Module 7: Multi Employer Coordination

Traditional employee/employer relationships have evolved in past years, and multi-employer worksites as well as use of temporary employees are becoming much more common than in the past.

OSHA has published guidelines and instruction documents clarifying their enforcement policies and employer responsibilities when multiple employers share responsibility for workplace hazards. Some OSHA standards, such as Permit Required Confined Space standards for general industry and construction, specify specific responsibilities for host employers, contractors and others working in a multiple employer situation. However, most OSHA standards do not address multi-employer worksite responsibilities within individual standards.

OSHA's Recommended Practices for Safety and Health Programs, which are based on Best Practices developed by VPP employers, provides guidance on establishing effective communication and coordination between employers.

The following definitions are found in OSHA documents:

Definitions	
Contractor	An individual or firm that agrees to furnish materials or perform services at a specified price, and controls the details of how the work will be performed and completed.
Controlling employer	An employer who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them.
Correcting employer	An employer who is engaged in a common undertaking, on the same worksite, as the exposing employer and is responsible for correcting a hazard.
Creating employer	The employer that caused a hazardous condition that violates an OSHA Standard
Dual Employers	(Washington) Two or more employers who may share liability for safety and health violations that expose employees to workplace hazards
Exposing employer	An employer whose own employees are exposed to the hazard.
Host employer	An employer who has general supervisory authority over the worksite, including controlling the means and manner of work performed and having the power to correct safety and health hazards or require others to correct them.
Staffing agency	A firm that provides temporary workers to host employers. A staffing agency hires its own employees and assigns them to support or supplement a client's workforce in situations involving employee absences, temporary skill shortages, seasonal workloads, and special projects.
Temporary workers	Workers hired and paid by a staffing agency and assigned to work for a host employer, whether or not the job is actually temporary.

The Stute Decision

Stute v PMMC, decided by the Washington State Supreme Court in 1990, was a landmark court case that established safety responsibility for both contractors and subcontractors on a worksite.

Andre Stute was 23 years old and working for a gutter repair contractor when he fell off a roof, 28 feet to the ground, and suffered serious injuries that prevented him from returning to his job as a construction worker. Under Washington State Worker's Compensation laws, an employee cannot sue his or her primary employer, although a 3rd party employer can be sued. Andre Stute filed a lawsuit with the General Contractor, and this eventually was taken up by the state Supreme Court.

The Washington State Supreme Court held that the general contractor had a specific duty to comply with all Labor and Industries health and safety requirements, and that this specific duty applied to all employees working on the site, not just the general contractor's own employees. This decision put employers on notice that they may be held legally liable for damages in a civil suit if employees of subcontractors are injured.

The Stute decision was one of several cases that helped set direction for OSHA and state agencies in developing multi employer citation policies.

Multi Employer Worksites

OSHA directive CPL-00.124 clarifies OSHA's multi employer citation policy. If a violation is found, OSHA follows criteria in this document to determine which employer(s) would receive citations. The directive describes responsibilities for safety for creating employers, exposing employers, and correcting employers. A single employer may fall into a single category, or multiple categories. Controlling employers have overall responsibility for safety. Specific responsibilities can be established through contractual agreements, or through actual practice.

Washington State and Oregon have also issued program directives for multi-employer worksites.

Employers on multi-employer worksites with pro-active safety programs establish safety responsibilities at the beginning of the project, or upon establishing contractual agreements for ongoing work. OSHA's documents can serve as guidance in setting up these agreements.

OSHA INSTRUCTION

U.S. DEPARTMENT OF LABOR — Occupational Safety and Health Administration

DIRECTIVE NUMBER: CPL 2-00.124 | **EFFECTIVE DATE:** December 10,1999

SUBJECT: Multi-Employer Citation Policy

ABSTRACT

Purpose: To Clarify the Agency's multi-employer citation policy.

Scope: OSHA-Wide

References: OSHA Instruction CPL 2.103 (the FIRM)

Suspensions: Chapter III, Paragraph C. 6. of the FIRM is suspended and replaced by this Directive.

State Impact: This Instruction describes a Federal Program Change. Notification of State intent is required, but adoption is not.

Action Offices: National, Regional and Area Offices

Originating Office: Directorate of Construction

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By and Under the Authority of
R. Davis Layne
Deputy Assistant Secretary, OSHA

Cover Sheet

TABLE OF CONTENTS

I. Purpose. This Directive clarifies the Agency's multi-employer citation policy and suspends Chapter III. C. 6. of OSHA's Field Inspection Reference Manual (FIRM).

II. Scope. OSHA-Wide

III. Suspension. Chapter III. Paragraph C. 6. of the FIRM (CPL 2.103) is suspended and replaced by this Directive.

IV. References. OSHA Instructions:

- CPL 02-00.103; OSHA Field Inspection Reference Manual (FIRM), September 26, 1994.
- ADM 08-0.1C, OSHA Electronic Directive System, December 19,1997.

V. Action Information.

A. Responsible Office. Directorate of Construction.

B. Action Offices. National, Regional and Area Offices

C. Information Offices. State Plan Offices, Consultation Project Offices

VI. Federal Program Change. This Directive describes a Federal Program Change for which State adoption is not required. However, the States shall respond via the two-way memorandum to the Regional Office as soon as the State's intent regarding the multi-employer citation policy is known, but no later than 60 calendar days after the date of transmittal from the Directorate of Federal-State Operations.

VII. Force and Effect of Revised Policy. The revised policy provided in this Directive is in full force and effect from the date of its issuance. It is an official Agency policy to be implemented OSHA-wide.

VIII. Changes in Web Version of FIRM. A note will be included at appropriate places in the FIRM as it appears on the Web indicating the suspension of Chapter III paragraph 6. C. and its replacement by this Directive, and a hypertext link will be provided connecting viewers with this Directive.

IX. Background. OSHA's Field Inspection Reference Manual (FIRM) of September 26, 1994 (CPL 2.103), states at Chapter III, paragraph 6. C., the Agency's citation policy for multi-employer worksites. The Agency has determined that this policy needs clarification. This directive describes the revised policy.

A. Continuation of Basic Policy. This revision continues OSHA's existing policy for

issuing citations on multi-employer worksites. However, it gives clearer and

more detailed guidance than did the earlier description of the policy in the FIRM, including new examples explaining when citations should and should not be issued to exposing, creating, correcting, and controlling employers. These examples, which address common situations and provide general policy guidance, are not intended to be exclusive. In all cases, the decision on whether to issue citations should be based on all of the relevant facts revealed by the inspection or investigation.

B. No Changes in Employer Duties. This revision neither imposes new duties on employers nor detracts from their existing duties under the OSH Act. Those duties continue to arise from the employers' statutory duty to comply with OSHA standards and their duty to exercise reasonable diligence to determine whether violations of those standards exist.

X. Multi-employer Worksite Policy. The following is the multi-employer citation policy:

A. Multi-employer Worksites. On multi-employer worksites (in all industry sectors), more than one employer may be citable for a hazardous condition that violates an OSHA standard. A two-step process must be followed in determining whether more than one employer is to be cited.

1. Step One. The first step is to determine whether the employer is a creating, exposing, correcting, or controlling employer. The definitions in paragraphs (B) - (E) below explain and give examples of each. Remember that an employer may have multiple roles (see paragraph H). Once you determine the role of the employer, go to Step Two to determine if a citation is appropriate (NOTE: only exposing employers can be cited for General Duty Clause violations).

2. Step Two. If the employer falls into one of these categories, it has obligations with respect to OSHA requirements. Step Two is to determine if the employer's actions were sufficient to meet those obligations. The extent of the actions required of employers varies based on which category applies. Note that the extent of the measures that a controlling employer must take to satisfy its duty to exercise reasonable care to prevent and detect violations is less than what is required of an employer with respect to protecting its own employees.

B. The Creating Employer

1. Step 1: Definition: The employer that caused a hazardous condition that violates an OSHA standard.

2. Step 2: Actions Taken: Employers must not create violative conditions. An employer that does so is citable even if the only employees exposed are those of other employers at the site.

   a. *Example 1*: Employer Host operates a factory. It contracts with Company S to service machinery. Host fails to cover drums of a chemical despite S's repeated requests that it do so. This results in airborne levels of the chemical that exceed the Permissible Exposure Limit.

      Analysis: **Step 1**: Host is a creating employer because it caused employees of S to be exposed to the air contaminant above the PEL. **Step 2**: Host failed to implement measures to prevent the accumulation of the air contaminant. It could have met its OSHA obligation by implementing the simple engineering control of covering the drums. Having failed to implement a feasible engineering control to meet the PEL, Host is citable for the hazard.

   b. *Example 2:* Employer M hoists materials onto Floor 8, damaging perimeter guardrails. Neither its own employees nor employees of other employers are exposed to the hazard. It takes effective steps to keep all employees, including those of other employers, away from the unprotected edge and informs the controlling employer of the problem. Employer M lacks authority to fix the guardrails itself.

      Analysis: **Step 1:** Employer M is a creating employer because it caused a hazardous condition by damaging the guardrails. **Step 2:** While it lacked the authority to fix the guardrails, it took immediate and effective steps to keep all employees away from the hazard and notified the controlling employer of the hazard. Employer M is not citable since it took effective measures to prevent employee exposure to the fall hazard.

C. The Exposing Employer.

1. Step 1: Definition: An employer whose own employees are exposed to the hazard. See Chapter III, section (C)(1)(b) for a discussion of what constitutes exposure.

2. Step 2: Actions taken: If the exposing employer created the violation, it is citable for the violation as a creating employer. If the violation was created by another employer, the exposing employer is citable if it (1)

knew of the hazardous condition or failed to exercise reasonable diligence to discover the condition, and (2) failed to take steps consistent with its authority to protect is employees. If the exposing employer has authority to correct the hazard, it must do so. If the exposing employer lacks the authority to correct the hazard, it is citable if it fails to do each of the following: (1) ask the creating and/or controlling employer to correct the hazard; (2) inform its employees of the hazard; and (3) take reasonable alternative protective measures. In extreme circumstances (e.g., imminent danger situations), the exposing employer is citable for failing to remove its employees from the job to avoid the hazard.

a. *Example 3:* Employer Sub S is responsible for inspecting and cleaning a work area in Plant P around a large, permanent hole at the end of each day. An OSHA standard requires guardrails. There are no guardrails around the hole and Sub S employees do not use personal fall protection, although it would be feasible to do so. Sub S has no authority to install guardrails. However, it did ask Employer P, which operates the plant, to install them. P refused to install guardrails.

Analysis: **Step 1**: Sub S is an exposing employer because its employees are exposed to the fall hazard. **Step 2**: While Sub S has no authority to install guardrails, it is required to comply with OSHA requirements to the extent feasible. It must take steps to protect its employees and ask the employer that controls the hazard – Employer P – to correct it. Although Sub S asked for guardrails, since the hazard was not corrected, Sub S was responsible for taking reasonable alternative protective steps, such as providing personal fall protection. Because that was not done, Sub S is citable for the violation.

b. *Example 4:* Unprotected rebar on either side of an access ramp presents an impalement hazard. Sub E, an electrical subcontractor, does not have the authority to cover the rebar. However, several times Sub E asked the general contractor, Employer GC, to cover the rebar. In the meantime, Sub E instructed its employees to use a different access route that avoided most of the uncovered rebar and required them to keep as far from the rebar as possible.

Analysis: **Step 1**: Since Sub E employees were still exposed to some unprotected rebar, Sub E is an exposing employer. **Step 2**: Sub E made a good faith effort to get the general contractor to correct the hazard and took feasible measures within its control to protect its employees. Sub E is not citable for the rebar hazard.

D. The Correcting Employer.

1. Step 1: Definition: An employer 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.

2. Step 2: Actions taken: The correcting employer must exercise reasonable care in preventing and discovering violations and meet its obligations of correcting the hazard.

a. *Example 5:* Employer C, a carpentry contractor, is hired to erect and maintain guardrails throughout a large, 15-story project. Work is proceeding on all floors. C inspects all floors in the morning and again in the afternoon each day. It also inspects areas where material is delivered to the perimeter once the material vendor is finished delivering material to that area. Other subcontractors are required to report damaged/missing guardrails to the general contractor, who forwards those reports to C. C repairs damaged guardrails immediately after finding them and immediately after they are reported. On this project few instances of damaged guardrails have occurred other than where material has been delivered. Shortly after the afternoon inspection of Floor 6, workers moving equipment accidentally damage a guardrail in one area. No one tells C of the damage and C has not seen it. An OSHA inspection occurs at the beginning of the next day, prior to the morning inspection of Floor 6. None of C's own employees are exposed to the hazard, but other employees are exposed.

Analysis: **Step 1:** C is a correcting employer since it is responsible for erecting and maintaining fall protection equipment. **Step 2:** The steps C implemented to discover and correct damaged guardrails were reasonable in light of the amount of activity and size of the project. It exercised reasonable care in preventing and discovering violations; it is not citable for the damaged guardrail since it could not reasonably have known of the violation.

E. The Controlling Employer.

1. Step 1: Definition: An employer who has 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

4. Evaluating Reasonable Care. In evaluating whether a controlling employer has

weekly review of S's own inspection reports. GH has a system of graduated enforcement that it has applied to S for the few safety and health violations that had been committed by S in the past few years. Further, due to respirator equipment problems S violates respiratory protection requirements two days before GH's next scheduled inspection of S. The next day there is an OSHA inspection. There is no notation of the equipment problems in S's inspection reports to GH and S made no mention of it in its telephone discussions.

Analysis: **Step 1**: GH is a controlling employer because it has general supervisory authority over the worksite, including contractual authority to correct safety and health violations. **Step 2:** GH has taken reasonable steps to try to make sure that S meets safety and health requirements. Its inspection frequency is appropriate in light of the low number of workers at the site, lack of significant changes in the nature of the work and types of hazards involved, GH's knowledge of S's history of compliance and its effective safety and health efforts on this job. GH has exercised reasonable care and is not citable for this condition.

(2) *Example 7*: Employer GC contracts with Employer P to do painting work. GC has the same contract authority over P as Employer GH had in Example 6. GC has never before worked with P. GC conducts inspections that are sufficiently frequent in light of the factors listed above in (G)(3). Further, during a number of its inspections, GC finds that P has violated fall protection requirements. It points the violations out to P during each inspection but takes no further actions.

Analysis: **Step 1**: GC is a controlling employer since it has general supervisory authority over the site, including a contractual right of control over P. **Step 2:** GC took adequate steps to meet its obligation to discover violations. However, it failed to take reasonable steps to require P to correct hazards since it lacked a graduated system of enforcement. A citation to GC for the fall protection violations is appropriate.

(3) *Example 8*: Employer GC contracts with Sub E, an electrical subcontractor. GC has full contract authority over Sub E, as in Example 6. Sub E installs an electric panel box exposed to the weather and implements an assured equipment grounding conductor program, as required under the contract. It fails to

connect a grounding wire inside the box to one of the outlets. This

contract states that M does not have a right to require compliance with

report to O on contract compliance, and to certify completion of work. A has no authority or means to enforce compliance, no authority to approve/reject work and does not exercise any other authority at the site, although it does call the general contractor's attention to observed hazards noted during its inspections.

Analysis: **Step 1:** A's responsibilities are very limited in light of the numerous other administrative responsibilities necessary to complete the project. It is little more than a supplier of architectural services and conduit of information to O. Its responsibilities are insufficient to confer control over the subcontractors and it did not exercise control over safety. The responsibilities it does have are insufficient to make it a controlling employer. Merely pointing out safety violations did not make it a controlling employer. NOTE: In a circumstance such as this it is likely that broad control over the project rests with another entity. **Step 2:** Since A is not a controlling employer it had no duty under the OSH Act to exercise reasonable care with respect to enforcing the subcontractors' compliance with safety; there is therefore no need to go to Step 2.

