation policy contradict OSHA 29 CFR 1910.12(a) (*Secretary of Labor v. Summit Contractors Inc.*, 2007)?

- Does OSHA's (1999) multiemployer citation policy apply to states' safety regulations (e.g., *Hughes v. Utah Labor Commission*, 2014).

Essentially, OSHA expects that a prime or general contractor would have control over the work site. In OSHA's view:

[I]n almost all cases, some entity has general supervisory authority over the work site. This authority often is given to a general contractor, although it is sometimes given to a construction manager

or other type of entity. In some circumstances, the owner of a project (such as a commercial developer) may opt not to have a general contractor or other entities perform these functions and instead perform them itself. (Swanson, 2001)

U.S. OSHA regulations stipulate that “with respect to subcontracted work, the prime contractor and any subcontractor shall be deemed to have joint responsibility” [29 CFR 1926.16(a)] and “in no case shall the prime contractor be relieved of overall responsibility for compliance” [29 CFR 1926.16(a)]. However, under 1910.12(a), establishing the construction industry standard (29 CFR 1926), OSHA has declared that “[e]ach employer shall protect the employment and places of employment of each of his employees engaged in construction work by complying with the appropriate standards prescribed in this paragraph.”

This has been interpreted (or misinterpreted) as “each company is only responsible for their own employees and not for subcontractors,” which has created a significant regulatory ambiguity and has become a source of continuous legal challenges to the multiemployer citation policy specifically regarding OSHA’s expectations to controlling employer’s safety role.

### Arguments on OSHA’s Multiemployer Citation Policy in the U.S.

OSHA’s (1999) multiemployer citation policy is important doctrine, regulating the citation process for controlling employers (among other categories of employers at these projects); it plays a prominent role in defining the roles and responsibilities for firms at multiemployer sites. As this policy does not constitute a statute or a law in the U.S., however, its applicability has been continuously contested. [For example, the Utah Supreme Court rejected the doctrine “as incompatible with the governing Utah statute, Utah Code section 34A-6-201(1).]

In first *Summit* case (2007), it was argued that 29 CFR 1910.12(a) “only placed a duty on employers to protect their own employees, not other subcontractors’ employees.” Thus, it was argued *Summit* contractors should not have been cited as the controlling employer for safety violations committed by their subcontractor, when its own employees were not exposed to the hazardous condition.

Occupational Safety and Health Review Commission (OSHRC) agreed with *Summit*’s position and vacated the OSHA citation based on:

1) The plain language of the regulation, which states, in part, “each employer shall protect the employment and places of employment of each of his employees engaged in construction work.”

2) The Secretary’s [OSHA] “checkered history” on multiemployer work site liability characterized by inconsistent application and explanation.

OSHA appealed, and the Eighth Circuit Court confirmed that OSHA’s controlling employer citation policy did not conflict with OSHA regulations.

In later cases, such as *Secretary of Labor v. Summit Contractors Inc.* (2010), OSHRC reversed its 2007 *Summit* opinion that 29 CFR 1910.12(a) “only placed



a duty on employers to protect their own employees, not other subcontractors’ employees” and upheld the validity of the multiemployer liability doctrine on a part of a controlling employer.

The current OSHRC position is that the OSHA’s multiemployer citation policy does not contradict the 1910.12(a) standard and that the scope of the 1910.12(a) standard includes controlling (as well as creating, correcting and exposing) employers, and, in general, that an employer is “responsible for the violations of other employers where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the work site” (*Secretary of Labor v. Summit Contractors Inc.*, 2010).

The situation in which a hiring contractor does not have a statutory duty of care toward a hired contractor unless control authority has been retained or controlling action applied, can potentially negatively affect safety as companies hiring subcontractors may attempt to take a hands-off approach to avoid legal liabilities of a controlling employer.

The Washington State Supreme Court has concluded that a general contractor has a statutory, nondelegable duty of care to project subcontractors; thus, no hands-off option exists for general contractors in that state (*Stute v. P.B.M.C. Inc.*, 1990).

