

## **Multi-Employer Jobsites: The Need to Effectively Pre-Qualify Contractors**

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### **A. Introduction**

Almost every safety professional has heard about OSHA's multi-employer worksite policy and knows something about the levels of employers identified within it. Despite this, many of us may not understand the liability that is presented by this regulation and often fail to protect our clients with some basic programs that if implemented, help to both provide some degree of protection and also ensure that our workplaces are as safe as they need to be. For those who have been involved in a worksite accident, you already know of the disruption and problems that are created. Much like the example of the iceberg that is used to illustrate that some things are not as obvious as others, a worksite accident can bring many things to the surface that otherwise are not seen. Beside the obvious direct issues associated with the accident, having to deal with the employee and the injury, workers compensation issues, and the direct cost of handling those things; the indirect cost of an accident at the worksite can be far greater. And that is equally or even more true when the employee who is injured at your site is not your own. For now, in addition to the things that are normally involved, the complex morass of legal technicalities and liability begin to surface. Such is the nature and intent of the multi-employer worksite policy and its application to the workplace.

One doesn't need to be an attorney to understand some basic legal concepts when it comes to the liability concerns brought forth by the multi-employer worksite rules. As someone who has been qualified as an expert witness, the concepts are part of many lawsuits and make the need to implement a program of qualifying those who work at your site or who you hire to perform work on your behalf. While we would never intentionally allow our own employees to break safety rules or act in an unsafe manner, without knowing more about those we hire, we run not only the risk that an accident will occur, but also the risk of being sued for not protecting that employee from hazards created or present at your site.

Before any further discussion of liability and accident prevention programs can occur, it is important that we take time to review the four groups of employers that are designated by OSHA and who work at the multi-employer worksites. It is also important that we understand how these groups of workers interact and what is the real intent of breaking employers into these groups. As the name infers, multi-employer worksites are those that involve more than one employer at the site. Keep in mind that a multi-employer worksite does not mean that they all have to be at the same worksite at the same time. In some cases, a hazard could be created by one group of

employees who then leave the site. That hazard could be present to the next group of employees who work at the site even though the group who created it is no longer on the site. It is the concept of worker protection that overrides the designations as we will see.

It is easy to see why OSHA would devise such a system of classifying employers into these different groups. Given the high level of sophistication of some types of work, it is very common to see numbers of different employee groups at any single worksite. This does not have to be a large construction project, because even operations involving facility maintenance or upgrading systems at your site may require the use of multiple employee groups from a range of employers. While each of these groups of employees is highly trained in their craft, they are also trained in the associated hazards. However, when those employees are working at a site where they create a hazard that is something they are taught to control, they may accidentally or intentionally expose other employees from other crafts or trades to that hazard. These employees may become exposed to a hazard that they did not recognize, were not trained to handle, and were not protected from. It is this overlap of workers and their hazards that lead to the creation of the employer groups.

OSHA provides us with some definitions and identifies employers working at multi-employer worksites in the following manner:

A **multi-employer worksite** is one “at which two or more entities are performing tasks that contribute to the completion of a common project. The entities may or may not be related contractually. The contractual relationship may or may not be in writing. On multi-employer worksites, both in construction and industry, more than one employer may be citable for the same condition.”

In effect, more than one group of employers may be responsible and failure to live up to that degree of responsibility may show that the employer was negligent as we will discuss later.

The **exposing employer** is an employer, “whose own employees are exposed to the hazard.” This would be most employers at the site since their employees may be exposed to a hazard that another employer’s employee created.

The **creating employer** is the employer who actually created the hazard at the worksite. This could be your own employees who are familiar with the hazards and regularly work around them. Or, if you are the one who hires many contractors to come to the site, it could be that another contractor created a hazard that others were exposed to.