(2) *Example 12:* Engineering firm E has the same contract authority and functions as in Example 9.

Analysis: **Step 1:** Under the facts in Example 9, E would be considered a controlling employer. **Step 2:** The same type of analysis described in Example 9 for Step 2 would apply here to determine if E should be cited.

d. Control Without Explicit Contractual Authority. Even where an employer has no explicit contract rights with respect to safety, an employer can still be a controlling employer if, in actual practice, it exercises broad control over subcontractors at the site (see Example 9). NOTE: Citations should only be issued in this type of case after consulting with the Regional Solicitor's office.

(1) *Example 13:* Construction manager MM does not have explicit contractual authority to require subcontractors to comply with safety requirements, nor does it explicitly have broad contractual authority at the site. However, it exercises control over most aspects of the subcontractors' work anyway, including aspects that relate to safety.

Analysis: **Step 1:** MM would be considered a controlling employer since it exercises control over most aspects of the subcontractor's work, including safety aspects. **Step 2:** The same type of analysis on reasonable care described in the examples in (G)(5)(a) would apply to determine if a citation should be issued to this type of controlling employer.

F. Multiple Roles.

1. A creating, correcting or controlling employer will often also be an exposing employer. Consider whether the employer is an exposing employer before evaluating its status with respect to these other roles.

2. Exposing, creating and controlling employers can also be correcting employers if they are authorized to correct the hazard.

OREGON OCCUPATIONAL SAFETY AND HEALTH DIVISION
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES

PROGRAM DIRECTIVE

Program Directive: A-257
Issued: December 15, 2006
Revised:

SUBJECT: Multi-employer Workplace Citation Guidelines

AFFECTED STANDARDS/ DIRECTIVES: ORS 654.071(4), OAR 437-001-0760(1)(a), OAR 437-003, subdivision C, 1926.20(b), OAR 437-001-0760(7)(a), and OAR 437-001-0099

PURPOSE: These guidelines provide directions to compliance officers on how to issue citations at multi-employer worksites. They do not preclude inspections to determine whether or how to issue appropriate citations. They do not constitute rules, policies, or statements of rights. The guidelines have general application to owners, general contractors, and subcontractors on any multi-employer worksite that have a direct (e.g., general contractor to subcontractor) or indirect (e.g., subcontractor to subcontractor, owner to subcontractor, etc.) contractual relationship to one another. These guidelines do not supersede responsibilities set out elsewhere such as those in the Hazard Communication Standard, Asbestos, Confined Space, etc.

DEFINITIONS:

A. Control: An employer will be determined to have sufficient control to abate hazardous conditions on a multi-employer worksite when it either: (1) has a direct employment relationship with an employee exposed to the hazard; or (2) has the authority to direct, or actually directs, how other employers and/or their direct employees are to safely accomplish their specific job tasks.

Exceptions:

1. An employer does not have control if it did not create the hazardous condition that violates OR-OSHA regulations unique to another employer's specialty occupation, unless it had knowledge of the hazardous condition for a reasonable period.

2. Control sufficient to abate a violation cannot be based solely on an employer's right to terminate or suspend work to correct unsafe working conditions, nor on an employer's authority to remove another employer's employee from the site for nonconformance with OR-OSHA regulations or other safety plans or obligations.

B. Knowledge: An employer on a multi-employer worksite will be determined to have knowledge of the existence of a hazardous condition if the employer had actual knowledge or with the exercise of reasonable

diligence could have known for a reasonable period of a condition or practice at the worksite that constituted a safety or health hazard. Exception: Under no circumstances will an employer be determined to have knowledge of hazards related to violations unique to another employer's specialty occupation unless the first employer had knowledge of the hazardous condition for a reasonable period.

C. Reasonable period: A brief period of time that, with the exercise of due diligence, would allow the employer to take appropriate steps to have the safety or health hazard abated or exposure to the hazard eliminated.

ACTION:

A. OR-OSHA Actions:
   1. OR-OSHA will identify which employers on multi-employer worksites are responsible for hazardous conditions. The identified employers that have "knowledge" of the hazardous conditions and exercise, or have the right to exercise, direct control over the work practices of employees who could reasonably have been exposed to such conditions may be cited. It is OROSHA's intent to cite only those employers responsible for violations of the Oregon Safe Employment Act.

   2. OR-OSHA may issue an "Order to Correct" pursuant to ORS 654.071(1) requiring an employer that was not cited to take reasonable steps to abate an existing hazard and/or avoid the recurrence of a hazard. Failure to comply with such an order will subject the employer to citation based on ORS 654.071(4).

B. Citation Guidelines:

   1. Worksite Inspections: Any employer involved in a multi-employer workplace may be cited pursuant to OAR 437-001-0760(1)(a), OAR 437-003, subdivision C, 1926.20(b), and OAR 437-001-0760(7)(a), for failing to take reasonable steps to provide for frequent and regular inspections of the jobsite to be made on the employer's behalf by its employees or agents as often as the type of operation requires.

   2. Exposing employer: Any employer in a multi-employer workplace may be cited if it exposes employees over whose work practices it has direct control, or the right to exercise direct control, to hazards of which it has knowledge.

   3. Controlling employer: Any employer that has sufficient control over a multi-employer workplace to cause hazardous conditions to be abated may be cited for failing to do so if that employer had knowledge of the hazard and there is a reasonable likelihood that employees over whose work practices it exercised direct control, or had the right to exercise direct control, could have been exposed to the hazardous conditions.

4. Creating employer: Any employer in a multi-employer worksite that causes a hazardous condition to be created may be cited if it has knowledge of the hazard and there is a reasonable likelihood that employees over whose work practices it has direct control, or the right to exercise direct control, could have been exposed to the hazardous condition.[1]

C. Closing Conference:

1. Prior to issuing a citation relating to an inspection of a multi-employer workplace, the Compliance Officer will conduct a closing conference in accordance with OAR 437-001-0099.

2. At the employer's request, a second conference will be held, either in person or by phone, within a reasonable time, so long as this conference does not impact the timeliness of a citation.

3. A designated manager, knowledgeable in the application of OR-OSHA's multi-employer workplace citation guidelines, will conduct the second conference.

4. Participants in the second conference will include the Compliance Officer who conducted the inspection, the Compliance Officer's manager (if requested by any of the parties), an employer representative, and an employee representative (if reasonably available).

EFFECTIVE DATE: This directive is effective immediately.

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[1] The category of "correcting employers" as previously set out in OR-OSHA guidelines is not included herein because such employers are covered under the existing employer categories set out in paragraphs B(2), (3) & (4) above. To the extent that circumstances arise involving specialized subcontractors that are hired specifically to correct hazardous conditions, it is noted that such subcontractors are obligated to assure that their employees work in a safe manner while also effectively abating hazards to which employees of other employers may be exposed.

DOSH DIRECTIVE
Department of Labor and Industries
Division of Occupational Safety and Health
Keeping Washington safe and working

27.00 General or Upper-Tier Contractor (Stute) Responsibility

Updated: November 30, 2016

I. Purpose

This Directive establishes guidelines for DOSH compliance and consultation staff when assessing an upper-tier contractor's compliance with the Washington Industrial Safety and Health Act (WISHA) as it applies to a lower-tier contractor or its employees. Property owners, developers, and other employers may also be liable for the safety of non-employees, depending on the degree of control exercised and whether they control or create a hazard. See, *Afoa v. Port of Seattle*, 176 Wn.2d 460, 296 P.3d 800 (2013), and *Martinez Melgoza & Assocs., Inc. v. Dep't of Labor & Indus*., 125 Wn. App. 843, 847, 106 P.3d 776 (2005).

II. Scope and Application

This document represents DOSH compliance policy, providing interpretation of appropriate application of the WISH Act in such situations. For the purposes of this document, "general contractor" and "upper-tier subcontractor" refer to any entity whose business operations involve the use of any unrelated building trades or crafts whose work the contractor will superintend in whole or in part. "Subcontractor" refers to any contractor that is subordinate to a general or upper-tier contractor.

This Directive updates and replaces WRD 27.00, *Contractor Responsibility Under Stute v. PBMC*, issued August 1, 2001.

III. Background

In 1990, the Washington Supreme Court held in *Stute v. PBMC*[1] that a general contractor could be held liable for an injury to a subcontractor's employee that occurred as a result of a WISHA violation. This decision clarified construction law regarding the liability of a general or prime contractor, which has created a dramatic change in the construction industry.

Since the *Stute* decision, the Washington Courts of Appeals have extended the rule to include an upper-tier subcontractor, *Husfloen v. MTA Construction*[2]; and owner/developers, *Weinert v. Bronco National Co.*[3] In *Weinert*, the Court of Appeals held that the owner/developer held a position so comparable to the general contractor that the owner/developer was also responsible to all employees on the work site. On January 7, 1991, in *Doss v. ITT Rayonier*[4] the Court of Appeals extended the rule in *Stute* to impose potential liability to a landowner whose independent contractor failed to comply with safety and health regulations. Also see, *Afoa v. Port of Seattle*, 176 Wn.2d 460, 471, 296 P.3d 800 (2013).

This Directive was last updated in 2001. Since that time Washington courts have issued several opinions that further clarify the nature and extent of the duty owed by a contractor to the employees of lower-tier contractors. Because the law in this area has evolved since 2001, the intent of this Directive is to reflect the current state of the law as accurately as possible. Future updates to this Directive may be needed as courts further clarify the duty owed by contractors to employees of subcontractors.

IV. Application Guidance

A. What is the basis for holding general contractors liable for violations by subcontractors?

In addition to the general concepts of creating or correcting employers (on which federal OSHA's policy guidance on this issue is based), the *Stute* decision and subsequent rulings have established that general contractors may be liable for WISHA violations committed by subcontractors.

B. When does DOSH consider a general or upper-tier subcontractor liable for a subcontractor's violation?

The Washington Supreme Court has said that the liability of a general contractor to employees on the worksite is "per se" liability. *See Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 122, 52 P.3d 472 (2002). Washington courts have explained that general contractors have a non-delegable, specific duty to ensure compliance with all applicable WISHA regulations for "every employee on the jobsite," not just its own employees. *Stute*, 114 Wn.2d at 456, 463-64; *accord Kamla*, 147 Wn.2d at 122. Thus, a general contractor's duty to protect workers on the jobsite extends to "*any* employee who may be harmed by the employer's violation of the safety rules." *Afoa v. Port of Seattle*, 176 Wn.2d 460, 471, 296 P.3d 800 (2013). As our Supreme Court explained, "[t]he *Stute* court imposed the per se liability as a matter of policy: 'to further the purposes of WISHA to assure safe and healthful working conditions for every person working in Washington.'" *Kamla*, 147 Wn.2d at 122 (quoting *Stute*, 114 Wn.2d at 464).

The basis for a general contractor's expansive duty to all workers on the jobsite arises from "the general contractor's innate supervisory authority," which "constitutes sufficient control over the workplace." *Stute*, 114 Wn.2d at 464. A general contractor has authority to influence work conditions at a construction site. *Kamla*, 147 Wn.2d at 124. As *Stute* explained, general contractors "as a matter of law" have "per se control over the workplace," which places them "in the best position to ensure compliance with safety regulations." 114 Wn.2d at 463-64. Because a general contractor is in the best position, financially and structurally, to ensure WISHA compliance "the prime responsibility for the safety of all workers should rest on the general contractor." *Stute,* 114 Wn.2d at 463.

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[1] 114 Wn.2d 454, 788 P.2d 545 (1990)

[2] 58 Wn. App. 686, 794 P.2d 859 (1990)

[3] 58 Wn. App. 692, 795 P.2d 1167 (1990)

[4] 60 Wn. App. 125, 803 P.2d 4 (1991)

The Department interprets these statements from the Washington Supreme Court to mean that if there is a serious violation by a lower-tier contractor, a parallel violation to an upper-tier contractor may be appropriate.

The issue in each case will be whether there is a serious violation by the lower-tier contractor. If it appears that the lower-tier contractor will be able to successfully assert an affirmative defense such as unpreventable employee misconduct or any other recognized affirmative defense, then no violation should be issued to either contractor.

C. Do general and upper-tier contractors have the same level of responsibility as the actual employer?

It should be noted that this understanding reflects only the general "duty of care" inherent in the role of a general or upper-tier contractor. Where a general or upper-tier contractor is the "creating" or "correcting" employer, it may be subject to citation even if the subcontractor is not (for example, the subcontractor might successfully defend itself using the argument that the hazard was created by the general contractor and could not be controlled by the subcontractor).

V. Responsibilities of a General Contractor

A. What is a general contractor's general responsibility under WISHA?

Because the general contractor has authority to direct all working conditions on a construction site, the general contractor has ultimate responsibility under WISHA for job safety and health at the job site.

B. What about situations where there is more than one general contractor on a site?

Where there is more than one general contractor on the job site, they must coordinate safety and health activities in a manner consistent with this DOSH Directive.

C. How must a general contractor demonstrate that it is meeting this responsibility by preparing for the job?

A general contractor must demonstrate that it is meeting these responsibilities by fulfilling the following responsibilities:

1. The general contractor must contractually require its subcontractors to provide all safety equipment required to do the job, or furnish the required safety equipment. Additionally, the general contractor may contractually require the subcontractor to reimburse the general contractor for liability incurred as a result of safety violations committed by the subcontractor or its employees. However, these contractual clauses are effective as an enforcement mechanism only to the extent that they are communicated to the subcontractor, and actually enforced.

2. The general contractor must take reasonable steps to ensure that it has established work rules that are designed to prevent violations of the Washington Administrative Code (WAC) rules enacted pursuant to the WISH Act. To accomplish this, the general contractor must:

   a. Develop and implement an Accident Prevention Program that:

      - Includes its roles and responsibilities pertaining to safety;
      - Includes training and corrective action; **and**
      - Is tailored to the safety and health requirements of particular plants, job sites or operations that may be involved.

   b. Where appropriate, develop a written site specific Safety Plan that addresses and coordinates the safety issues of all its subcontractors at the site.

      (1) The general contractor must develop or require its subcontractors to develop, limited to the scope of the subcontract, site specific plans that:

         - Identify anticipated hazards that will most likely be encountered in all phases of the project; **and**
         - Identify the specific means that will be used to address these hazards.

         For example, if there are two or more contractors on the job site where guarding is required in common areas to provide adequate fall protection, the general contractor must address how the general contractor and the other contractors will coordinate their efforts to provide protection.

      (2) It is the general contractor's duty to require that a site specific Safety Plan is developed in a manner consistent with the relevant WAC regulations. It is not the general contractor's duty to select or interfere with the means of appropriate safety protection selected by its subcontractors.

   c. Require its subcontractors to have Accident Prevention Programs *and* site specific plans consistent with the relevant WAC regulations.

   d. Develop a management plan that not only confirms existence of subcontractor required programs/plans, but also assures review for compliance with the WAC regulations and conformance with the project.

      For example, the general contractor may request its subcontractors to respond to a Safety Questionnaire in a form that is substantially similar to Appendix A (attached to this Directive). In the event such a request is made, it is not required of any general contractor to confirm its subcontractors' WISHA citation history with DOSH under this subsection, and the general contractor may rely on reasonable representations made by its subcontractors.

e. Make the Accident Prevention Program *and* all site-specific safety plans available *and* accessible in accordance with the WAC regulations. The general contractor must develop a site specific Safety Plan, or require its subcontractors to develop a plan limited to the scope of the contract, that:

- Identifies all anticipated hazards that will most likely be encountered in all phases of the project; and
- Identifies the specific means that will be used to address the hazard.

