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ENHANCED OSHA LIABILITY FOR “CONTROLLING EMPLOYERS”

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I. Introduction

From large-scale construction sites to office buildings and factories, many employers rely on one or more subcontractors to perform any number of specialized functions. In such an arrangement, the employer subcontracting work to another entity often assumes (and the contractual arrangement often directs) that the subcontractor is to retain exclusive responsibility for the safety and health of its own employees while performing the subcontracted work. In a recent decision from the U.S. Court of Appeals for the Eighth Circuit, the court unequivocally held that an employer can no longer avoid OSHA liability simply by subcontracting work to another entity. *Solis v. Summit Contractors, Inc.*, ___ F.3d ___, 2009 WL 465978 (8th Cir. Feb. 26, 2009). With this case validating its ability to cite employers regardless of whether a violation affects the employer's own employees, OSHA will undoubtedly increase its focus on work sites, particularly construction sites, where it can cite multiple employers for a single safety or health

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violation. This decision also increases the potential for criminal liability for multiple employers where an employee is killed at the work site.

II. OSHA's Multi-Employer Policy

Section 5(a) of the Occupational Safety and Health Act broadly requires employers to furnish each of its employees a workplace free from recognized hazards and to comply with all occupational safety and health standards developed by OSHA. Thus, the Act creates two types of obligations: 1) a “general duty” obligation running *only* to the employer’s own employees; and 2) an obligation to obey all OSHA standards with respect to *all* employees, regardless of their employer.

This second obligation formed the basis for OSHA’s “multi-employer worksite policy,” under which the Agency decided it had the authority to issue citations not only to employers who exposed their own employees to hazardous conditions, but also to employers who created a hazardous condition that endangered employees, whether its own or those of another employer. This policy gave OSHA the ability to issue citations to multiple employers even for violations that did not directly affect the employer’s own employees. This policy had particular import in the construction industry, with many different employers having employees at a site at any given time.

Since the early 1980s, OSHA has continuously expanded the scope of its multi-employer worksite policy. By 1994, OSHA’s policy instructed its compliance officers to issue citations to any employer who:

- 1) exposed its own employees to a hazardous condition;
- 2) created a hazardous condition that endangered any employer’s employees;

- 3) was responsible for correcting a hazardous condition even if its own employees were not exposed to the hazard; or
- 4) had the ability to prevent or abate a hazardous condition through the exercise of reasonable supervisory authority.

This fourth category has historically caused the most consternation among employers as well as courts. In particular, construction industry employers have frequently challenged OSHA's ability to cite them for violations where their own employees are not exposed to any hazards related to the violations. In these cases, the employers have relied primarily upon language in 29 C.F.R. § 1910.12(a), an introduction to OSHA's construction industry standards, which appears to limit the scope of an employer's obligations under OSHA's construction industry standards to the employer's own employees.

III. Summit Contractors

In June 2003, OSHA issued citations to Summit Contractors, Inc., which was the general contractor for the construction of a college dormitory in Little Rock, Arkansas, and All Phase Construction, Inc., a subcontractor Summit hired to perform exterior masonry work. OSHA's compliance officer had observed All Phase's employees working on scaffolds more than ten feet above the ground without wearing fall protection equipment. Summit had subcontracted the entire project and, consequently, had only four employees on site: a project superintendent and three assistant superintendents and no tradesmen. Summit's project superintendent had observed All Phase employees working on scaffolds without wearing fall protection equipment on two or three separate occasions and had advised All Phase to correct these problems. Based on those facts, OSHA cited Summit because it had the ability to prevent or abate a hazardous condition through the exercise of reasonable supervisory authority.

After an Administrative Law Judge upheld the citation against Summit, the OSH Review Commission vacated the citation on review. *Sec. of Labor v. Summit Contractors, Inc.*, 21 O.S.H. Cas. (BNA) 2020 (O.S.H.R.C. Apr. 27, 2007). Specifically, the Review Commission held that 29 C.F.R. § 1910.12(a) prohibited OSHA from imposing an obligation on general contractors to protect the employees of their subcontractors from hazardous conditions. The Review Commission's decision abruptly reined in the previous expansion of OSHA's multi-employer worksite policy by restricting OSHA's ability to cite employers for violations that did not affect their own employees.

