



Contactor Liability and Risk Management Solutions

by Adele Abrams

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By Adele L. Abrams, Esq., CMSP
Law Office of Adele L. Abrams PC
www.safety-law.com

Legal liability, arising from activities of third parties at a worksite, is one of the most difficult risk exposures to address and properly manage. Unless contractors are prequalified, trained, and proper coordination of safety activities is ensured, a company can face civil penalties from government safety agencies, tort liability arising from personal injury or wrongful death claims, and even criminal prosecution of company supervisors and upper management. In short, contractors may be the weakest link in the safety chain and it is critical to forge a partnership with those contractors and subcontractors who endeavor to perform work at a company's facilities.

This attorney has significant experience in cases where failure to adequately address contractor risks in advance created tort liability for injuries to workers as well as wrongful death actions, criminal prosecutions, litigation and even contract fee disputes between the parties. A few examples:

- A rail contractor's employee suffered permanently disabling injuries after failing to follow safe work procedures at a Wyoming metal/nonmetal mine. The mine operator was heavily fined by MSHA, a criminal prosecution of the trainer ensued, and a personal injury action resulted in a jury award of more than \$6 million. The mine operator, the contractor and several individuals employed by the companies were all named defendants in the tort action.
- A contractor performing demolition work at a chemical facility in Alabama did not follow OSHA recommended practices when bringing down a building, and one of the contractor's employees was killed when the building collapsed on him. In addition to several serious OSHA citations issued against the company, tort litigation was brought by the worker's estate against multiple parties claiming that the OSHA violations were proof of "negligence per se."
- A blasting contractor in Pennsylvania did not coordinate with the mine operator when clearing the blast area, and the mine supervisor and plant worker were caught in a burst of fly rock as they sat in a truck. The worker in the passenger seat suffered fatal internal injuries. Both companies received citations from the federal government, and multi-million dollar wrongful death tort actions resulted, as well as litigation over the economic harm arising from business disruption, which resulted from the government investigation.

This paper analyzes some of these legal liability theories, and the impact of recent court decisions on enforcement activities by the federal Occupational Safety and Health Administration ("OSHA") and the Mine Safety and Health Administration ("MSHA"). It also offers suggestions on how to proactively manage contractor safety programs and to structure prequalification to minimize risk and maximize safety.

OSHA and MSHA Enforcement Issues

Historically, OSHA has utilized an enforcement approach that creates tension between employers, general contractors, and subcontractors. If a prime employer or general contractor does not adequately anticipate and address its responsibilities under the Occupational Safety and Health Act (“OSH Act”), it may be rudely awakened when it receives civil penalties of up to \$70,000 for violations in which it had no direct involvement. Too often, employers give little advance scrutiny 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 has implemented a four-part analysis to determine when it is appropriate to cite the prime employer (or general contractor), the subcontractor, or both for violations arising from the subordinate company’s activities. This legal test, with one exception discussed below, has withstood challenges for more than 30 years.

An initial two-step process is used by OSHA in its multi-employer citation policy (CPL 2-0.124, 12/10/1999) to determine whether more than one employer shall be cited: (1) determine whether the employer is a “creating, exposing, correcting, or controlling employer” (this is the four-part analysis); 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 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 OSHA’s 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 its core, OSHA’s “General Duty Clause”—expressed in Section 5(a)(1) of the 1970 OSH Act—forms the basis for holding each employer at a worksite potentially responsible for any hazards present. Section 5(a)(1) 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). Only the “exposing” employer may be cited under the General Duty Clause; however, OSHA has on occasion determined that more than one company had exposed workers arising from a single violative condition. Normally, the multi-employer citations arise under one or more of OSHA’s specific standards that are codified in 29 CFR Part 1910 (general industry), Part 1915 (shipyards), Part 1926 (construction) and Part 1928 (agriculture). There are, of course, other sections of 29 CFR that apply to all sectors (e.g., injury/illness recordkeeping and reporting requirements under Part 1904).

