

Article

Legal - Responding to OSHA's Multi-Employer Citation Policy

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Construction News

SAN ANTONIO - In late 2018, the federal courts of appeals for Texas, Louisiana and Mississippi overturned thirty seven years' of precedent in deciding that the Occupational Safety & Health Administration can issue citations for a workplace hazard to entities other than the actual employer of the worker exposed to the hazard.

The Case:

The facts of that particular case are useful in understanding the implications of the court's decision. A Texas city, acting as owner, entered into a contract with a general contractor (GC) to build a public library. The GC maintained control over the worksite through on-site management personnel. As would be expected, the GC contracted with a subcontractor (Sub1) to perform a part of the work, and Sub1 also contracted with another subcontractor (Sub2) to perform part of its work. During construction, Sub2's employees were working at the base of an unsupported dirt wall. The Occupational Safety & Health Administration (OSHA) received an anonymous tip concerning the hazardous condition and conducted an inspection of the worksite. Following the inspection, OSHA issued citations to both Sub2 (employer) and to GC (non-employer) for the lack of proper support protecting workers in an excavation.

OSHA's Multi-Employer Citation Policy:

In issuing citations to both the GC and Sub2, OSHA relied upon what it now refers to as its "Multi-Employer Citation Policy." Under this policy, OSHA takes the position it can issue citations to a number of different entities at a particular workplace for the same workplace hazard – regardless of whether the cited entities actually employed a worker exposed to the hazard. Instead, at a workplace where several different entities are working alongside each other, OSHA classifies those entities in one (or more) of the following categories:

- "Creating" – entity that creates or causes a hazardous workplace condition.
- "Exposing" – entity that exposes its employees to a hazardous workplace condition.
- "Correcting" – entity responsible for correcting a hazardous workplace condition.
- "Controlling" – entity that has supervisory authority or control over the workplace.

What Does It Mean for the Construction Industry?

Although the court limited its decision to upholding a citation under the "controlling" category of the Multi-Employer Citation Policy, the decision will likely have a broader impact potentially allowing OSHA to issue citations under the other categories of the Multi-Employer Citation Policy as well. As a result, general contractors and subcontractors may both now be subject to OSHA citations for creating a workplace hazard or failing to correct a workplace hazard even though none of their own employees are exposed to the hazard.

Because OSHA's Multi-Employer Citation Policy will necessitate that general contractors and perhaps owners take an active role in down-stream contractor/subcontractor (lower-tier contractor) safety, this Policy may lead to important liability consequences for up-stream owners and contractors under state law, such as increased potential exposure to lawsuits involving worker injuries, especially in instances where OSHA holds more than one entity liable for job site accidents. For very large construction projects that are of a scale that support owner or contractor controlled insurance programs (a fairly small percentage of the construction projects), it

may make economic sense to use project-specific controlled insurance programs such as Owner Controlled Insurance Programs (OCIPs) or Contractor Controlled Insurance Programs (CCIPs) where owners and general contractors may be able to take advantage of the worker's comp bar against a plaintiff's recovery of damages over and above their direct employer's worker's compensation benefits (a/k/a "action over claims"), especially in instances where gross negligence does not apply.

However, since controlled programs are expensive and deductibles under such controlled insurance programs tend to be very large, for the majority of projects, use of OCIPs or CCIPs is not possible. For more typical projects, selection of quality lower-tier contractors at every level, with strong, proactive, safety programs and safety records will be essential. It will be important for owners and general contractors, not only to hire the safest lower-tier contractors, but it may be prudent to also (1) thoroughly vet all lower tier contractor entities for safety, (2) incorporate strong contractual indemnity language into subcontracts to protect against action over claims, (3) require lower-tier contractors to insure upstream parties as primary, non-contributory additional insureds under lower-tier contractor insurance policies, and (4) use flow down clauses to require the same protections from all down-stream, lower-tier contractors (with owners and general contractors as the third-party beneficiaries). We also recommend that up-stream parties review lower-tier insurance policies for coverage, when possible.

In summary, the Multi-Employer Citation Policy will require significant new levels of over-OSHA partnership, oversight, contractual protection and on occasions where it is an economic fit for a project, perhaps use of controlled insurance programs. Similarly, it will increasingly be important for contractors of all levels to educate their respective work forces in such a way that they can perform more safely on projects and better comply with OSHA requirements.

The full article can also be viewed [here](#).

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