For example, if trenching is identified as a particular phase of the project for a subcontractor, the plan must identify the specific means of protection that will be used (for example, trench boxes, shoring, sloping, etc.) It is not sufficient to state that the excavation codes will be followed, or that the contractor will use either trench boxes, shoring, or sloping.

3. Other considerations: In order to establish work rules that are designed to enhance safety and health and to prevent violations of the WAC regulations, the general contractor may wish to consider:

- Preparing agendas for job safety meetings;
- Mandatory attendance of all workers at job site safety meetings;
- Promote communication between the general contractor and its subcontractors;
- Common work areas;
- Safety incentive or recognition programs to reward employees based on actual compliance with safety rules and regulations. However, these programs may not include or be based on the rate of reported injuries;
- Programs to reward employees for making safety suggestions.

4. The general contractor must develop a plan that will reasonably discover violations of its Accident Prevention Program or Safety Plan. The general contractor may wish to consider the following:

- Audits
- Assessments
- Reviews
- Training.

D. What must a general contractor do to correct health and safety violations and enforce health and safety rules?

Disciplinary action related to safety violations must be communicated to the appropriate work force.

The general contractor must show it has effectively enforced in practice its Accident Prevention Program and/or Safety Plan when it discovers safety violations through the following methods:

1. The general contractor must provide contractual language that requires its subcontractors to comply with all safety rules.
2. The general contractor must require its subcontractors to have and enforce a disciplinary schedule that will be followed by its subcontractors in the event safety violations are discovered, regardless of who makes the discovery. Appropriate disciplinary action must not be contingent upon the issuance of a WISHA citation.
3. The plan must include a method of documenting safety violations, as well as a method of recording what, if any, appropriate disciplinary action is taken.

   NOTE: *In this context, disciplinary action includes verbal or written reprimands, demotion, suspensions of work, reduction in pay, or termination. While it does not include corrective counseling, effective disciplinary action must be taken where appropriate.*
4. The Contract between the general contractor and its subcontractors should provide for the means and methods to allow the general contractor to effectively promote safety in the work site.

VI. Compliance Inspection Protocols

A. How should DOSH staff determine whether a parallel violation should be issued to a general contractor for a subcontractor's violation of WAC rules?

The Washington Supreme Court has stated that a general or upper-tier contractor's WISHA liability is "per se liability." Therefore, except as noted below, if there is a serious violation by a lower-tier contractor, a parallel citation to an upper-tier contractor may be appropriate.

The issue in each case will be whether there is a serious violation by the lower-tier contractor. If it appears that the lower-tier contractor will be able to successfully assert an affirmative defense such as unpreventable employee misconduct or any other recognized affirmative defense, then no violation should be issued to either the upper- or lower-tier contractor.

In applying the guidance of this Directive, DOSH staff are expected to apply the following checklist and to document their conclusions (failure of an inspector to do so in whole or in part, however, does not represent a contractor defense to an otherwise valid citation):

1. Determine whether there is a contractor to whom this Directive applies, and identify the employers of all employees exposed to hazards;
2. Once it is established that there is a relationship between a general contractor or upper tier subcontractor and the subcontractor(s) being cited, determine whether the subcontractor appears to have a valid affirmative defense.

3. For example, determine whether the affirmative defense of "unpreventable employee misconduct" is available to the subcontractor by evaluating the following elements:
   - Did the subcontractor establish safety work rules?
   - If so, did the subcontractor adequately communicate its safety work rules to its employees?
   - If so, did the subcontractor establish a process to discover and control recognized hazards?
   - If so, did the subcontractor enforce safety on the job site in a manner that was effective in practice?

B. If a parallel violation is identified, how should it be cited?

The department has determined as a matter of enforcement discretion that parallel violations will not necessarily be issued to general or upper-tier subcontractors for every violation cited against one or more subcontractors. In order to distinguish upper-tier contractor violations from violations involving the contractor's own employees, compliance staff should normally use WAC 296-155-100(1)(a). Violations involving generally similar conditions or hazards should not be cited separately but instead should be handled as instances of a single parallel violation by the general contractor or upper-tier subcontractor. Violations not involving such generally similar conditions or hazards would be addressed in a separate violation.

In other words, the following general categories that might be present on a construction site would each be handled as a separate violation if they were cited at all:

- Working at height (including all violations related to scaffolding, fall protection, guardrails, etc.);
- High voltage (including, but not limited to, violations related to overhead lines and violations related to electrical exposures in underground vaults);
- Trenching and excavation;
- Respiratory protection;
- Personal protective equipment (but not if the PPE involved one of the other categories, such as fall protection equipment or respiratory protection).

Any determination that the interests of worker safety would be better served, due to extraordinary circumstances, by citing the general contractor or upper-tier subcontractor separately for each violation, must be approved in advance by the DOSH Statewide Compliance Manager.

C. Should a general contractor or upper-tier subcontractor be issued a parallel citation for a general violation?

The department has determined as a matter of enforcement discretion that parallel citations for general violations will not be issued, nor will parallel violations for program violations be issued regardless of classification (this does not apply to required site-specific plans, such as those involving fall protection or lead).

D. When should repeat violations be issued to a general contractor or upper-tier subcontractor for parallel citations?

Violations of WAC 296-155-100(1)(a) are not automatically repeat violations. Repeat violations must not be cited unless previous parallel violations involve substantially similar hazards (see the list of examples in B above). In addition, a previous violation involving a contractor's direct employees cannot be used as the basis for a repeat parallel violation.

E. How should the exposure of the general contractor or upper-tier subcontractor's own employees to a similar violation be handled?

Violations involving the general contractor's own employees should be cited in accordance with normal agency practice, without regard to the presence of a parallel violation. If a hazardous condition involves employees of both the general contractor and one or more of its subcontractors, both a direct citation and a parallel citation should be issued to the general contractor if both violations are identified in the course of the inspection.

Approved: _____

Anne F. Soiza, Assistant Director
Division of Occupational Safety and Health
Department of Labor and Industries

[Appendix A is attached below]

APPENDIX A

SUBCONTRACTOR'S SAFETY QUESTIONNAIRE

Name of Subcontractor: _____

Project: _____ Date: _____

1. List your firm's workers' compensation Interstate Experience Modification Rate for the three most recent years.

   20_____ _____ 20_____ _____ 20_____ _____

2. Please use your last year's OSHA 300A Summary to fill in:

   (a) Number of lost workday cases _____

   (b) Number of fatalities _____

3. Employee staff hours worked last year _____

4. Do you conduct project safety inspections?

   Yes _____ No _____ If yes, how often? _____

   Who conducts this inspection (title)? _____

5. List key personnel planned for this project. Please list safety responsible person and his/her experience:

   _____

   _____

   _____

6. Do you have a written Safety Program? Yes _____ No _____

7. Do you have an orientation program for new hires? Yes _____ No _____

8. Do you have a program for newly hired or promoted foremen? Yes _____ No _____

9. Do you hold craft "toolbox" safety meetings? Yes _____ No _____

   How often? Weekly _____ Biweekly _____ Monthly _____

   Less often, as needed _____

Signature: _____

Attachment to DOSH Directive 27.00, General or Upper-Tier Contractor (Stute) Responsibility

Temporary Employees and Staffing Agencies

Temporary workers typically are employed by a primary employer at a staffing agency, and receive paychecks and any benefits from the staffing agency. However, they report to a worksite owned by the host employer. Unless the temporary employee reports to a staffing agency employee also working for the host employer, the temporary employee receives work direction from the host employer.

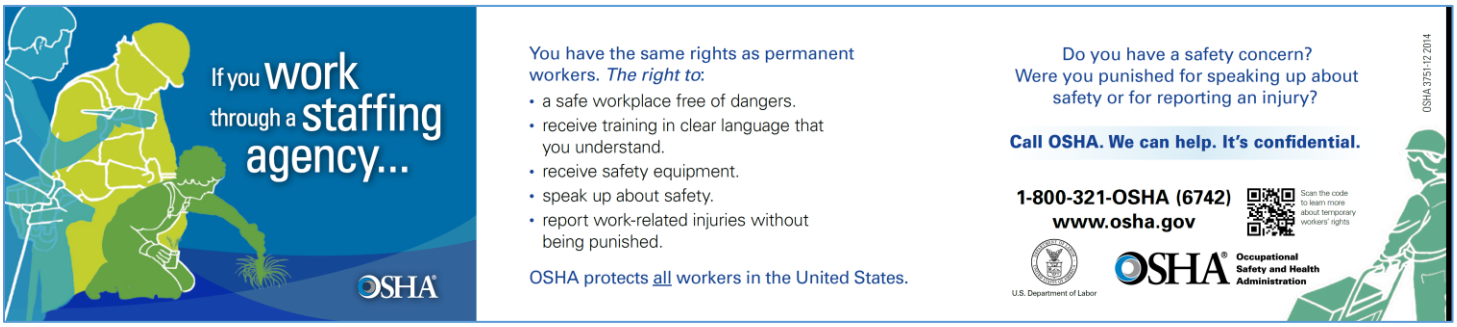
OSHA has concerns that some employers may use temporary employees for hazardous jobs as a way to avoid all their obligations under the OSH Act and worker protection laws. In response to these concerns, OSHA has established a Temporary Worker Initiative to clarify that both host employers and staffing agencies have roles in complying with workplace health and safety requirements, and have a shared responsibility for ensuring worker safety and health.

Specifically:

- The staffing agency and host employer need to communicate to ensure that hazards to which temporary employees are exposed to are known and that protections are provided.
- Staffing agencies have a duty to inquire into the conditions of their workers' assigned workplace. They must ensure that they are sending workers to a safe workplace.
- Ignorance of hazards is not an excuse.
- Staffing agencies need not become experts on specific workplace hazards, but they should determine what conditions exist at their client (host) agencies, what hazards may be encountered, and how best to ensure protection for the temporary workers.
- The staffing agency has the duty to inquire and *verify* that the host has fulfilled its responsibilities for a safe workplace.
- Host employers *must treat temporary employees like any other workers* in terms of training and safety and health protections.

https://www.osha.gov/temp_workers/index.html

If a temporary employee suffers a recordable injury while at work, the injury would be recorded on the OSHA 300 log of the employer directing the employee's work. Specifically, if the temporary employee is injured while under the supervision of an employee from the Host Employer, the injury would be recorded on the Host Employer's OSHA 300 log.



July 15, 2014

MEMORANDUM FOR: REGIONAL ADMINISTRATORS

THROUGH: DOROTHY DOUGHERTY
Deputy Assistant Secretary

FROM: THOMAS GALASSI, DIRECTOR
DIRECTORATE OF ENFORCEMENT PROGRAMS

SUBJECT: Policy Background on the Temporary Worker Initiative

On April 29, 2013, OSHA launched the Temporary Worker Initiative (TWI) in order to help prevent work-related injuries and illnesses among temporary workers.[1] The purpose of this initiative is to increase OSHA's focus on temporary workers in order to highlight employers' responsibilities to ensure these workers are protected from workplace hazards.

As detailed in the documents posted on our website (www.osha.gov/temp_workers), temporary workers are at increased risk of work-related injury and illness. In recent months, OSHA has received and investigated many reports of temporary workers suffering serious or fatal injuries, some in their first days on the job. Numerous studies have shown that new workers are at greatly increased risk for work-related injury, and most temporary workers will be "new" workers multiple times a year. Furthermore, as the American economy and workforce are changing, the use of temporary workers is increasing in many sectors of the economy.

OSHA compliance officers regularly encounter worksites with temporary workers. This memorandum is being sent to remind OSHA field staff of the Agency's long standing general enforcement policy regarding temporary workers. Additional enforcement and compliance guidance will be issued in the near future.

For the purposes of the TWI, "temporary workers" are workers hired and paid by a staffing agency and supplied to a host employer to perform work on a temporary basis. In general, OSHA will consider the staffing agency and host employer to be "joint employers" of the worker in this situation. Joint employment is a legal concept recognizing that, in some situations, the key attributes of the traditional employer-employee relationship are shared by two or more employers in such a manner that they each bear responsibility for compliance with statutory and regulatory requirements. For example, the staffing agency often controls a worker's paycheck and selects the host employer location where the worker will be sent. The host employer, in turn, assigns the particular work to be done each day and controls operations in the physical workplace.

As joint employers, both the host employer and the staffing agency have responsibilities for protecting the safety and health of the temporary worker under the OSH Act. In assessing compliance in any inspection where temporary workers are encountered, compliance officers must consider whether each employer has met its responsibility.

Identifying Employer Responsibilities. It is a fundamental principle that temporary workers are entitled to the same protections under the OSH Act as all other covered workers. The staffing agency and host employer must work together to ensure that OSH Act requirements are fully met and that the temporary worker is provided a safe workplace. This requires effective initial and follow-up communication and a common understanding of the division of responsibilities for safety and health. OSHA compliance officers should review any written contract(s) between the staffing agency and the host employer and determine if it addresses responsibilities for employee safety and health. It should be understood, however, that the contract's allocation of responsibilities may

not discharge either party's obligations under the Act.

The extent of the obligations each employer has will vary depending on workplace conditions and may be clarified by their agreement or contract. Their duties will sometimes overlap. The staffing agency or the host may be particularly well suited to ensure compliance with a particular requirement, and may assume primary responsibility for it. For example, staffing agencies might provide general safety and health training applicable to many different occupational settings, while host employers provide specific training tailored to the particular hazards at their workplaces. If the staffing agency has a long-term, continuing relationship with the temporary worker, it may be best positioned to comply with requirements such as audiometric testing or medical surveillance. The host employer, in turn, would be the primary party responsible for complying with workplace-specific standards relating to machine guarding, exposure to noise or toxic substances, and other workplace-specific safety and health requirements.

As noted above, although the host employer typically has primary responsibility for determining the hazards in their workplace and complying with worksite-specific requirements, the staffing agency also has a duty. Staffing agencies must ensure they are not sending workers to workplaces with hazards from which they are not protected or on which they have not been trained. Agencies need not become experts on all potential hazards at the host's workplace, but nevertheless have a duty to diligently inquire and determine what, if any, safety and health hazards are present at their client's workplaces. For example, if a staffing agency is supplying workers to a host where they will be working in a manufacturing setting using potentially hazardous equipment, the agency should take reasonable steps to identify any hazards present, to ensure that workers will receive the required training, protective equipment, and other safeguards, and then later verify that the protections are in place.

Prior to accepting a new host employer as a client, or a new project from a current client, both parties should jointly review the task assignments and any job hazard analyses in order to identify and eliminate potential safety and health dangers and provide the necessary protections and training for workers. If information becomes available that questions the adequacy of the host employer's job hazard analyses, such as injury and illness reports, safety and health complaints or OSHA enforcement history, the staffing agency should make efforts to address those issues with the host employer to ensure that existing hazards are properly assessed and abated to protect the workers. In assessing worksite hazards, host employers typically have the safety and health knowledge and control of worksite operations. However, the staffing agency may itself perform, if feasible, an inspection of the workplace to conduct its own hazard assessment or to ensure implementation of the host employer's safety and health obligations.

It is incumbent on both employers to communicate with each other when a worker is injured, and to determine what measures are to be implemented to prevent future injuries from occurring. Communication between the host employer and staffing agency is of fundamental importance in this regard. For example, if a temporary worker is injured at a host employer worksite, the host employer should inform the staffing agency of the injury, and the staffing agency, in turn, should follow-up about preventive actions taken. Similarly, if a staffing agency learns of a temporary worker's injury (through, for example, the filing of a workers' compensation claim), the staffing agency should inform the host employer to help ensure that preventive measures are taken before additional workers are injured.