### Negative Effect of OSHA Citation on Tort Litigation Outcome

Arguments on 29 CFR 1910.12(a) applicability to subcontractors and on the right of OSHA to cite controlling employers are fueled, in part, by the valid concern that an OSHA citation issued to a hiring employer after the subcontractor’s incident would play a negative role in a subsequent civil litigation. For example, Wyrick and Oliverio (2014) indicate that the prevailing law is:

1) OSHA regulations can be used as evidence of the duty of care owed to a plaintiff.

2) Evidence of an OSHA citation can be used as evidence that the standard of care was breached.

The topic of duty of safety care owed to subcontractors and other project parties is important in determining the safety strategy for companies operating at multiemployer project sites.

3) Evidence of an OSHA citation is not conclusive proof of negligence.

### Select U.S. State Supreme Court Decisions

State courts have interpreted identical clauses in various state safety regulations differently. Consider these two codes:

1) Utah Code, Section 34A-6-201. Duties of employers and employees:

Each employer shall furnish each of the employer's employees a place of employment free from recognized hazards that are causing or are likely to cause death or physical harm to the employer's employees and comply with the standards promulgated under this chapter.

2) Washington Code, Section RCW 49.17.060. Employer, General Safety Standard, Compliance:

Each employer:

- 1) shall furnish to each of his or her employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his or her employees; and
- 2) shall comply with the rules, regulations and orders promulgated under this chapter.

The Utah Supreme Court held "that the responsibility for ensuring occupational safety under the governing statute is limited to an employer's responsibility to its employees" (*Hughes v. Utah Labor Commission*, 2014).

The Washington Supreme Court held "that RCW 49.17.060(2) creates the general contractor's duty to comply with WISHA regulations as to all employees at the job site, including all subcontractors" (*Stute v. P.B.M.C. Inc.*, 1990). Specifically:

The Commissioner held that since Stute was not an employee of P.B.M.C., the general contractor had no duty to him to comply with WISHA. This

aspect of the Commissioner's ruling is contrary to decisions of this court and the Court of Appeals.

A general contractor's supervisory authority is per se control over the workplace, and the duty is placed upon the general contractor as a matter of law. It is the general contractor's responsibility to furnish safety equipment or to contractually require subcontractors to furnish adequate safety equipment relevant to their responsibilities.

Other U.S. jurisdictions have interpreted federal OSHA regulations and the common law as follows:

- The Texas Supreme Court believes that OSHA imposes no duty on Texas contractors beyond Texas common law. Texas common law on this issue derives from *Redinger v. Living Inc.* (1985), in which the Texas Supreme Court adopted the Restatement (Second) of Torts, Section 414.

- The California Supreme Court, in *Seabright Insurance Co. v. US Airways* (2011) ruled on the issue of who is liable for workplace injuries sustained by the employee of an independent contractor when those injuries occur as a result of a lapse in workplace safety requirements on the premises of the hirer (the party that hired the independent contractor). In the cited case, the company that hired a contractor was a property owner. The court held:

Generally, when employees of independent contractors are injured in the workplace, they cannot sue the party that hired the contractor to do the work. Here, we consider whether the rule applies when the party that hired the contractor (the hirer) failed to comply with workplace safety requirements concerning the precise subject matter of the contract, and the injury is alleged to have occurred as a consequence of that failure. We hold that the rule does apply in that circumstance.

By hiring an independent contractor, the hirer implicitly delegates to the contractor any tort law duty it owes to the contractor's employees to ensure the safety of the specific workplace that is the subject of the contract. That implicit delegation includes any tort law duty the hirer owes to the contractor's employees to comply with applicable statutory or regulatory safety requirements. Such delegation does not include the tort law duty the hirer owes to its own employees to comply with the same safety requirements, but under the definition of "employer" that applies to California's workplace safety laws the employees of an independent contractor are not considered to be the hirer's own employees.

In California, Cal/OSHA's regulation §336.10, Determination of Citable Employer, is based on federal OSHA's (1999) multiemployer citation policy.