On appeal, the U.S. Court of Appeals for the Eighth Circuit reversed the Review Commission's decision. *Solis v. Summit Contractors, Inc.*, ___ F.3d ___, 2009 WL 465978 (8th Cir. Feb. 26, 2009). The court found that Congress intended the OSH Act to require employers to adhere to OSHA's standards, regardless of whether the endangered employee was their own. The court acknowledged the heavy burden placed on these employers: “[*T*he controlling employer citation policy places an enormous responsibility on a general contractor to monitor all employees and all aspects of a worksite.” 2009 WL 465978, at *11 (emphasis added). The court's decision validates OSHA's expansive view of the circumstances under which an employer has the ability to correct or abate violations committed by another employer.

IV. Effect of Summit Contractors on Employers

The *Summit Contractors* decision will doubtless reenergize OSHA's enforcement of its standards at construction sites, and there will be more citations issued to the “controlling employer,” whether that employer is the general contractor, the construction manager, or any other employer with control over a subcontractor. The decision also opens the door for OSHA to use its multi-employer worksite policy in its inspections beyond the construction industry, from

manufacturers who subcontract out maintenance work, for example, to office property managers who subcontract out window cleaning and who maintain any level of control over the “means and methods” by which the subcontractor performs the actual work. OSHA has applied the multi-employer worksite policy to factory settings, where it cited the factory operator where an employee of a subcontracted cleaning company was killed while working at the factory. Ultimately, the citation was dismissed based on the operator’s lack of actual control over the subcontractor, but the application of the multi-employer worksite policy was validated. *See IBP, Inc. v. Herman*, 144 F.3d 861 (D.C. Cir. 1998).

Finally, it bears mentioning that the *Summit Contractors* decision also opens the door for OSHA to impose criminal liability on employers, including penalties and jail time for managers, where a subcontractor is killed and there was a willful violation. OSHA has already demonstrated its willingness to use the multi-employer worksite policy in this way. *See, e.g., U.S. v. Pitt-Des Moines, Inc.*, 168 F.3d 976 (7th Cir. 1999) (upholding conviction of general contractor for the death of a subcontractor’s employee). The *Summit Contractors* decision expands the scope of employers that can be swept into the web of criminal OSHA liability in the event a worker is killed.

V. Recommendations

Accordingly, it is recommended that all employers carefully evaluate the degree to which they control the means and methods of a subcontractor’s work and implement immediate actions to ensure the exercise of reasonable care in identifying and correcting violations, including:

- While an employer cannot discharge its OSHA liability by contract, contractual language can be protective to the extent to which a particular employer limits its responsibility and ability to correct or abate dangerous conditions at a multiple employer site. Employers must carefully review

contractual language to identify the degree of control the employer exercises over other employers.

- When working with a subcontractor, the employer should review the subcontractor's safety-related documentation, including personal protective equipment records and safety programs and policies, to ensure they are up-to-date and address the particular hazards (e.g., fall, electrical, excavation hazards) to which the subcontractor's employees are expected to be exposed.
- When working at a multiple employer worksite, the employer with supervisory responsibility must either inspect the worksite itself or ensure that inspections are being conducted by a subcontractor frequently enough to be able to identify and correct observed safety and health violations. This includes training on-site managers and supervisors to identify safety and health violations.
- The employer must also implement an effective system either for correcting any safety and health violations that it observed during these inspections or for ensuring that the subcontractor corrects any observed violations. This should include documenting the completion of any corrective action recommended.
- The employer should develop a system for subcontractors to monitor their employees, correct violations, and report to the general contractor, the construction manager, etc.
- The employer should require the subcontractor to immediately report injuries both to the proper regulatory authority (as applicable) and to the employer. The employer should maintain documentation of any worksite injuries to subcontractors' employees, as well as any corrective action taken to address any hazardous conditions that led to the injury.
- An OSHA 300 log should be maintained at the work site to record work-related injuries and illnesses.

VI. Conclusion

Under the new Administration, it can be expected that OSHA will begin to more aggressively enforce compliance with workplace safety and health laws and regulations. The newly invigorated multi-employer worksite policy will be another tool employed by the Agency in its mission. Employers who exert control over other employers must assess their potential

liability as a “controlling employer” and develop appropriate administrative procedures and written documentation to demonstrate compliance with a controlling employer’s duties.