When investigations reveal a temporary worker exposed to a violative condition, and the worker is considered to be employed by both a staffing agency and a host employer, OSHA will consider issuing citations to either or both of the employers, depending on the specific facts of the case. This will require Area Offices to make a careful assessment of whether both employers have fulfilled their respective compliance responsibilities in each individual case. These inspections are considered high priority and early consultation between OSHA and SOL is essential to facilitate

case development.

Temporary workers have the same rights and protections against retaliation as all other covered workers. Given the importance of communication between employers about the presence of hazards, it is also incumbent on both employers to take necessary steps to ensure that temporary workers are aware of their rights and responsibilities under the OSH Act. Section 11(c) of the OSH Act protects temporary workers who report injuries and illnesses or complain to their employer, OSHA, or other government agencies about unsafe or unhealthful working conditions in the workplace. Temporary workers have the right to report injuries or illnesses or complain to both the host employer and the staffing agency without fear of retribution. Both the staffing agency and the host employer should inform temporary employees how to report injuries and illnesses and include training on the employee's right to report workplace safety concerns. If the CSHO finds evidence of retaliation by either the host employer or the staffing agency for reporting an injury or illness, the CSHO will inform the worker of his/her right to file a retaliation complaint with OSHA.

When to Open an Inspection with the Staffing Agency. When a temporary worker is exposed to a violation, the CSHO should make inquiries into the staffing agency's actual or constructive knowledge of the worksite's hazards - whether the staffing agency knew, or with the exercise of reasonable diligence, could have known about the hazards. The CSHO should review such factors as the terms of the staffing agency-host employer contract, the interaction and communication between the staffing agency and the host employer, the staffing agency's contact with its temporary workers, whether those workers have had any complaints or concerns and whether they have made those concerns known to the employers (and if not, why not).

As noted above, the staffing agency has a basic duty to inquire into the conditions at the host worksite. The decision to open an inspection with the staffing agency is not dependent upon whether or not a staffing agency management representative is on-site. If a temporary worker is or could be exposed to a serious hazard or if the staffing agency does not appear to have taken any actions to learn of the conditions at the host's worksite, then the CSHO should initiate an inspection with the staffing agency. In all other instances, Area Directors may decide, based upon the evidence found during the inquiries, whether to open an inspection with the staffing agency.

Resources. Determining the responsibilities of host employers and staffing agencies will be highly fact-specific. To assist the field in such cases, the Directorate of Enforcement Programs is preparing a series of bulletins on various aspects of the TWI. The first bulletin addresses recordkeeping requirements and can be found on our Temporary Worker webpage. The second bulletin will address whistleblower protection rights. Other topics may include personal protective equipment, training, hazard communication, duty-to-inquire, hearing conservation programs, exposures to heat, and powered industrial trucks. A compliance directive is also planned.

In addition, a large number of resources devoted to the TWI have been assembled on OSHA's internal website. These include existing interpretive guidance and compliance directives related to temporary worker issues on recordkeeping, hazard communication, bloodborne pathogens, and other standards. More resources will be added in the future.

Conclusion. Too often in recent months, it has been OSHA's sad duty to investigate fatalities and injuries involving temporary workers who were not given the necessary safety and health protections required under the Act. In the TWI, we are attempting to ensure that all employers, whether host or staffing agency, individually and collaboratively, fulfill their duties to their workers, so that at the end of the shift of every work day, all temporary workers in the United States can return home safely.

As noted above, further guidance in the form of bulletins and a compliance directive will be forthcoming. Should you have any further questions, please contact Mary Lynn in the Office of Chemical Process Safety and Enforcement Initiatives, at lynn.mary@dol.gov.

cc: Jim Maddux, Director, DOC
Doug Kalinowski, DCSP

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1 See OSHA New Release 13-800-NAT,OSHA launches initiative to protect temporary workers, April 29, 2013

https://www.osha.gov/temp_workers/Policy_Background_on_the_Temporary_Worker_Initiative.html

More information can be found on OSHA's Temporary Worker Initiative website:

https://www.osha.gov/temp_workers/index.html

OREGON OCCUPATIONAL SAFETY AND HEALTH DIVISION
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES

PROGRAM DIRECTIVE

Program Directive A-246
Issued February 28, 2001
Revised December 17, 2015

SUBJECT Inspection Criteria: Temporary Service Providers and Leasing Companies

PURPOSE: To provide guidance to Oregon OSHA staff when working with temporary service providers and worker leasing companies.

SCOPE: This instruction applies to all Oregon OSHA.

ACTION: Managers will ensure that all Oregon OSHA staff working with temporary service providers and worker leasing companies are aware of and follow these guidelines when appropriate.

DEFINITIONS:

Administrative Service Organization (ASO) - A company that provides administrative services as they relate to a host employer's responsibilities regarding their employees. ASO services outsource payroll and human resource departments for businesses that use host employer tax identification numbers, which is different from a worker leasing company that uses the worker leasing company's tax identification numbers. **Note:** There is no further discussion about ASOs within the document. ASO is defined here to highlight their existence.

Host employer - The client of a worker leasing company or a temporary service provider who is using leased or temporary employees.

Staffing Agencies

Temporary Service Provider – A staffing provider that provides workers to a client by contract and for a fee, having current written documentation describing the work being provided on a temporary basis (defined below). Temporary service providers are not required to be licensed.

Worker Leasing Company - A licensed company, commonly known as a professional employer organization (PEO) that provides workers by contract and for a fee to work for a client. It **does not** include a company that provides workers to a client on a temporary basis. (See temporary service provider definition.) Leasing companies must meet the requirements of ORS chapter 656.850(4) compliance with workers' compensation and occupational safety and health laws.

Temporary basis - Workers provided to a client in situations such as employee absences, professional skill shortages, seasonal workloads, special assignments, and projects with the expectation that the positions will be terminated after the situation ends. Workers are also on a temporary basis if they are provided as probationary new hires with a reasonable expectation of transitioning to permanent employment and the client uses a pre-established probationary period in its overall employment selection program.

BACKGROUND: Clarification and standardization of Oregon OSHA policy is needed regarding the expectation and citation of the following:

- Host employers using leased or temporary workers under contract from worker leasing companies or temporary service providers.
- Worker leasing companies and temporary service providers.
- Oregon OSHA, the Workers' Compensation Board and the courts place the greater burden of protection on the party exercising direction and control at the workplace.

POLICY:

A. Host Employer Responsibilities. In general, the assumption is that the host employer directs and controls the workers. Based on this assumption, citations for safety and health hazards associated with conditions at the workplace that workers are exposed to will normally be issued to the host employer. **Note:** In those cases where the worker leasing companies or temporary service providers have control of the workplace or supervisory direction over the workers (e.g., an on-site supervisor), they have all the responsibilities as the host employer listed below.

1. Hazard Control. The host employer is responsible for controlling and correcting all hazards employees are exposed to at the workplace. They have supervisory direction over the workers and control of the workplace conditions. Normally citations for hazards at the workplace will be issued to the host employer.

2. Training. The host employer is responsible for site-specific training of all workers at the workplace. This includes, but is not limited to, training on the following:
   a. Site-specific hazard communication program, including the location of the written program and safety data sheets.
   b. Control of hazardous energy (lockout/tagout) procedures for equipment and machinery that they work with at the workplace.
   c. The personal protective equipment (PPE) to be used, worn, and maintained at the workplace.

3. PPE. The host employer is responsible for conducting a hazard assessment of the workplace and ensuring the use and maintenance of PPE for all workers. They are also required to provide PPE to

leased/temporary workers, unless the contract states the leasing company or temporary service provider will provide it. Neither the host employer nor the worker leasing company or the temporary service provider can require workers to provide or pay for their own PPE to the extent not otherwise allowed. See Program Directive A-211, Personal Protective Equipment.

The worker leasing company or the temporary service provider and the host employer may agree to have the worker leasing company or the temporary service provider supply some or all of the PPE and provide PPE training as long as the host employer ensures that the PPE is appropriate for the worker's assigned tasks. Such an agreement should be detailed in writing; however both employers may still be liable if inadequate PPE and training is not provided to the workers, regardless of which employer agreed to provide the PPE and training.

4. Safety Committee and Safety Meetings.
Host employers who lease or use temporary workers must include them in their employee count when determining the employer's options according to OAR 437-001-0765. If employers choose to hold safety meetings, they must include temporary workers.

   Temporary service providers and leasing companies must have their own safety committee or hold safety meetings in compliance with OAR 437-001-0765 for their own staff (other than those who work for a host employer.)

5. Accident Reporting. The host employer is required to report accidents to Oregon OSHA according to OAR 437-001-0700. When Oregon OSHA receives a report from the worker leasing company or the temporary service provider, that notice is acceptable. **Note:** effective January 1, 2016 Oregon's new rule, 437-001-0704 Reporting Fatalities and Injuries to Oregon OSHA, is in effect.

   a. Fatality or catastrophe must be reported to Oregon OSHA within 8 hours of the employer's knowledge of the event.
   b. Accidents requiring hospital admission and treatment must be reported to Oregon OSHA within 24 hours of the employer's knowledge of the event.

6. Recordkeeping. The host employer is responsible for medical record retention and injury and illness record keeping. This includes the OSHA 300 log and 300-A. An OSHA 300 log is required if they had more than 10 employees at any one time during the previous calendar year, unless they are in an exempt industry (see Table 1) according to OAR 437-001-0700(3)(b). When counting the number of employees, leased or temporary employees are included. Injuries to them must be recorded on the OSHA 300 Log of the host employer where the injury or illness occurred.

7. Accident Investigation. This is a joint responsibility of the host employer and the leasing company or temporary service provider. All lost time injuries must be investigated to determine how to prevent recurrence. OAR 437-001-0760(3)

B. Worker Leasing Companies and Temporary Service Providers Responsibilities. Staffing agencies also have responsibilities related to rule compliance and employee safety. **Note:** When the worker leasing companies or temporary service providers do not have direction and control, they must assure that the host employer provides adequate training, supervision, and instruction for those workers.

1. Training. Staffing agencies that send employees to host locations need to provide initial awareness training to employees on fall protection, machine guarding, lockout/tagout, hazard communication and other basic requirements of the occupational safety and health standards.

2. PPE. Staffing agencies share responsibilities for their workers' safety and must take reasonable steps to ensure that the host employer conducts the appropriate hazard assessment and provides adequate PPE. The worker leasing company or the temporary service provider should become familiar with the hazards at the host employer's worksite and maintain communication with its workers and the host employer. Such pre-planning and ongoing communication alerts them to persistent or newly-created workplace hazards that may need to be addressed.

3. Recordkeeping. When the worker leasing company or the temporary service provider has direct workers' compensation coverage for the host employer, the worker leasing company or temporary service provider is responsible for completing and filing the DCBS Form 801 for all injuries to leased or temporary workers within seven calendar days after knowledge of an injury.

4. Accident Investigation. This is a joint responsibility of the worker leasing company or the temporary service provider and the host employer. All lost time injuries must be investigated to determine ways to prevent recurrence.

5. Safety Committee and Safety Meetings. Temporary service providers and leasing companies must have their own safety committee or hold safety meetings in compliance with OAR 437-001-0765 for their staff (other than those who work for a host employer.)

C. **Worker Leasing Companies and Temporary Service Providers Notices.** Oregon OSHA will send a letter (see Appendix A) to the appropriate leasing company or service provider notifying them of a host employer's work site hazards. The letter will contain a copy of the host employer's citation or hazard letter to ensure that they are fully aware of the hazards at the jobsite and that appropriate steps are taken to protect their employees at that jobsite.

Any questions concerning worker leasing companies should be referred to the Worker Leasing Program, within the Workers' Compensation Division.

E-mail: WCD.employerinfo@state.or.us
Phone: 503-947-7815
Toll free: 888-877-5670
Read more about Worker Leasing vs. Temporary Staffing

RECORDING INFORMATION ON THE OSHA-1 AND OSHA-1 SUPPLEMENT:
If the employer uses temporary or leased employees include the name and address of the staffing company on the OSHA-1 Supplement and in the "Addl Mailing" tab in OTIS.

In order to be able to record and track this information, enter optional information code "S 05 TEMP WORKERS" in OTIS any time you encounter temporary or leased workers exposed to a workplace hazard during an inspection.

Note: For use of this optional information code, temporary or leased workers are those workers who are paid by a temporary service provider or leasing company, whether or not their job is temporary. Temporary workers are those supplied to a host employer and paid by a staffing company.

EFFECTIVE DATE: This directive is effective immediately and will remain in effect until canceled or superseded.

History: Issued 2-28-2001 Revised 12-22-2009, 5-22-2013, 1-7-2014, 1-22-2014, 12-5-2014, 6-2-2015, and 12-17-2015

Appendix A – Sample letter

Date Field

Staffing Agency Employer
Attn: Manager's Name
Address

RE: Oregon OSHA Inspection No. #########

Dear Mr./Ms. Manager,

On [**enter date**], Oregon OSHA conducted an inspection at [**Name of Company**], located at [**address of inspection**]. This inspection was conducted as a result of a [**National Emphasis Program, Local Emphasis Program, accident, complaint, etc…, (enter description)**]. Oregon OSHA understands that your agency employs temporary workers who perform work for [**Name of Company**] at this jobsite.

While the extent of responsibility under the law for staffing agencies and host employers is dependent on the specific facts of each case, staffing agencies and host employers are *jointly responsible* for maintaining a safe work environment for temporary workers. Temporary staffing agencies and host employers share control over the worker, and Oregon OSHA may hold both host employer and the staffing agency responsible for violative conditions when appropriate.

Enclosed you will find copies of **[citations/hazard letters]** issued to **[Name of Company]**. We are forwarding you these copies to ensure that you are fully aware of the hazards at the jobsite. Please review these documents and ensure that appropriate steps are taken to protect your employees at that jobsite. Please note that Oregon Safe Employment Act, ORS 654.062(5), provides protection for employees against retaliation due to their involvement in protected safety and health related activity.

On April 29, 2003, OSHA launched the Temporary Worker Initiative (TWI) in order to help prevent work-related injuries and illnesses among temporary workers. See OSHA News Release 13-800-NAT, *OSHA launches initiative to protect temporary workers,* April 29, 2013.

A useful resource for information related to temporary workers, including recommended practices, can be found on our website www.orosha.org. See the A-Z topic list, Temporary Employee.

If you have any questions concerning this matter, please do not hesitate to contact this office. We appreciate your support and interest in the safety and health of your employees.

Sincerely,

DOSH DIRECTIVE
Department of Labor and Industries
Division of Occupational Safety and Health
Keeping Washington safe and working

1.15 Dual Employers & DOSH Enforcement

December 1, 2016

I. Purpose

This Directive establishes inspection and enforcement policies for assessing situations where two or more employers may share liability for safety or health violations that expose employees to workplace hazards.

II. Scope and Application

This Directive applies to all DOSH operations statewide and replaces all previous instructions on this issue, whether formal or informal. It supplements the guidance on "creating, correcting, and controlling" employers that is provided in the DOSH Compliance Manual. This updated DOSH Directive replaces WRD 1.15, issued July 7, 2006.

III. Background

Under the 1973 Washington Industrial Safety and Health Act, employers are responsible for the workplace safety and health of their employees. Employers may also have a responsibility for the safety and health of other employees as a creating, correcting, or controlling employer. In applying these responsibilities, the department must determine whether the employer of record (primary employer), or any other involved employer, did not reasonably meet their obligations under the statute.

Dual employer situations have increased over recent years with the growth of temporary services and employee leasing agencies, which provide employees to work at a site under the supervision and control of another employer. A dual employer situation exists when two or more employers may be cited for violating a safety or health standard that created a hazard to which employees were exposed.

In assessing such situations, CSHOs must consider the roles of the:

- Employer of record, who contracts with the employee to perform work in exchange for wages or a salary and issues the employee's pay check, secures workers' compensation insurance for the employee, and usually retains hiring and firing authority; and
- On-site employer (secondary or host employer) who controls the employee at the worksite.