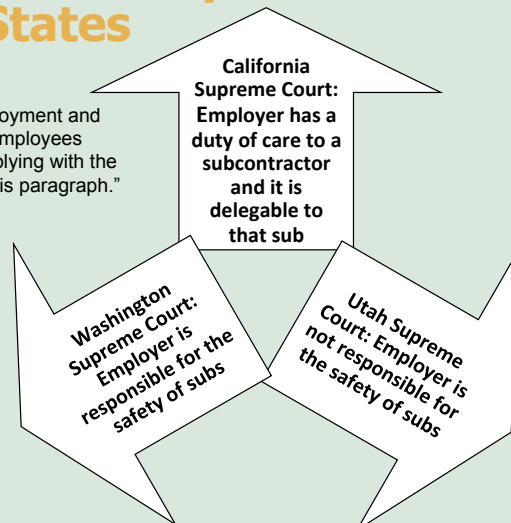
To summarize the court decisions and OSHA's citation doctrine in the cases cited (Figure 3):

- OSHA multiemployer citation doctrine: The controlling employer has duty of care to a subcontractor (*Secretary of Labor v. Summit Contractors Inc.*, 2010).

Figure 2

## Identical Regulatory Clauses Interpreted Differently in the Various U.S. States

"Each employer shall protect the employment and places of employment of each of his employees engaged in construction work by complying with the appropriate standards prescribed in this paragraph." 29 CFR § 1910.12(a).



•Washington Supreme Court: Any employer has a statutory duty of care to a subcontractor (and general contractor has a project-wide statutory safety duty) (*Stute v. P.B.M.C. Inc.*, 1990).

•Utah Supreme Court: An employer does not have a statutory duty of care to a subcontractor (*Hughes v. Utah Labor Commission*, 2014).

•Texas Supreme Court: The employer has duty of care to a subcontractor when a sufficient level of control has been applied (*Redinger v. Living Inc.*, 1985).

•California Supreme Court: An employer has a duty of care to a subcontractor and it is delegable to that subcontractor (*Seabright Insurance Co. v. US Airways*, 2011). Furthermore, Cal/OSHA has a multiemployer site citation law that is similar to the federal policy.

### Absolute Liability in the New York Labor Law 240

Regardless of control or no control, diligence or not, reasonable care or not, under the absolute liability of New York's Scaffold Law (Labor Law 240), owners and contractors are negligent by default for any subcontractor's injury. According to Eckert (2015), that law "has given rise to myriad legal battles over interpretation of the statute's requirements. There has been an explosion in litigation as well as an explosion in multimillion dollar verdicts." Rockefeller Institute (2013) provides an empirical analysis of the negative effects of that law, in part, as contributing "roughly 5.5 additional non-fatal worker injuries per 1,000 full-time equivalent employees." The report provides an estimate that repealing that law would contribute up to a roughly \$150 million net gain to the economy based on insurance and litigation costs savings. According to Marsh and McLennan (2012):

[S]ome of the largest verdicts in New York in 2012 resulted from construction litigation involving New York labor law [240]. The verdicts included one for nearly \$20 million, one for \$16.5 million, one for \$13 million and two for \$11 million, according to public sources.

The law has caused most insurers to reassess their ability to write contracting business profitability in New York, NY (Marsh & McLennan, 2012).

### Conclusion

The topic of duty of safety care owed to subcontractors and other project parties is important in determining the safety strategy for companies operating at multiemployer project sites. Enhanced clarity of this subject improves project-specific safety management systems and plans, optimizes project safety resource allocation, clarifies safety roles and responsibilities, reduces safety-related liabilities, and leads to safer sites.

Overall, more clarity is needed in the U.S. on statutory roles and responsibilities of all parties involved in multiemployer projects. In the author's opinion, the U.K. CDM regulations can serve as a model, providing a high level of safety diligence and coordination for all parties involved. In all

cases, project-specific safety strategy should be discussed with the legal, commercial and safety departments before contracts are signed, and project personnel should be trained in that strategy. **PS**

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