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Upholding OSHA's Multi-Employer Citation Policy

Law360, New York (July 24, 2009) -- Essentially, since the Occupational Safety and Health Administration's inception, it has had in place a "multi-employer" citation or worksite policy. This policy is published in its Field Inspection Reference Manual ("FIRM"), or more recently, the Field Operations Manual ("FOM").

OSHA's position is that on multi-employer worksites, regardless of the industry sector, more than one employer may be cited for any hazardous condition that violates an OSHA standard. The rule has not been well-received by general contractors or other employers with responsibility for overall safety at a site.

In its FOM, OSHA directs its compliance officers to follow a two-step procedure when determining whether to cite a particular employer:

Step 1 is to determine whether the employer is a creating, exposing, correcting, or controlling employer.

An "exposing" employer is one whose own employees are exposed to the hazard; a "creating" employer is one who creates a hazard to which a different employer's employees are exposed; a "correcting" employer is one who has been brought in specifically to correct hazards; and a "controlling" employer is one with general supervisory authority over the worksite with the power to have safety and health violations corrected.

If an employer falls into one of these categories then Step 2 is to determine if the employer's actions were sufficient to meet its obligations under the OSHA standards.

According to OSHA, an employer's responsibility for compliance will vary depending on its "category." For example, 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. OSHA Directive No. CPL 2-0.124, Dec. 10, 1999.

The creating employer and the controlling employer concepts allow OSHA to issue citations to employers for violations that do not directly affect the employer's own employees.

Recently, the Eighth Circuit Court of appeals upheld OSHA's multi-employer policy when deciding *Solis v. Summit Contractors Inc.*, (8th Cir., No. 07-2191). The specific issue was whether OSHA's multi-employer citation policy is precluded by the language of 29 C.F.R. § 1910.12(a) which provides:

The standards prescribed in part 1926 of this chapter are adopted as occupational safety and health standards ... and shall apply, ... to every employment and place of employment of every employee engaged in construction work.

Each employer shall protect the employment and places of employment of each of his employees engaged in construction work by complying with the appropriate standards prescribed in this paragraph.

Summit Contractors was the general contractor on a construction project. Because Summit had subcontracted the entire project, it had only four employees at the site, all supervisory.

The exterior brick masonry work was contracted out and on two or three separate occasions, Summit's project superintendent observed the brick masons working on scaffolds without personal fall protection or guardrails.

The Summit superintendent advised the workers to correct the hazard. However, an OSHA compliance officer observed the employees working on the scaffolds without guardrails or personal fall protection. The compliance officer cited both employers under OSHA's scaffolding standard — the masons' employer as an exposing employer and Summit as a controlling employer.

Summit contested the citation arguing that § 1910.12(a) places a duty on employers to protect only their own employees, not those of a subcontractor. The administrative law judge was not persuaded and upheld the citation. The judge determined that the plain language of § 1910.12(a) does not prohibit application of an employer's safety responsibility to the employees of other employers.

The Occupational Safety and Health Review Commission reversed and determined that § 1910.12(a) requires each employer to protect only its own employees thereby precluding the application of OSHA's Multi-Employer Citation Policy. The Secretary of Labor filed a petition for review.

The Eighth Circuit (2-1) reversed and found that the plain language of § 1910.12(a) does not preclude the issuance of controlling employer citations: "Even if the regulation were ambiguous, we would defer to the Secretary's reasonable interpretation."

The court expressly refused to consider policy arguments, referring the parties to Congress and/or the Secretary of Labor. The dissent found no ambiguity in § 1910.12(a) and determined that the regulation does not support controlling employer citations.

OSHA will very likely continue to cite general contractors for safety violations at any construction site where the contractor has employees. However, no industry is exempt. Particularly vulnerable are employers that are charged with the responsibility for overall safety at a multi-employer worksite.

Any “controlling employer” would be wise to diligently ensure that subcontractors have in place appropriate safety programs, a well-trained work force and disciplinary policies for employees who fail to comply with occupational safety and health standards as is required under section 5(b) of the act.

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