Citations related to dual employer situations are distinct and different from citations issued to general and upper-tier contractors in construction under the ***Stute Decision***, which is the subject of separate guidance.

IV. Enforcement Policies

A. The primary employer:

1. Must ensure employees are covered by an effective and appropriately tailored written Accident Prevention Program (APP) and receive all required training and Personal Protective Equipment (PPE) in order to safely perform work for the secondary employer. However, the primary employer can fulfill their obligation for training and PPE by taking reasonable steps to ensure the secondary employer provides the employees with the required training and appropriate PPE for the work to be done.
2. Will generally not be cited for safety or health violations that expose their employees to a hazard at the secondary worksite, as long as the primary employer meets the requirements in Section IV-A.1 above, and does not exercise supervision and control over the employees' work activities at the secondary worksite.
3. May be cited for safety or health violations at the secondary worksite whenever they:
   (a) Did not take reasonable steps to ensure the requirements above were met.
   (b) Disregard information about uncontrolled hazards at the worksite.
   (c) Supervise or control their employees at the secondary worksite (for example, in situations where the primary employer provides a crew, complete with a supervisor, to perform particular activities, or where the primary employer provides specialized staff not subject to the direction of the secondary employer).

B. The secondary employer will be cited for safety or health violations at the worksite when responsible for supervising or controlling the primary employer's employees at the worksite.

C. There are situations where DOSH will issue citations to both the secondary and primary employers. For example, if neither the primary employer nor the secondary employer took steps to ensure the appropriate selection and use of respiratory protection to protect employees from inhalation hazards while engaged in assigned work duties.

D. Situations where neither employer would be cited for safety or health violations are truly unforeseeable situations, or situations involving unpreventable employee misconduct. Otherwise, at least one employer will be cited for any documented safety or health violation that exposed an employee to a hazard.

V. Special Consultation and Compliance Protocols

A. Determine whether a dual employer situation exists. When safety or health violations are documented and employee exposure may involve a dual employer situation, CSHOS are expected to find out and document if there is evidence that a secondary employer was supervising, or was supposed to be supervising, the employees' work.

1. If the answer is *no*, then there is no dual employer issue.
2. If the answer is *yes*, then CSHOs are expected to apply the guidance in the remainder of this directive.

B. Evaluate the nature of the dual-employer relationship. CSHOs are expected to evaluate the level of secondary employer involvement by documenting answers to the following questions:

1. Was the primary employer aware or should they have been aware of the hazardous condition(s) found at the secondary worksite?
   - If so, the primary employer shares responsibility for the violation because they did not take reasonable steps to protect their employees from the hazard in question.
2. Did the primary employer control or influence work at the worksite?
   - If so, the primary employer shares responsibility for the worksite conditions and any violations that result from them. The primary employer who exercises control at the worksite cannot be relieved of safety and health obligations by a contract that assigns the responsibility for those issues to the secondary employer.
3. Did the primary employer have authority by contract, custom, or practice to enter the secondary worksite to supervise the employees' work?
   - If so, the primary employer may have a greater responsibility to take steps to identify and correct violations on the worksite.
4. Did the violation arise because the secondary employer relied on the primary employer for guidance about workplace safety or health?
   - If so, the primary employer may be responsible for the violations. In such circumstances, the secondary employer may be relieved of responsibility by demonstrating the affirmative "creating employer" defense.
5. Did the primary employer take steps to correct or prevent employee exposure to the hazardous condition found at the secondary worksite?
   - If so, then the primary employer may have reasonably fulfilled their obligations.

C. Violations that appear to be shared between both employers. As a general principle, all employers who knew or should have known about the safety or health violation, and who had or who controlled employees that were exposed to the hazard, are responsible and should be cited.

1. Secondary employers are normally responsible for safety or health violations and should be cited for each hazard that employees were exposed to. It does not matter whether the employees were their own or another's, or if it is determined that the primary employer is also liable for the violation.
2. A primary employer cannot be cited for safety or health violations at another worksite if the department cannot document exposure of the primary employer's employees. This is true even if the primary employer did not ensure that the secondary employer would provide effective APP coverage, adequate training, and appropriate PPE.

   In such a case, the primary employer should be messaged about the responsibility to ensure APP coverage, training, and PPE.

3. If the primary employer's employees were exposed to a hazard at the secondary site, the decision whether to cite the primary employer for the safety or health violation will be based on the nature of the violation, the level of involvement the primary employer had with the secondary worksite, and the primary employer's knowledge of the hazard.

   a. If the analysis in Section V-B, above, suggests that there is no significant involvement of the primary employer at the secondary employer's worksite, safety or health violations should be cited as follows:

      (1) APP, Training and PPE Violations. The primary employer must generally be cited for any failure to comply with APP or any other safety and health standards requiring the provision of PPE or training. However, do not cite the primary employer if they were unaware of the violations **and** took 'reasonable action' to ensure that the secondary employer would provide APP coverage and all required training and PPE.

      - Reasonable action is demonstrated by steps that as a whole result in a reasonable degree of certainty that APP coverage, training, and PPE will be provided to the employee as required. Reasonable action may include the following examples:
        - Making explicit arrangements in writing with the secondary employer to provide all required APP coverage, PPE and appropriate training.
        - Establishing a system where employees are not allowed to begin work at a secondary worksite until the primary employer receives a copy of the secondary employer's APP and confirmation that all required training was completed, including a description of the type of training. If the primary employer documented an on-site inspection that included reviewing the secondary employer's APP, this is an acceptable substitute for a physical copy of the secondary employer's APP on file.
      - Establishing a system of periodically monitoring the secondary employer to ensure compliance with agreements about employee safety.
      - Communicating to employees about the types of training that must be received before beginning work at the secondary site, and instructing employees to contact the primary employer immediately if the secondary employer requests that work begin before the training is received, or if employees feel that the work is unsafe.

      (2) Other Violations. If the primary employer is cited for not providing or not taking reasonable steps to provide effective APP coverage, appropriate training, or PPE, the primary employer may also be cited for other types of safety or health violations identified at the secondary worksite. In such cases, CSHOs are expected to cite the primary employer if their employees were exposed to hazards that directly relate to the deficiencies for which the primary employer is liable.

   b. In addition to the situations described in Section V-C.3.a, the primary employer can be cited if they had knowledge or clearly should have had knowledge of the violation.

Do not cite the primary employer if all of the following conditions are present:

(1) The primary employer took reasonable steps to abate the hazard, including giving the secondary employer a reasonably short timeline to correct the hazard, and the correction timeline had not yet passed without further action when the hazard was identified by DOSH.

(2) The primary employer, due to lack of direct control over the worksite, was unable to bring about immediate hazard correction.

(3) The hazard was not an imminent danger situation. Imminent danger would require the primary employer to prohibit the employee from going to work at the secondary site until the imminent danger situation was corrected.

c. In addition to the situations described in Section V-C.3.a, and V-C.3.b, the primary employer may be cited if they were able to exercise control over the worksite, had authority to enter the site to supervise employees' work, or gave deficient advice or guidance related to employee safety or health issues.

VI. Who to Contact

CSHOs dealing with complex issues involving dual employers are encouraged to contact the Compliance Operations Manager for assistance. If DOSH staff have questions or need additional guidance or interpretive assistance, they are encouraged to contact DOSH Technical Services.

VII. Expiration Date

This Directive will expire on December 1, 2018, or earlier, if replaced by some other method of sufficient guidance.

Approved: _____

Anne F. Soiza, Assistant Director
Division of Occupational Safety and Health
Department of Labor and Industries

OSHA • NIOSH

Recommended Practices

Protecting Temporary Workers

The Occupational Safety and Health Administration (OSHA) and the National Institute for Occupational Safety and Health (NIOSH) are aware of numerous preventable deaths and disabling injuries of temporary workers. One example is the death of a 27-year-old employed through a staffing agency to work as an equipment cleaner at a food manufacturing plant. While cleaning a piece of machinery, he came into contact with rotating parts and was pulled into the machine, sustaining fatal injuries. The manufacturing plant's procedures for cleaning the equipment were unsafe, including steps in which cleaners worked near the machine while it was energized and parts were moving. Additionally, while the company's permanent maintenance employees were provided with training on procedures to ensure workers were not exposed to energized equipment during maintenance or cleaning, this training was not provided to cleaners employed through the staffing agency. Source: Massachusetts Fatality Assessment and Control Evaluation (FACE) Program, 11MA050.

Workers employed through staffing agencies are generally called *temporary* or *supplied* workers. For the purposes of these recommended practices, "temporary workers" are those supplied to a host employer and paid by a staffing agency, whether or not the job is actually temporary. Whether temporary or permanent, **all workers always have a right to a safe and healthy workplace**. The staffing agency and the staffing agency's client (the *host employer*) are joint employers of temporary workers and, therefore, both are responsible for providing and maintaining a safe work environment for those workers. The staffing agency and the host employer must work together to ensure that the *Occupational Safety and Health Act of 1970* (the OSH Act) requirements are fully met. See 29 U.S.C. § 651. The extent of the obligations of each employer will vary depending on workplace conditions and should therefore be described in the agreement or contract between the employers. Their safety and health responsibilities will sometimes overlap. Either the staffing agency or the host employer may be better suited to ensure compliance with a particular requirement, and may assume primary responsibility for it. The joint employment structure requires effective communication and a common understanding of the division of responsibilities for safety and health. Ideally, these will be set forth in a written contract.

OSHA and NIOSH recommend the following practices to staffing agencies and host employers so that they may better protect temporary workers through mutual cooperation and collaboration. *Unless otherwise legally required, these recommendations are for the purpose of guidance and in some cases represent best practices.*

- **Evaluate the Host Employer's Worksite.** Prior to accepting a new host employer as a client, or a new project from a current client host employer, the staffing agency and the host employer should jointly review all worksites to which the worker might foreseeably be sent, the task assignments and job hazard analyses in order to identify and eliminate potential safety and health hazards and identify necessary training and protections for each worker. The staffing agency should provide a document to the host employer that specifies each temporary worker's specific training and competencies related to the tasks to be performed.

  Staffing agencies need not become experts on specific workplace hazards, but should determine what conditions exist at the worksite, what hazards may be encountered, and how to best ensure protection for the temporary workers. Staffing agencies, particularly those without dedicated safety and health professionals on staff, should consider utilizing a third-party safety and health consultant. For example, staffing agencies may be able to utilize the safety and health consultation services provided by their workers' compensation insurance providers. These consultation services are often offered to policyholders at little to no charge. Employers (staffing agencies and host employers) should inquire with their insurance providers about these services. Small and medium-sized businesses may request assistance from OSHA's free on-site consultation service. On-site consultation services are separate from enforcement and do not result in penalties or citations.

  If information becomes available that shows an inadequacy in the host employer's job hazard analyses, such as injury and illness reports, safety and health complaints or OSHA enforcement history, the staffing agency should make efforts to discuss and resolve those issues with the host employer to ensure that existing hazards are properly assessed and abated to protect the workers. In assessing worksite hazards, host employers typically have the safety and health knowledge and control of worksite operations. However, the staffing agency may itself perform an inspection of the workplace, if feasible, to conduct their own hazard assessment or to ensure implementation of the host employer's safety and health obligations for temporary workers.

- **Train Agency Staff to Recognize Safety and Health Hazards.** Many staffing agencies do not have dedicated safety and health professionals and, even when they do, these experts cannot be everywhere at once. By teaching agency representatives about basic safety principles and the hazards commonly faced by its temporary workers, the agency will be better equipped to discover hazards and work with the host employer to eliminate or lessen identified workplace hazards before an injury or illness occurs.

- **Ensure the Employer Meets or Exceeds the Other Employer's Standards.** When feasible, the host employer and staffing agency should exchange and review each other's injury and illness prevention program. Host employers should also request and review the safety training and any certification records of the temporary workers who will be assigned to the job. Host employers in certain industries, for example, will only accept bids from and hire staffing agencies that the host has previously verified as meeting the host employer's safety standards. Similarly, some staffing agencies work only with clients that have robust safety programs.

- **Assign Occupational Safety and Health Responsibilities and Define the Scope of Work in the Contract.** The extent of the responsibilities the staffing agency and the host employer have will vary depending on the workplace conditions and should be described in their agreement. Either the staffing agency or the host employer may be better suited to ensure compliance with

a particular requirement, and may assume primary responsibility for it. When feasible, the agency-host contract should clearly state which employer is responsible for specific safety and health duties. The contract should clearly document the responsibilities to encourage proper implementation of all pertinent safety and health protections for workers. This division of responsibilities should be reviewed regularly.

The tasks that the temporary worker is expected to perform, and the safety and health responsibilities of each employer, should be stated in the agency-host contract and should be communicated to the worker before that worker begins work at the job site. For example, should the job tasks require personal protective equipment, the contract should state what equipment will be needed and which employer will supply it. The worker should be informed of these details before beginning the job. Clearly defining the scope of the temporary worker's tasks in the agency-host contract discourages the host employer from asking the worker to perform tasks that the worker is not qualified or trained to perform or which carry a higher risk of injury. Defining, clarifying, and communicating the employers' and worker's responsibilities protects the workers of both the staffing agency and of the host employer. The contract should specify who is responsible for all such communications with the temporary worker.

- **Injury and Illness Tracking.** Employer knowledge of workplace injuries and investigation of these injuries are vital to preventing future injuries from occurring. Information about injuries should flow between the host employer and staffing agency. If a temporary worker is injured and the host employer knows about it, the staffing agency should be informed promptly, so the staffing agency knows about the hazards facing its workers. Equally, if a staffing agency learns of an injury, it should inform the host employer promptly so that future injuries might be prevented, and the case is recorded appropriately. The parties should therefore also discuss a procedure to share injury and illness information between the employers, ideally specifying that procedure contractually.

  NOTE on Injury and Illness Recordkeeping Requirements: Both the host employer and staffing agency should track and where possible, investigate the cause of workplace injuries. However, for statistical purposes, OSHA requires that injury and illness records (often called OSHA Injury and Illness Logs) be kept by the employer who is providing day-to-day supervision, i.e., controlling the means and manner of the temporary employees' work (the host employer, generally). See 29 CFR 1904.31(b)(2). The agency-host contract should therefore identify the supervising employer and state that this employer is responsible for maintaining the temporary workers' injury and illness records. Employers cannot discharge or contract away responsibilities that pertain to them under law. Further, the contract should specify which employer will make the records available upon request of an employee or an employee representative.

  The supervising employer is required to set up a method for employees to report work-related injuries and illnesses promptly and must inform each employee how to report work-related injuries and illnesses. However, both the staffing agency and the host employer should inform the temporary employee on this process and how to report a work-related injury or illness. See 29 CFR 1904.35(b).

  No policies or programs should be in place that discourage the reporting of injuries, illnesses or hazards. The OSH Act prohibits employers from retaliating against a worker for reporting an injury or illness, including for filing a workers' compensation claim for a work-related condition.

- **Conduct Safety and Health Training and New Project Orientation.** OSHA standards require site- and task-specific safety and health training. The training must be in a language the workers understand. Training helps to protect the workers of both the staffing agency and the host employer.

