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New Risks Without Rewards: More OSHA Liability for General Contractors

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Over the last two years, OSHA has begun to take a more expansive view of contractor liability for workplace safety. As a result, general contractors should be more cautious than ever in ensuring the compliance of their worksites with government regulatory standards.

***Solis v. Summit Contractors, Inc.*: A Cautionary Tale**
Summit Contractors was the general contractor for the construction of a college dormitory in Little Rock, Arkansas. Summit subcontracted the entire project and only had four employees at the construction site: a project superintendent and three assistant superintendents. One of Summit's subcontractors, All Phase Construction, was contracted to perform the exterior masonry work on the building.

On a few separate occasions, Summit's project superintendent observed All Phase employees working on scaffolds with no guard rails. The workers also were not using personal fall protectors. Although Summit's project superintendent notified All Phase of these issues, All Phase employees continued their work in the same dangerous manner. Summit did not order them off the project.

During the course of construction, an OSHA Compliance Safety and Health Officer observed All Phase employees working on scaffolds over ten feet above the ground without fall protection or guardrails. No Summit employees were exposed to the hazards created by this dangerous worksite condition, but OSHA issued Summit a citation for this violation based on OSHA's controlling employer citation policy.

The Revival of Broad "Controlling Employer" Liability
In 2007, the Occupational Safety and Health Review Commission (OSHRC) prescribed a limited interpretation of the multi-employer worksite doctrine in *Secretary of Labor v. Summit Contractors, Inc*. ("*Summit I*"). Under the OSHRC's order in *Summit I*, the limited interpretation of the doctrine provided that, even when multiple employers were involved at a single worksite, the construction employer exercising general supervisory authority over the worksite (the "controlling employer") could not be issued a citation under OSHA when that employer neither created nor exposed its own employees to a condition in violation of OSHA. On appeal in 2009, the United States Court of Appeals for the Eighth Circuit disagreed with the OSHRC's order in *Summit I. Solis v. Summit Contractors, Inc*.

The Eighth Circuit remanded the case to the OSHRC to be reheard under what they determined was the proper interpretation of the multi-employer worksite doctrine. The Eighth Circuit held that the plain language of OSHA § 1910.12(a) did not preclude the Secretary of Labor's broad interpretation of who could be a "controlling employer." Under the controlling employer citation policy, the Secretary of Labor has now interpreted this provision to permit the citation of contractors that endanger their own employees as well as the citation of contractors that endanger other's employees working at worksites on which the employer employs its own employees. This interpretation applies even if the general contractor's employees are not exposed to the dangerous condition. Further, the new interpretation by the Eighth Circuit allows OSHA to issue safety citations to general contractors even when the general contractor is not responsible for the violation and none of its own employees contributed to the unsafe condition.

In *Secretary of Labor v. Summit Contractors, Inc.*, ("*Summit II*"), the OSHRC applied the Eighth Circuit's interpretation of the controlling employer citation policy and held that contractors may be liable under OSHA for any unsafe condition at any worksite over which the contractor has control if the contractor has at least one employee on site. This broad interpretation of the controlling employer policy is now OSHA's enforcement policy nationally.

The Aftermath and Potential for Liability

The Eighth Circuit's opinion in *Summit I* and the OSHRC's order in *Summit II* create both legal uncertainty and practical difficulty for construction employers. Legal uncertainty exists because construction employers cannot predict how federal courts outside the jurisdiction of the Eighth Circuit will receive the OSHRC's affirmation of *Summit I*. It might seem logical that federal courts will follow the lead of the OSHRC on the enforcement of OSHA policy, but the Eighth Circuit's opinion in *Summit I* disagreeing with an OSHRC order serves as a reminder that predicting the disposition of federal courts, even in cases with apparently obvious outcomes, is never a sure proposition.

The legal uncertainty creates practical difficulties for construction employers that must make difficult decisions: incur the additional costs required to ensure compliance or hope that the federal court of appeals in their jurisdiction will interpret OSHA's controlling employer citation policy differently than the Eighth Circuit. For some, incurring the costs of compliance will be an easy choice; for construction employers on tight budgets hoping for a more favorable interpretation, the risk may at first seem worth it. But the choice to forego the additional expenses required to ensure compliance will not only expose construction employers to potential liability under the controlling employer citation policy; it could also lead to other employer and third-party liability. Certainly, the significance of these risks should not be overlooked.

Mitigating Risks and Preventing Liability

The increased breadth of the multi-employer worksite doctrine and the increased exposure to liability that results both lead unavoidably to increased costs of compliance. But, while one clear option for construction employers is to spend more on supervision, training, and other precautions, another option is to seek creative legal solutions by structuring contracts to account for this new level of exposure.

Through their agreements with subcontractors, general contractors may attempt to address the broader range of risks created by the current interpretation of the multi-employer worksite doctrine.

Specifically tailored indemnity clauses that address the scenario in which a general contractor is cited for noncompliance created by a subcontractor's employees or by a subcontractor's worksite would likely be a popular option. Clauses requiring subcontractors to monitor worksites, supervise employees and report on compliance issues would be another option. However, enforcing such obligations may be a difficult and perhaps costly task for general contractors.

One potential compromise would be to identify this new level of exposure to liability and to agree to utilize joint efforts to police for compliance and to assume joint risk for noncompliance. Such an option might be attractive to both parties, especially in the scenario in which a subcontractor hires several subcontractors itself and, as a result, becomes exposed to liability under the multi-employer worksite doctrine. These sorts of complex arrangements are not uncommon, so an agreement to share the burden of compliance could be a straightforward solution. Still, no arrangement is perfect. Ultimately, this new interpretation of the multiemployer worksite doctrine creates complex problems that will require contractors to make difficult decisions and to tailor unique legal solutions.

Conclusion

This development in the law of occupational safety has exposed construction employers to broad liability for

unsafe conditions at a worksite under OSHA. Now, no matter how the hazard was created or whose employees were endangered, a construction employer with supervisory authority at a worksite can be cited under OSHA for any dangerous condition at the worksite so long as at least one of its employees is present at the worksite. This significantly increased potential for liability should motivate construction employers that are involved in multi-employer projects to act with even more prudence and vigilance in monitoring worksite safety and addressing unsafe conditions.