The legitimacy of the four-part test has been questioned in a 2007 recent split decision of the Occupational Safety and Health Review Commission (“OSHRC”). In *Secretary of Labor v. Summit Contractors, Inc.*, OSHRC Docket No. 03-1622 (Apr. 27, 2007), OSHRC vacated a citation issued by OSHA to a general construction contractor for a violation committed by one of his subcontractors. The majority held that that OSHA’s application and enforcement of its long-standing policy, when applied to construction worksites, must be revised in light of 29 CFR 1910.12, which states, relative to construction employers: “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 [Part 1926].”

This novel interpretation is now under appeal by OSHA in the U.S. Court of Appeals, 8th Circuit, because it goes against 30 years of precedent. However, unless that ruling is reversed, OSHA no longer has the authority to issue a citation to a general construction contractor solely on the basis of its being a “controlling employer” if the general contractor (i) did not create the hazard and (ii) does not have any of its employees exposed to the hazard. The ruling has no bearing in general industry employer/contractor situations, nor is it binding precedent in any of the 22 states¹ that administer their own OSHA programs for private worksites and that are not required to follow OSHRC case law.

¹ The state-plan states are: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Utah,

While contractor liability exposure has lessened (at least for the short-term) at some OSHA-regulated worksites, it has increased for those governed by MSHA. In *Sec’y of Labor v. Twentymile Coal Co.*, 456 F.3d 151 (D.C. Cir. 2006), the U.S. Court of Appeals held that MSHA has unfettered discretion to issue citations to the mine operator, the contractor or both for any violations arising from contractor activities—or even from defects in equipment that a contractor might bring onto the mine site.² The Federal Mine Safety and Health Review Commission (“FMSHRC”) will no longer weigh in on MSHA’s exercise of prosecutorial discretion, although it can still consider whether the cited standard was violated at all, and whether the agency’s classification of gravity and negligence are appropriate.

Given that Congress recently increased MSHA’s maximum civil penalty amounts to \$220,000 per citation, the consequences are greater than ever for failing to ensure that contractors retained to perform work at mine sites are capable of performing the work safely, and conforming to mandatory MSHA requirements.

Both OSHA and MSHA often assess higher civil penalties against the prime employer, mine operator, or general contractor than against the subordinate company directly involved in the violative action, because the agencies deem the primary employers to have a higher level of culpability or a better understanding of regulatory responsibilities. Moreover, both agencies’ penalty systems are linked to the size of the underlying corporate entity and/or the number of employees that the employer has at the worksite making unsafe contractors a greater financial risk for larger corporations to utilize.

Finally, each agency has authority to make criminal referrals arising from high negligence violations of workplace safety laws; and there is nothing limiting such prosecutions to an accident victim’s direct employer. Criminal violations of MSHA standards can trigger up to five years in prison and a \$250,000 criminal penalty. Fatal accidents involving OSHA violations can result in six months imprisonment, but pending legislation would increase this to 10 years, plus monetary penalties.

Tort Liability Considerations

Evidence of OSHA or MSHA violations that are upheld against a prime employer or general contractor can normally be introduced as proof of negligence *per se* in tort actions brought by a subcontractor (or his/her estate) or third parties for injuries or fatalities suffered at the worksite. It often does not normally make a difference whether the defendant was the “creating employer” under these circumstances.

Vermont, Virginia, Washington and Wyoming. Three additional states -- Connecticut, New Jersey and New York -- administer state-run programs covering public sector workers, but have federal OSHA enforcement in the private sector. With respect to U.S. territories, Puerto Rico has its own state plan, while the Virgin Islands and American Samoa are both under federal OSHA relative to private sector employer oversight.

² At issue in *Twentymile* was the mine operator’s failure to examine the contractor’s equipment prior to use at the mine, when such equipment was found to have safety defects such as a leaking oil pan.