  The training of temporary workers is a responsibility that is shared between the staffing agency and the host employer. Staffing agencies should provide general safety and health training applicable to different occupational settings, and host employers provide specific training tailored to the particular hazards at their workplaces. The host employer and the staffing agency should each provide — separately or jointly — safety and health orientations for all temporary workers on new projects or newly-placed on existing projects. The orientation should include information on general worker-protection rights and workplace safety and health. At least one of the joint employers, generally the host employer, must provide worksite-specific training and protective equipment to temporary workers, and identify and communicate worksite-specific hazards. The temporary workers' tasks, as defined by the agency-host contract, should also be clearly communicated to the workers and reviewed with the host employer's supervisor(s). **Host employers should provide temporary workers with safety training that is identical or equivalent to that provided to the host employers' own employees performing the same or similar work.** Host employers should inform staffing agencies when such site-specific training for temporary workers has been completed. Informing workers and supervisors of their respective responsibilities agreed upon by the joint employers protects the workers of both the staffing agency and the host employer.

  - **First Aid, Medical Treatment, and Emergencies.** Procedures should be in place for both reporting and obtaining treatment for on-the-job injuries and illnesses. Temporary employees should be provided with information on how to report an injury and obtain treatment on every job assignment. Host employers should train temporary employees on emergency procedures including exit routes.

- **Injury and Illness Prevention Program.** It is recommended that staffing agencies and host employers each have a safety and health program to reduce the number and severity of workplace injuries and illnesses and ensure that their temporary workers understand it and participate in it. The employers' safety programs should be communicated at the start of each new project, whenever new temporary workers are brought onto an existing project, or whenever new hazards are introduced into the workplace.

  NOTE: Employers are required to have hazard-specific programs when workers are exposed to certain hazards. Such programs include bloodborne pathogens, hearing conservation, hazard communication, respiratory protection, and control of hazardous energy (lock-out/tag-out).

  Contractors and employers who do construction work must comply with standards in 29 CFR 1926, Subpart C, General Safety and Health Provisions. These include the responsibilities for each contractor/employer to initiate and maintain accident prevention programs, provide for a competent person to conduct frequent and regular inspections, and instruct each employee to recognize and avoid unsafe conditions and know what regulations are applicable to the work environment.

- **Injury and Illness Prevention Program Assessments.** The employers should identify and track performance measures key to evaluating the program's effectiveness. For both staffing agencies and host employers, a quality program will stipulate how there will be ongoing assessments to evaluate the consistency, timeliness, quality and adequacy of the program. Leading indicators, such as training and number of hazards identified and corrected, should be included in the assessments. Generally speaking, these assessments should take place at least on an annual basis with a competent internal team or a combined internal and external team. The value of these assessments is the resulting prioritized recommendations for program improvement.
- **Incidents, Injury and Illness Investigation.** In addition to reporting responsibilities, employers should conduct thorough investigations of injuries and illnesses, including incidents of close-calls, in order to determine what the root causes were, what immediate corrective actions are necessary, and what opportunities exist to improve the injury and illness prevention programs. It is critical that both the staffing agency and host employer are engaged in partnership when conducting these investigations.

- **Maintain Contact with Workers.** The staffing agency should establish methods to maintain contact with temporary workers. This can be as simple as the agency representatives touching base with the workers throughout the temporary assignment, such as when the representatives are at the site to meet with the host employer or to drop off paychecks, or by phone or email. The staffing agency has the duty to inquire and, to the extent feasible, verify that the host has fulfilled its responsibilities for a safe workplace.

The staffing agency should have a written procedure for workers to report any hazards and instances when a worker's tasks are altered by the host employer from those previously agreed upon. The staffing agency and host employer should inform workers how to report hazards and/or changes to job tasks. For example, some staffing agencies have a hotline for their workers to call to report problems at the host employer's worksite. The staffing agency distributes this phone number during the orientation.

The staffing agency should follow up on a worker's safety and health concerns and any complaints with the host employer, as well as investigate any injuries, illnesses and incidents of close calls.

How Can OSHA Help?

OSHA has a great deal of information to assist employers in complying with their responsibilities under the law. Information on OSHA requirements and additional health and safety information is available on the OSHA website (www.osha.gov). Further information on protecting temporary workers is available at the OSHA Temporary Worker webpage (www.osha.gov/temp_workers).

Workers have a right to a safe workplace (www.osha.gov/workers.html#2). For other valuable worker protection information, such as Workers' Rights, Employer Responsibilities and other services OSHA offers, visit OSHA's Workers' page.

The OSH Act prohibits employers from retaliating against their employees for exercising their rights under the OSH Act. These rights include raising a workplace health and safety concern with the employer, reporting an injury or illness, filing an OSHA complaint, and participating in an inspection or talking to an inspector. If workers have been retaliated

against for exercising their rights, they must file a complaint with OSHA within 30 days of the alleged adverse action. For more information, please visit www.whistleblowers.gov.

OSHA can help answer questions or concerns from employers and workers. To reach your regional or area OSHA office, go to OSHA's Regional and Area Offices webpage (www.osha.gov/html/RAmap.html) or call 1-800-321-OSHA (6742). OSHA also provides help to small and medium-sized employers. OSHA's On-site Consultation Program offers free and confidential advice to small and medium-sized businesses in all states across the country, with priority given to high-hazard worksites. On-site consultation services are separate from enforcement activities and do not result in penalties or citations. To contact OSHA's free consultation program, or for additional compliance assistance, call OSHA at 1-800-321-OSHA (6742).

Workers may file a complaint to have OSHA inspect their workplace if they believe that their employer is not following OSHA standards or that there are serious hazards. Employees can file a complaint with OSHA by calling 1-800-321-OSHA (6742) or by printing the complaint form and mailing or faxing it to your local OSHA area office. Complaints that are signed by an employee are more likely to result in an inspection.

If you think your job is unsafe or you have questions, contact OSHA at 1-800-321-OSHA (6742). It's confidential. We can help.

How Can NIOSH Help?

The National Institute for Occupational Safety and Health (NIOSH) is the federal agency that conducts research and makes recommendations to prevent worker injury and illness. Recommendations for preventing worker injuries and illnesses across all industries and for a wide variety of hazards are available on the NIOSH website (www.cdc.gov/niosh). To receive documents or more information about occupational safety and health topics, please contact NIOSH at 1-800-CDC-INFO (1-800-232-4636), TTY 1-888-232-6348.

The NIOSH Fatality Assessment and Control Evaluation (FACE) program investigates selected work-related fatalities to identify high-risk work injury situations and to make recommendations for preventing future similar deaths. Investigations are conducted by NIOSH and state partners. For more information and links to reports of temporary worker deaths, please visit www.cdc.gov/niosh/face. The Michigan and Massachusetts FACE programs have developed 1-2 page Hazard Alerts on temporary worker deaths that are available on their websites (www.oem.msu.edu/userfiles/file/MiFACE/TemporaryWorkerHA17.pdf and www.mass.gov/eohhs/docs/dph/occupational-health/temp-workers.pdf).

The NIOSH Health Hazard Evaluation (HHE) Program provides advice and assistance regarding work-related health hazards. NIOSH may provide assistance and information by phone, in writing, or may visit the workplace. The HHE Program can be reached at www.cdc.gov/NIOSH/HHE or 513-841-4382.

Disclaimer: This document is not a standard or regulation, and it creates no new legal obligations. It contains recommendations as well as descriptions of mandatory safety and health standards. The recommendations are advisory in nature, informational in content, and are intended to assist employers in providing a safe and healthful workplace. The *Occupational Safety and Health Act* requires employers to comply with safety and health standards and regulations promulgated by OSHA or by a state with an OSHA-approved state plan. In addition, the Act's General Duty Clause, Section 5(a)(1), requires employers to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm.

U.S. Department of Labor

OSHA Occupational Safety and Health Administration

CDC Workplace Safety and Health NIOSH

DHHS (NIOSH) Publication Number 2014-139 OSHA - 3735-2014

TWI BULLETIN NO. 4

Temporary Worker Initiative

Safety and Health Training

This is part of a series of guidance documents developed under the Occupational Safety and Health Administration's (OSHA's) Temporary Worker Initiative (TWI). This Initiative focuses on compliance with safety and health requirements when **temporary workers** are employed under the joint employment of a **staffing agency** and a **host employer**.

Temporary workers are entitled to the same protections under the *Occupational Safety and Health Act of 1970* (the OSH Act) as all other covered workers. When a staffing agency supplies temporary workers to a business, typically, the staffing agency and the staffing agency's client, commonly referred to as the **host employer**, are joint employers of those workers. Both employers are responsible to some degree for determining the conditions of employment and complying with the law. In these joint employment situations, questions regarding how each employer can fulfill their duty to comply with the standard are common. This bulletin addresses what both the staffing agency and the host employer can do to provide safety and health training to temporary workers.

Many OSHA standards include specific safety and health training requirements to ensure that workers have the required skills and knowledge to safely perform their work. These requirements reflect OSHA's principle that training is an essential part of an effective safety and health management program for protecting workers from injuries and illnesses. Many fatal incidents have occurred where temporary workers were not provided the training necessary to do their job safely.

Training of Temporary Workers

The staffing agency and the host employer share the responsibility for training temporary workers. Training must be completed before the worker begins work on a project and the training must be in a language and vocabulary the worker understands. Depending on the industry, worksite, and job duties to which the temporary worker is assigned, certain OSHA standards which require both generic and specific training may be applicable. While both the host and the staffing agency are responsible to ensure that the employee is properly trained according to the applicable standard, the employers may decide that a division of the responsibility may be appropriate. As a recommended practice, the staffing agency and host employer should establish which party is responsible for each aspect of training, as well as inform the other employer when training is completed. The details of the training to be performed can be clearly stated in the language of the contract between the employers. However, neither employer may avoid their ultimate responsibilities under the OSH Act by requiring another party to perform them.

In most cases, the **host employer** is responsible for site-specific training and the **staffing agency** is responsible for generic safety and health training. It is the responsibility of both the staffing agency and the host employer to review applicable OSHA standards, know the specific training requirements, and determine and agree upon the generic safety training requirements that the staffing agency will provide to temporary workers and the site-specific training requirements that the host employer will provide. The training goal is to ensure that workers know how to do their work safely, can identify hazards, and understand control and protective measures.

Under OSHA's Recordkeeping Requirement both the staffing agency and the host employer are responsible for ensuring that the temporary employees are involved in the recordkeeping system by training temporary employees on the reporting process for all work-related injuries or illnesses and setting up a system for the temporary workers to report work-related injuries and illnesses promptly. See 29 CFR 1904.35(b). The employer that supervises employees on a day-to-day basis (usually the host employer) must record the work-related injuries and illnesses of the temporary workers. See 29 CFR 1904.31(b)(2). If the staffing agency is not the employer responsible for recording the work-related injuries or illnesses, the staffing agency should implement a mechanism for the temporary employees to report incidents to the staffing agency. Neither the host employer nor the staffing agency should have any policies or programs that discourage the reporting of injuries, illnesses, or hazards.

Host Employer Responsibilities

The host employer is usually responsible for site-specific training because it is often in the best position to provide such training. The host employer generally controls the details, means, methods and processes by which the work is to be accomplished. In addition, the host employer is most familiar with the hazards of the specific job tasks, machinery, equipment, and processes of its worksite and understands the training necessary to protect workers from those specific hazards.

Staffing Agency Responsibilities

The staffing agency is usually responsible for providing generic safety and health training so that its workers have a basic ability to identify hazardous situations, report hazards, injuries and illnesses, and understand their rights if confronted with a hazardous situation at a worksite. The staffing agency is responsible for ensuring that employees receive proper site-specific training. In order to fulfill this obligation, the staffing agency must have a reasonable basis for believing that the host employer's training adequately addresses the potential hazards to which employees will be exposed at the host employer's worksite. If the staffing agency has reason to believe the site-specific training is not adequate, it should inform the host employer and collaboratively determine and provide adequate training, provide the training itself, or remove its workers from the host employer's worksite. While the staffing agency may have a representative at the host employer's worksite, the presence of that representative does not transfer responsibilities for site-specific training to the staffing agency.

The staffing agency may agree to provide site-specific training if it is familiar with the hazards of the worksite. The staffing agency may choose to conduct a walkthrough of the worksite to identify tasks that temporary employees will perform and the hazards of those tasks. However, the employer originally responsible for the particular training (determined by supervision and control over the workers and hazards) must still ensure that the workers complete the training and that the training is adequate before work begins.

Example Scenarios*

The examples provided below are fictitious but describe what often happens when temporary workers are not adequately trained for their job assignments by the staffing agencies and host employers.

Construction Scenario

Remediation and Construction, LLC (RAC) is a company that remediates damaged commercial and residential structures. They need additional skilled roofers to complete a commercial remediation project in Alaska. RAC contracts with Temp Staffing to provide unskilled laborers on a temporary basis to complete the job on time because unskilled laborers are less expensive than skilled roofers. Temp Staffing did not determine the type of work these workers would be doing and just provided generic safety and health training for the workers before sending them to RAC's worksite.

At the RAC worksite, a RAC foreman assigned three of the temporary workers to work on the roof. For several days, the workers remove roofing material on top of a sheet metal roof of a fire-damaged building. The work location is approximately 13 feet above the ground.

RAC did not mention to Temp Staffing that the temporary workers would be used as roofers and did not mention that the workers would need fall protection training or any other jobsite-specific training. The temporary workers convey their concerns to the RAC foreman regarding the lack of fall protection and training while working on the fire-damaged roof. The foreman takes no action to provide fall protection or fall protection training.

Construction Analysis

RAC requested unskilled laborers instead of skilled roofers to complete the job. Therefore, RAC had no reason to believe the workers had received fall protection training. RAC was in the best position to provide the jobsite-specific training. Since RAC should have known from the start of the project that the workers did not have fall protection training, and the RAC foreman found out during the course of the project that the workers had not received fall protection training, RAC was responsible for identifying the need for fall protection training and providing the training under 29 CFR 1926.503 — Training requirements. RAC supervised and controlled the day-to-day work of the temporary workers at its worksite. For this failure to provide appropriate site-specific training, RAC may be subject to an OSHA citation.

In most cases, the temporary agency is responsible for generic safety and health training. Although Temp Staffing provided such generic training, it also had a responsibility to determine what its workers would be doing and the hazards to which they would be exposed in order to ensure that site-specific training was provided and completed. Temp Staffing failed to fulfill this responsibility when it made no effort to determine what kind of work the workers would be performing or if RAC had provided the necessary training. For failure to ensure that appropriate site-specific training was provided, Temp Staffing may also be subject to an OSHA citation related to fall protection training requirements.

**The company names in this scenario are fictitious. Any resemblance to real companies is entirely coincidental.*

General Industry Scenario

A metal equipment manufacturer, Iron Alloys Co. (IAC), needs machine operators for a short-term increase in production. The company contracts with a staffing agency, Temp Staffing, to provide workers. Temp Staffing hires ten temporary workers as power press operators and sends them to work on site at IAC. The staffing agency also hires a person to act as the temporary workers' team leader who will communicate the host employer's orders and any provided site-specific training. Before sending the workers to the IAC worksite, the staffing agency plays a generic safety training video on machine guarding for them.

At the worksite, a supervisor from IAC assigns each of the temporary workers to a particular work area and machine. On the assumption that the workers have experience working with mechanical power presses, no site-specific instruction is provided. The host employer then sends the workers directly to their assigned tasks, checking on their work throughout the shift.

IAC's workplace has numerous pieces of running machinery. Although compliance with safety and health requirements is mentioned in Temp Staffing's contract with IAC, machine guarding is not addressed. IAC does not mention to either Temp Staffing or the temporary workers that many of IAC's machines are mechanical power presses that require guards. A day after the temporary workers begin working at IAC, the Temp Staffing team leader informs his supervisor at Temp Staffing that a temporary worker removed a guard from the power press he was working on to clear a jam, and that supervisors from IAC saw the worker operating the machine without the guard in place. Temp Staffing took no action.

General Industry Analysis

Although Temp Staffing played a generic safety training video on machine guarding, the training may not have been effective. Temp Staffing should have verified that its employees understood the elements included in the training. Temp Staffing may be subject to an OSHA citation for failing to ensure that its employees understood the generic training on machine guarding and working safely with machinery.

IAC was responsible for identifying the need for machine guarding and providing the needed training and other required site-specific work rules. IAC supervises and controls the day-to-day work of the temporary employees at its facility. Therefore, IAC is in the best position to provide the task-specific training. The training should have included instructions on how to operate the mechanical power presses safely, pursuant to 29 CFR 1910.217(f)(2). The responsibility of providing the training does not shift to Temp Staffing just because it included a team leader as part of the temporary work group. For this failure to provide appropriate site-specific training, IAC may be subject to an OSHA citation.

Temp Staffing also had a responsibility to ensure that the site-specific training was provided and completed. The staffing agency had reason to believe that IAC failed to fulfill this responsibility when it discovered that a temporary worker had operated a power press without a guard in place. Examples of measures Temp Staffing could have taken include reminding IAC of its obligations and following up to ensure that training was provided, removing the workers from the project, or providing the training itself in coordination with IAC. For this failure to ensure that appropriate site-specific training was provided, Temp Staffing may also be subject to an OSHA citation.

State Plans

Twenty-eight states and U.S. territories have their own OSHA-approved occupational safety and health programs called State Plans. State Plans have and enforce their own occupational safety and health standards that are required to be at least as effective as OSHA's, but may have different or additional requirements. A list of the State Plans and more information are available at: www.osha.gov/dcsp/osp.

How Can OSHA Help?

Workers have a right to a safe workplace. If you think your job is unsafe or you have questions, contact OSHA at 1-800-321-OSHA (6742) or visit OSHA's main web page at www.osha.gov. It's confidential. We can help.

For other valuable worker protection information, such as Workers' Rights, Employer Responsibilities and other services OSHA offers, visit OSHA's Workers' page at www.osha.gov/workers.

For more information on Temporary Workers visit OSHA's Temporary Workers' page at www.osha.gov/temp_workers.

Training requirements vary between industries and safety and health hazard exposures. Information on these requirements is available on the OSHA training website www.osha.gov/dte/library/materials_library.html and in OSHA's publication *Training Requirements in OSHA Standards*, www.osha.gov/Publications/osha2254.pdf.

The OSH Act prohibits employers from retaliating against their employees for exercising their rights under the OSH Act. These rights include raising a workplace health and safety concern with the employer, reporting an injury or illness, filing an OSHA complaint, and participating in an inspection or talking to an inspector. If workers have been retaliated or discriminated against for exercising their rights, they must file a complaint with OSHA within 30 days of the alleged adverse action to preserve their rights under section 11(c) of the OSH Act. For more information, please visit www.whistleblowers.gov.

OSHA also provides help to employers. OSHA's On-site Consultation Program offers free and confidential occupational safety and health services to small and medium-sized businesses in all states and several territories across the country, with priority given to high-hazard worksites. On-site Consultation services are separate from enforcement and do not result in penalties or citations. Consultants from state agencies or universities work with employers to identify workplace hazards, provide advice on compliance with OSHA standards, and assist in establishing and improving safety and health management systems. To locate the OSHA On-site Consultation Program nearest you, call 1-800-321-6742 (OSHA) or visit www.osha.gov/consultation.

Disclaimer: This bulletin is not a standard or regulation, and it creates no new legal obligations. It contains recommendations as well as descriptions of mandatory safety and health standards. The recommendations are advisory in nature, informational in content, and are intended to assist employers in providing a safe and healthful workplace. The *Occupational Safety and Health Act* requires employers to comply with safety and health standards and regulations promulgated by OSHA or by a state with an OSHA-approved state plan. In addition, the OSH Act's General Duty Clause, Section 5(a)(1), requires employers to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm.

For more information

OSHA® Occupational Safety and Health Administration

www.osha.gov (800) 321-OSHA (6742)

U.S. Department of Labor

OSHA 3859-04 2016

TWI BULLETIN NO. 1

OSHA® Temporary Worker Initiative

Injury and Illness Recordkeeping Requirements

This is the first in a series of guidance documents issued under the Occupational Safety and Health Administration's (OSHA's) Temporary Worker Initiative (TWI). This Initiative focuses on compliance with safety and health requirements when **temporary workers** are employed under the joint (or dual) employment of a **staffing agency** and a **host employer**.

When a staffing agency supplies temporary workers to a business, typically, the staffing agency and the staffing firm client (also known as the **host employer**) are joint employers of those workers. Both employers are responsible to some degree for determining the conditions of employment and for complying with the law. In this joint employment structure, questions regarding which employer is responsible for particular safety and health protections are common. This bulletin addresses how to identify who is responsible for recording work-related injuries and illnesses of temporary workers on the OSHA 300 log.

Injuries and illnesses should be recorded on only one employer's injury and illness log (29 CFR 1904.31(b)(4)). In most cases, the **host employer** is the one responsible for recording the injuries and illnesses of temporary workers.

Injury and illness recordkeeping responsibility is determined by supervision. Employers must record the injuries and illnesses of temporary workers if they supervise such workers on a day-to-day basis (29 CFR 1904.31(a)). Day-to-day supervision occurs when "in addition to specifying the output, product or result to be accomplished by the person's work, the employer supervises the details, means, methods and processes by which the work is to be accomplished." See OSHA FAQ 31-1 at www.osha.gov/recordkeeping. (Essentially, an employer is performing day-to-day supervision when that employer controls conditions presenting potential hazards and directs the worker's activities around, and exposure to, those hazards.) In most cases, the host employer provides this supervision.

While the **staffing agency** may have a representative at the host employer's worksite, the presence of that representative does not necessarily transfer recordkeeping responsibilities to the staffing agency. As long as the host employer maintains day-to-day supervision over the worker, the host employer is responsible for recording injuries and illnesses.

The non-supervising employer (generally the staffing agency) still shares responsibility for its workers' safety and health. The staffing agency, therefore, should maintain frequent communication with its workers and the host employer to ensure that any injuries and illnesses are properly reported and recorded. Such communication also alerts the staffing agency to existing workplace hazards and to any protective measures that need to be provided to its workers. Ongoing communication is also needed after an injury or illness so the recording employer can know the outcome of the case.

The staffing agency and host employer must set up a way for employees to report work-related injuries and illnesses promptly and tell each employee how to report work-related injuries and illnesses. In addition, employees, former employees, their personal representatives, and their authorized employee representatives have the right to access the injury and illness records (29 CFR 1904.35).

In order to provide safe working conditions, information about injuries and illnesses should flow between the host employer and staffing agency. If a temporary worker sustains an injury or illness and the host employer knows about it, the staffing agency should be informed, so the staffing agency knows about the hazards facing their workers. Equally, if a staffing agency learns of an injury or illness, they should inform the host employer so that future injuries might be prevented, and the case is recorded. As a best practice, the staffing agency and host employer should establish notification procedures to ensure that when a worker informs one employer of an injury or illness, the other employer is apprised as well. The details of how this communication is to take place should be clearly established in contract language.

Please note that OSHA law prohibits retaliation against a worker for reporting an injury or illness. Further information on OSHA's recordkeeping requirements is available on the OSHA Recordkeeping website (www.osha.gov/recordkeeping). Further information on protecting temporary workers is available at the OSHA Temporary Worker website (www.osha.gov/temp_workers).

Twenty-five states and two territories operate occupational safety and health programs approved by OSHA. States enforce at least as effective standards that may have different or additional requirements. A list of State Plans is available at www.osha.gov/dcsp/osp.

EXAMPLE SCENARIO

A manufacturer of metal cans, Metal Can Co., needs machine operators for a short-term increase in production. Metal Can Co. contracts with Industrial Staffing, a staffing agency, to provide machine operators to work shifts on a temporary basis. Industrial Staffing hires ten operators with minimal knowledge of English and sends them to work onsite at Metal Can Co. The staffing agency also hires a person to act as the temporary workers' team lead who will translate the employers' orders and any provided training, and perform administrative duties such as time and attendance tracking. At the worksite, a supervisor from Metal Can Co. assigns each of the temporary workers to a particular machine. The supervisor also controls and checks on the employees' work throughout their shift. On their second day, one of the temporary workers suffers a finger amputation injury from an inadequately guarded machine press. Who is responsible for recording this injury?

Analysis:

For recordkeeping purposes, **Metal Can Co. must record the injury** on its injury and illness log. The key fact in this scenario is that Metal Can Co. supervises and controls the day-to-day work of the temporary employees at its facility. The team leader provided by the staffing agency is not empowered to modify or override the host employer's directions and therefore is not considered a supervisor under OSHA's recordkeeping regulation. While Metal Can Co. should inform the staffing agency of the injury, the staffing agency should not record it on its own log because the injury should only be recorded on one set of injury and illness logs. Should Metal Can Co. refuse or ignore its duty to record, the company may be subject to an OSHA citation.

HOW CAN OSHA HELP?

Workers have a right to a safe workplace. If you think your job is unsafe or you have questions, contact OSHA at 1-800-321-OSHA (6742). We can help. It's confidential. For other valuable worker protection information, such as workers' rights, employer responsibilities and other services OSHA offers, visit OSHA's Workers' page (www.osha.gov/workers.html).

The OSH Act prohibits employers from retaliating against their employees for exercising their rights under the OSH Act. These rights include reporting an injury or illness, filing an OSHA complaint, participating in an inspection or talking to an inspector, seeking access to employer exposure and injury records, and raising a safety or health complaint with the employer. If workers have been retaliated against for exercising their rights, they must file a complaint with OSHA within 30 calendar days from the date the retaliatory decision has been both made and communicated to the worker.

OSHA also provides help to employers. OSHA's On-site Consultation Program (www.osha.gov/consultation) offers free and confidential advice to small and medium-sized businesses in all states across the country, with priority given to high-hazard worksites. For more information or for additional compliance assistance, contact OSHA at 1-800-321-OSHA (6742), or visit our website at www.osha.gov.

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For more information

OSHA® Occupational Safety and Health Administration

www.osha.gov (800) 321-OSHA (6742)

U.S. Department of Labor

OSHA 3748-03 2014

TWI BULLETIN NO. 2

Temporary Worker Initiative

Personal Protective Equipment

This is part of a series of guidance documents developed under the Occupational Safety and Health Administration's (OSHA's) Temporary Worker Initiative (TWI). This Initiative focuses on compliance with safety and health requirements when **temporary workers** are employed under the joint employment of a **staffing agency** and a **host employer**.

Temporary workers are entitled to the same protections under the *Occupational Safety and Health Act of 1970* (the OSH Act) as all other covered workers. When a staffing agency supplies temporary workers to a business, typically, the staffing agency and the staffing agency's client (also known as the **host employer**) are joint employers of those workers. Both employers are responsible to some degree for determining the conditions of employment and for complying with the law. In this joint employment structure, questions regarding which employer is responsible for particular safety and health protections are common. This bulletin addresses how to identify who is responsible for providing **personal protective equipment (PPE)** pursuant to the PPE Hazard Assessment conducted for task(s) the workers will be performing, as well as training necessary for temporary workers. PPE may include items such as gloves; safety glasses and shoes; earplugs or muffs; hard hats; respirators; or coveralls, vests, and full body suits.

OSHA requires the use of PPE to minimize worker exposure to hazards when engineering, administrative controls, and work practices are not feasible or effective in reducing exposures to acceptable levels. Employers must conduct a hazard assessment to determine if PPE should be used to protect their workers and what type of PPE is appropriate, including any necessary respiratory protection. 29 CFR 1910.132. Employers must also provide training to workers who are required to use PPE and they must ensure that defective or damaged equipment is not used. In some instances, such as when respiratory protection is used, medical evaluations may be required. See 29 CFR 1910.134 for specific requirements for respiratory protection.

Employers must provide and ensure the proper use and maintenance of PPE when it is required by OSHA standards or by the employer. Proper maintenance includes cleaning and decontaminating PPE, and sanitizing shared PPE. As joint employers of temporary workers, both the host employer and the staffing agency are responsible for ensuring that adequate PPE and associated training is provided. The **host employer** will usually have the primary responsibility for selecting, providing and ensuring the use of adequate PPE for the process(es) or operation(s) to which workers have been assigned because:

- The host employer is most familiar with the workplace hazards that the temporary workers will encounter.
- The host employer generally controls the workplace hazards and the worker's activities around, and interaction with, those hazards.
- The host employer is usually best situated to perform the hazard assessment required for determining if PPE is necessary and will likely have already done so for its permanent staff. 29 CFR 1910.132(d).

The **staffing agency** shares responsibility for its workers' safety and must take reasonable steps to ensure that the host employer conducts the appropriate hazard assessment and provides adequate PPE. To this end, the staffing agency should become familiar with the hazards at the host employer's worksite and maintain communication with its workers and the host employer. Such pre-planning and ongoing communication also alerts the staffing agency to persistent or newly-created workplace hazards that may need to be addressed.

Employers must provide training to each worker who is required to use PPE. The training must teach, at minimum, when PPE is necessary; what

EXAMPLE SCENARIO

A metal equipment manufacturer, Metal Works Co. (MWC), needs lathe operators for a short-term increase in production. The company contracts with Industrial Staffing to provide workers to work shifts on a temporary basis. Industrial Staffing hires ten workers and sends them to work at MWC.

When a lathe is operated, metal splinters can fly off and hit the worker. There is no mention of PPE in MWC's contract with Industrial Staffing and no safety glasses are provided to the workers. A week later, a temporary worker mentions to an Industrial Staffing representative that safety glasses have not been provided. When Industrial Staffing discusses this with MWC, MWC refuses to supply the glasses.

Analysis:

Because an eye injury hazard exists, adequate PPE must be provided to both the permanent and temporary lathe workers by their employer(s). Because MWC controls the lathe, supervises and controls the day-to-day work of the temporary employees, and is, overall, best situated to control the hazard, MWC is also best positioned to select, provide, and maintain adequate PPE for those operating and working in the vicinity of the lathes and therefore may be subject to OSHA citations. Industrial Staffing, in turn, should be familiar with MWC's operation and the specific work that the temporary workers are doing. The staffing agency must take reasonable steps to ensure that MWC is providing adequate PPE and can do so by communicating with MWC and the temporary workers. Thus, as should happen, here the staffing agency discovered MWC's lapse in safety protection reasonably quickly and, upon discovery, immediately addressed the issue with MWC. If MWC continues to refuse to provide the PPE, Industrial Staffing has the choice of supplying the PPE itself or withdrawing its workers from the site. If Industrial Staffing does neither, it may also be subject to OSHA citations.

If MWC did not want to be the provider of PPE, it could have initially negotiated with Industrial Staffing for the staffing agency to provide the safety glasses (and any other necessary PPE) so long as MWC ensured that the PPE provided by Industrial Staffing was adequate for the worksite's hazards. MWC should understand, however, that in this scenario, with its knowledge and control over the hazards and workers as outlined above, the host itself holds primary responsibility for providing the PPE because it is in a better position to do so.

Should OSHA discover that the workers are using the lathe without eye protection, both employers may be subject to OSHA citations. Because MWC itself has primary responsibility for providing the PPE, by neither providing PPE nor having the staffing agency supply the PPE, MWC would be subject to OSHA citations. By failing to a) establish that MWC would provide PPE, and b) diligently act to maintain communication with MWC and the workers to ensure that PPE was actually being provided, Industrial Staffing could also be subject to OSHA citations.

PPE is necessary; how to properly don, doff, adjust, and wear the PPE; the limitations of the PPE; and the proper care, maintenance, useful life, and disposal of the PPE. See 29 CFR 1910.132(f) and other applicable standards. As above, both the host employer and the staffing agency are responsible for ensuring the provision of PPE training. For the same reasons, the host employer is often best situated to provide the PPE, as well as to provide the training.