Compliance with OSHA or MSHA standards infer a duty of care and give juries a reference against which to benchmark an employer's activities relative to prequalification, training and oversight of contractors at their facility. Although some states have taken different approaches, it is significant that the California Supreme Court recently ruled in *Elsner v. Uveges* that the amendments to its Labor Code (section 6304.5) now permit the introduction at trial of occupational health and safety standards in the same manner as any other statute, ordinance, or regulation. As such, Cal-OSHA provisions now may be admitted in third party negligence actions to establish the standards and duties of care.

The issue, of course, is that the owner/operator of a worksite is not the “employer” of the contract workers and so, except in rare situations, cannot invoke the worker's compensation shield against tort liability. All states provide a system of worker's compensation coverage that requires employers to provide insurance protection for the injuries and illnesses suffered by their employees arising out of the conditions and activities of their employment and, in exchange, worker's compensation awards become an exclusive remedy for injured or deceased workers. In most situations, individuals employed by a contractor or subcontractor will be able to bring a tort action against the prime employer, even if they receive worker's compensation awards from their direct employer.³ Moreover, the majority of states prohibit the joinder of employers by third parties for any purpose so even where OSHA or MSHA have also cited the subcontractor for a violation, this finding normally will not reduce the prime employer's liability exposure. Tort awards in cases arising from workplace injuries have, in some cases, been \$10 million or more—often outside the company's liability insurance limits.

Prequalification of Contractors and Program Coordination

Coordination of employer/contractor safety and health activities is a good idea from a practical perspective, but it is also required under certain OSHA and MSHA standards—particularly when workers of more than one company are engaged simultaneously in the same activities such as construction, repair, or maintenance work. The standards requiring harmonization of safety efforts include, but are not limited to:

- Hazard communication
- Confined space entry
- Lockout/tagout for electrical and mechanical work
- Process safety management
- Asbestos removal
- Hazardous waste
- Emergency response activities.

It is also critical to verify that all contract workers coming on site have the requisite training (and supporting documentation) in advance of beginning work, although the prime employer may have to supplement this to alert contractors to site-specific hazards.

³ There are limited exceptions for “borrowed employees” or where the independent contractor does not carry worker's compensation insurance and the prime employer can invoke state-specific “statutory employer” status and apply its worker's compensation insurance to the non-employee's claim.

It is also important to determine the line of supervision appropriate to each part of a particular project and each work area. Negligent training and negligent supervision are two of the fastest growing tort liability claim areas associated with contractor safety.

In light of the considerable legal liability arising from contractor/subcontractor work, it is prudent to prequalify contractors to the extent possible, to ensure that these companies have good safety cultures, training programs, ensure that equipment they bring to the worksite is defect-free, and that they enforce use of appropriate protective gear by workers. A thorough prequalification will involve checking contractors' OSHA/MSHA compliance history in advance, analyzing their experience modification rate (companies that frequently injure their own employees may trigger wall-to-wall inspections when accidents occur), scrutinizing references, verifying technical certifications, considering the company's participation in trade associations, and examining their safety programs and training.

There should be a corporate-wide consistent policy for contractor utilization, written contracts that implement the policies and provide for enforcement, and procedural guidelines for use in contractor selection, orientation, auditing and contract enforcement. This is a lot for companies to develop and maintain if it uses contractors on a regular basis, but there are services that conduct prequalification, compile and regularly update this type of information for companies that perform contract services for other employers. These may be worthwhile engaging in terms of allocation of resources and ensuring that all available pertinent information has been thoroughly considered.

In addition, solid contract language requiring them to indemnify the prime employer for any OSHA/MSHA penalties (and related defense costs) that may be incurred as the result of contractor violations is worth pursuing, but will only have limited effectiveness in some scenarios, will not be available to defend against criminal charges, and cannot prevent contract workers from filing tort litigation that has both direct and indirect consequences for corporate defendants. Finally, it is worth considering when evaluating competitive bids that the "low bid" may be lowest because the company skimps on safety. The stakes are too high to allow safety to be given low priority by any contractor working at your company's worksite ... or to engage companies that may be OSHA or MSHA "magnets," triggering heightened enforcement activities and drawing your company into litigation.

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