Neither the host nor the staffing agency can require workers to provide or pay for their own PPE.[1] Employers cannot avoid their obligations under the standard by requiring their workers to purchase PPE as a condition of employment or placement, nor can employers deduct the cost of PPE from the workers' wages.

The staffing agency and the host employer may agree to have the staffing agency supply some or all of the PPE and provide PPE training as long as the host employer ensures that the PPE is appropriate for the worker's assigned tasks, and that it is provided at no cost to the worker. Such an agreement should be made during the pre-planning meeting(s) and detailed in writing. However, neither employer may escape liability for its ultimate responsibilities under the OSH Act by requiring another party to perform those responsibilities. Both employers may still be liable if adequate PPE and training is ultimately not provided to the workers, regardless of which employer agreed to provide the PPE and training.

PPE requirements vary between industries and according to applicable OSHA standards. Information on these requirements is available on OSHA's Personal Protective Equipment (PPE) page (www.osha.gov/SLTC/personalprotectiveequipment). Further information on protecting temporary workers is available at the OSHA Protecting Temporary Workers website (www.osha.gov/temp_workers).

Twenty-seven states and U.S. territories have their own OSHA-approved occupational safety and health programs. These state plans have and enforce their own occupational safety and health standards that must be at least as effective as OSHA's, but may have different or additional requirements. A list of the state plans and more information is available at: www.osha.gov/dcsp/osp.

HOW CAN OSHA HELP?

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The OSH Act prohibits employers from retaliating against their employees for exercising their rights under the OSH Act. These rights include raising a workplace health and safety concern with the employer, reporting an injury or illness, filing an OSHA complaint, and participating in an inspection or talking to an inspector. If workers have been retaliated or discriminated against for exercising their rights, they must file a complaint with OSHA within 30 days of the alleged adverse action to preserve their rights under section 11(c). For more information, please visit www.whistleblowers.gov.

OSHA also provides help to employers. OSHA's On-site Consultation Program (www.osha.gov/consultation) offers free and confidential advice to small and medium-sized businesses in all states across the country, with priority given to high-hazard worksites. For more information or for additional compliance assistance, contact OSHA at 1-800-321-OSHA (6742), or visit our website at www.osha.gov.

1. There are very specific exceptions to this rule. To see the list of PPE and the circumstances under which the employer is not required to provide it, see 29 CFR 1910.132(h) and 29 CFR 1926.95(d).

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For more information

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U.S. Department of Labor

OSHA 3780-03 2015

TWI BULLETIN NO. 6

Temporary Worker Initiative

Bloodborne Pathogens

This is part of a series of guidance documents developed under the Occupational Safety and Health Administration's (OSHA's) Temporary Worker Initiative (TWI). This Initiative focuses on compliance with safety and health requirements when **temporary workers** are employed under the joint employment of a **staffing agency** and a **host employer**.

Temporary workers are entitled to the same protections under the *Occupational Safety and Health Act of 1970* (the OSH Act) as all other covered workers. When a staffing agency supplies temporary workers to a business, typically, the staffing agency and the staffing agency's client (commonly referred to as the **host employer**) are considered joint employers of those workers. Both employers are responsible for determining the conditions of employment and complying with the law. In these joint employment situations, questions regarding how each employer can fulfill their duty to comply with OSHA standards are common. This bulletin addresses what both the staffing agency and the host employer can do to ensure that temporary workers are protected from exposure to bloodborne pathogens in accordance with OSHA standard 29 CFR 1910.1030 — *Bloodborne Pathogens* (the standard).

Bloodborne pathogens are microorganisms in human blood and other bodily fluids that can cause infectious diseases in humans. These pathogens include, but are not limited to, the hepatitis B virus (HBV), hepatitis C virus (HCV), and human immunodeficiency virus (HIV). All occupational exposure to blood or other potentially infectious materials[1] (OPIM), including needlesticks and other sharps-related injuries, places workers at risk for infection from bloodborne pathogens. Temporary workers may be at risk for exposure to bloodborne pathogens in many professions including, but not limited to, nursing and other healthcare work, housekeeping in some industries, and emergency response.

Workers with reasonably anticipated occupational exposure[2] to bloodborne pathogens must be afforded protections in accordance with the standard, 29 CFR 1910.1030(c)(1), under the employer's written exposure control plan including but not limited to the following:

1. The standard at 29 CFR 1910.1030(b) defines "blood" to mean human blood, human blood components, and products made from human blood. Other potentially infectious materials (OPIM) means: (1) The following human body fluids: semen, vaginal secretions, cerebrospinal fluid, synovial fluid, pleural fluid, pericardial fluid, peritoneal fluid, amniotic fluid, saliva in dental procedures, any body fluid that is visibly contaminated with blood, and all body fluids in situations where it is difficult or impossible to differentiate between body fluids; (2) Any unfixed tissue or organ (other than intact skin) from a human (living or dead); and (3) HIV-containing cell or tissue cultures, organ cultures, and HIV- or HBV-containing culture medium or other solutions; and blood, organs, or other tissues from experimental animals infected with HIV or HBV.

2. Occupational exposure means reasonably anticipated skin, eye, mucous membrane, or parenteral (outside the intestines) contact with blood or other potentially infectious materials that may result from the performance of an employee's duties.

- Exposure determination;
- Universal precautions, engineering and work practice controls, personal protective equipment, and housekeeping;
- Procedures for HIV and HBV research laboratories and production facilities if applicable;
- Hepatitis B vaccination and post-exposure follow-up;
- Procedures for evaluating circumstances surrounding an exposure incident;
- Communication of hazards including information and training; and
- Recordkeeping, including a sharps injury log if applicable.

As joint employers, both the host and the staffing agency are responsible for ensuring that the temporary employee is properly protected against bloodborne pathogens. However, the employers may decide that a division of the compliance responsibility may be appropriate. In doing so, the staffing agency and host employer should jointly review the task assignments and job hazards to include temporary workers in an exposure control plan. The details of the protections to be provided can be clearly established in the contract language between the employers. While the employers may agree to divide responsibilities, neither employer may avoid its ultimate responsibilities under the OSH Act by shifting responsibilities to the other employer.

Host Employer Responsibilities

Generally, the host employer has the primary responsibility for developing and implementing a written exposure control plan at the worksite because the host employer creates and controls the work processes at the facility and is most familiar with tasks having the potential for occupational exposure to bloodborne pathogens. The host employer is also typically responsible for providing site-specific bloodborne pathogens training and personal protective equipment, which should be equivalent to that given to the host's own employees in the same job classifications. The host employer also has the primary responsibility for controlling hazardous conditions at its worksite, including ensuring that engineering and work practice controls, such as sharp injury protections, are in place.

In addition, the employer who has day-to-day supervision over the temporary workers, typically the host employer, is required to maintain a log of occupational injuries and illnesses under 29 CFR 1904[3] and to record injuries and illnesses of temporary workers on that log. The Bloodborne Pathogens standard requires that this employer must also maintain a sharps injury log for the recording of percutaneous (through the skin) injuries from contaminated sharps and to record such injuries occurring to temporary workers on that log.

The host employer must communicate and coordinate with the staffing agency to ensure compliance with the standard's provisions, particularly regarding post-exposure evaluation and follow-up. It is also the host employer's obligation to take reasonable measures to ensure that the staffing agency has complied with its responsibilities for hepatitis B vaccination, post-exposure evaluation and follow-up, medical and training records retention, and generic training.

Staffing Agency Responsibilities

The staffing agency whose employees have reasonably anticipated occupational exposure to blood or OPIM is responsible for providing generic bloodborne pathogen information and training, ensuring that the temporary workers are provided with the required vaccinations and follow-up, providing proper post-exposure evaluation and follow-up after an exposure incident, and retaining applicable medical and training records in accordance with 1910.1030(h). The staffing agency is also responsible for (1) violations occurring at the workplace about which the staffing agency actually knew and where the staffing agency failed to take reasonable steps to have the host employer correct the violation and (2) pervasive serious violations occurring at the workplace about which the staffing agency could have known with the exercise of reasonable diligence. See OSHA Directive, CPL 02-02-069, *Enforcement Procedures for the Occupational Exposure to Bloodborne Pathogens*, paragraph XI.B, Personnel Services.

3. www.osha.gov/temp_workers/OSHA_TWI_Bulletin.pdf

Example Scenario*

An urban out-patient surgical center, Eastern SC, Inc. (ESC) needs housekeeping workers to clean (e.g., change linens, empty trash) and resupply surgical suites and recovery rooms during an exceptionally busy period of the year. The company contracts with a personnel service, HKMed Staffing, which employs medical care staff and service employees. These employees are assigned to work at hospitals and other healthcare facilities to perform housekeeping duties. Compliance with safety and health requirements is mentioned in HKMed's contract with ESC, including coverage for the temporary workers under both ESC's and HKMed's bloodborne pathogens exposure control plans. The contract states that HKMed will provide temporary workers who have hepatitis B vaccinations and basic bloodborne pathogens training and that ESC will provide site-specific bloodborne pathogens training, work practice and engineering controls, and personal protective equipment to those temporary workers.

HKMed assigns five temporary workers to ESC. Before sending the workers to the ESC worksite, the staffing agency plays a generic bloodborne pathogens training video for them that includes general information on hazards associated with blood and OPIM, information on the hepatitis B vaccinations, and what to do should an exposure incident occur. A question and answer period is also included in the training. In addition, HKMed ensures that each worker is offered or has had the hepatitis B vaccination series.

At the worksite, the ESC human resources representative assigns the temporary workers to the surgical and recovery areas to clean the rooms, including changing linen and restocking. The workers are provided with limited site-specific training. They are not provided with an explanation of ESC's exposure control plan, but are shown where to access housekeeping and general medical supplies, where to access regulated waste containers for waste containing visible blood, and where the sharps containers are located for the disposal of used needles. They are instructed not to handle any sharps containers and to notify one of the nurses if a sharps container is full. Utility gloves and appropriate disinfecting and cleaning supplies are made available to the workers in the supply area.

A temporary worker mentions to the ESC human resources representative that oftentimes the sharps containers are full and that used sharps are sometimes found on top of the container and around patient areas. The ESC human resources representative tells the worker that the center is understaffed and she will look into it. The worker also notifies his HKMed supervisor of this situation. HKMed tells the worker to be careful. A week after the notification, one of the temporary workers experiences a needlestick while placing a used needle found in dirty bed linens into an overflowing sharps container. ESC immediately recorded the incident on the needlestick injury log and notified HKMed. HKMed sent the worker for post-exposure evaluation and follow-up.

Analysis

Eastern SC and HKMed have a joint responsibility to ensure that the temporary workers are protected from occupational exposure to blood and OPIM. Since ESC controls the worksite, it is responsible for controlling occupational exposure to blood and OPIM by considering and using safer medical devices, ensuring sharps are properly disposed, and ensuring that used sharps containers are properly maintained. ESC also must provide site-specific bloodborne pathogens training, which in this scenario was inadequate. ESC may be subject to OSHA citations under the methods of compliance, housekeeping, and information and training sections of the

standard. HKMed also has a responsibility to take reasonable steps to ensure the protection of its workers, particularly after being notified about problems with the disposal of sharps. HKMed should have contacted ESC to discuss its concerns and remedy the situation. Thus, HKMed may also be subject to OSHA citations under the housekeeping section of the standard.

Both employers took some appropriate actions with respect to the needlestick injury. Prior to starting the work, HKMed ensured that the workers were vaccinated for hepatitis B and provided generic bloodborne pathogens training. Also, HKMed ensured that the injured worker was immediately provided post-exposure evaluation and follow-up. In addition, ESC appropriately recorded the incident on the needlestick injury log.

**The company names used in this scenario are fictitious. Any resemblance to real companies is entirely coincidental.*

State Plans

Twenty-eight states and U.S. territories have their own OSHA-approved occupational safety and health programs called State Plans. State Plans have and enforce their own occupational safety and health standards that are required to be at least as effective as OSHA's, but may have different or additional requirements. A list of the State Plans and more information is available at www.osha.gov/dcsp/osp.

How Can OSHA Help?

Workers have a right to a safe workplace. If you think your job is unsafe or you have questions, contact OSHA at 1-800-321-OSHA (6742). It's confidential. We can help. For other valuable worker protection information, such as Workers' Rights, Employer Responsibilities and other services OSHA offers, visit OSHA's Workers' page at www.osha.gov/workers.

For information on Temporary Workers visit OSHA's Temporary Workers' page at www.osha.gov/temp_workers.

The OSH Act prohibits employers from retaliating against their employees for exercising their rights under the OSH Act. These rights include raising a workplace health and safety concern with the employer, reporting an injury or illness, filing an OSHA complaint, and participating in an inspection or talking to an inspector. If workers have been retaliated or discriminated against for exercising their rights, they must file a complaint with OSHA within 30 days of the alleged adverse action to preserve their rights under section 11(c). For more information, please visit www.whistleblowers.gov.

OSHA also provides help to employers. OSHA's On-site Consultation Program offers free and confidential occupational safety and health services to small and medium-sized businesses in all states and several territories, with priority given to high-hazard worksites. On-site Consultation services are separate from enforcement and do not result in penalties or citations. Consultants from state agencies or universities work with employers to identify workplace hazards, provide advice on compliance with OSHA standards, and assist in establishing and improving safety and health management systems. To locate the OSHA On-site Consultation Program nearest you, call 1-800-321-6742 (OSHA) or visit www.osha.gov/consultation.

Disclaimer: This bulletin is not a standard or regulation, and it creates no new legal obligations. It contains recommendations as well as descriptions of mandatory safety and health standards. The recommendations are advisory in nature, informational in content, and are intended to assist employers in providing a safe and healthful workplace. The *Occupational Safety and Health Act* requires employers to comply with safety and health standards and regulations promulgated by OSHA or by a state with an OSHA-approved state plan. In addition, the OSH Act's General Duty Clause, Section 5(a)(1), requires employers to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm.

For more information

OSHA® Occupational Safety and Health Administration

www.osha.gov (800) 321-OSHA (6742)

U.S. Department of Labor

OSHA 3888-09 2016

Exercise: *Review the following scenario and work with your group to answer the questions below:*

XYZ Widget Sales is a retail shop that sells high end widgets to elite clientele. XYZ Widget Sales rents space in a building owned by City Properties, LLC, that has been listed as a historical landmark.

During a period of high temperatures in August, the air conditioner stops working, and XYZ Widget Sales elite clientele are not pleased. The XYZ Widget Sales Manager reports the outage to City Properties. City Properties hires Top Notch HVAC Services to make repairs.

Since many of their service technicians are on vacation in August, Top Notch HVAC Services has worked with A Plus Temporary Staffing to provide additional technicians. A Plus Temporary Staffing assigns Technician Terry to report to Top Notch HVAC Services. Top Notch HVAC Services then dispatches Technician Terry to City Properties to repair XYZ Widget Sales' air conditioner.

After inspecting XYZ's system, Technician Terry determines that a repair needs to be made to the air handling unit on the roof of the City Properties building. Due to the height and slope of the roof, fall protection is required. However, because the building is a historical landmark (and cannot be modified), there is no acceptable tie off point. Terry realizes that without the ability to tie off the work is unsafe, and makes a wise decision to contact his or her employer to report the fall safety hazard.

However, there are several types of employers in this situation.

1. Which employer is the "host" employer?

2. Which employer is the "creating" employer?

3. Which employer is the "exposing" employer?

4. Which employer is the "controlling" employer?

5. Which employer should Terry report the hazard to?

6. Which employer has the responsibility for finding a solution to the fall hazard?

7. If Technician Terry suffers a recordable injury, which employer must record the injury on their OSHA 300 log?