The **correcting employer** is the employer who is responsible for correcting a hazard that has been recognized. In some cases, the employees who create the hazard are the ones responsible to correct the hazard before other employees become exposed. But if they do not, that responsibility may fall onto the employer who is overall responsible for the conditions at the site. That could be the host employer or the General Contractor.

The **Controlling Employer or Manager** is the employer or manager who by contractual right or a combination of other rights has the authority to manage the exposing, creating or correcting employer. In many cases this is the group who has the greatest liability and becomes the target of the lawsuits from injured employees from a contracting firm. This is because OSHA

believes that this group should exercise control over the worksite to help ensure that all of the various employees are protected from the hazards created by the project itself. To protect ourselves, we must exercise appropriate levels of care and responsibility including taking a close look at those other groups of employees who we invite to our sites or with whom we work.

## **B. Setting the bar – Negligence**

One only needs a basic understanding of legal concepts to see the issues created when one group of employees creates a hazard that ultimately leads to the injury or death of another employee. The affected employee group may not have been aware or prepared to handle the condition that was created. And yet, each group of employees has a duty or standard that they must follow if they are to be compliant with their responsibilities to help protect others from conditions that they create. Looking at the overlap among the employer groups above we can see that there is a system whereby someone oversees the overall conditions at the jobsite and has the overall responsibility to control the actions of those. This is often the General Contractor (GC) in major construction activities and the host employer at other sites. It is the GC or host employer that most often has the largest burden to help ensure the safety of those at the site. To fail to provide the required standard of care may be all that is necessary for a lawsuit to be filed. This concept is known as negligence.

Wikipedia defines negligence as “a type of conduct that is culpable because it misses the legal standard required of a reasonable person in protecting individuals against foreseeably risky, harmful acts of other members of society. Negligent behavior towards others gives them rights to be compensated for the harm to their body, property, mental well-being, financial status, or relationships. Negligence is used in comparison to acts or omissions which are intentional or willful.”

Simply put, everyone is required to perform at a certain level or standard. To fail in performing up to that standard is negligence. When you are negligent, you may have some liability and exposure depending on a number of factors such as whether or not some degree of harm or damage resulted. In effect, the premise of *no harm – no foul* comes into play. If you were injured at your job, and your employer paid their workers compensation insurance, they are not generally liable for additional damages since they have taken care of you. Therefore, with limited exceptions, your employer is not going to be subject to a lawsuit from their own employees since they are covered by the insurance: *no harm – no foul*.

But what if that accident occurs as a result of someone else’s negligence? What if the employee is injured at a site where another employer is working and an employee of that employer created the condition that led to the injury? Could a third party lawsuit from the employee be filed towards the other employer? The answer is, “Yes,” and the ability to file these types of suits is now compounded because of two things. First, the multi-employer jobsite classifications impose a duty on each of the levels of employer at the site. Some of these levels have a higher duty than others to provide for the safety and health of other employees at the site. Add to this the fact that there have been some court decisions that now make the proof of negligence as simple as showing that an employer failed to comply with an OSHA regulation. Previously this was not allowed in court, however that is changing.

## **C. Getting over the bar: Protection from negligence**

Now that we know something about our liability, we can now move onto a discussion of how to limit your liability when it comes to hiring outside workers. As a host employer you will incur more liability than you might think and total elimination of that is not possible. But a proper risk management program will involve a proper Contractor Pre-Qualification Program to help identify the issues and protect yourself along the way. While no one program is perfect, there are some basic concepts that need to be addressed if we are going to protect ourselves from the unnecessary liability that could occur.

Perhaps the first step in setting up a program to reduce or control your risk is to identify what about other employees from other employers creates additional hazards or problems. When it comes to this we likely would all be able to come up with a list of common issues with contractors who come to our site. Some of these may include the following:

1. The contract firm may not have all of the required safety systems and programs required by OSHA. Failing to have these may result in a higher potential for one of their employees to get injured at your site.
2. The contract firm may only pay lip service to the issues of safety. They may have a track record of violations and other problems with OSHA or other regulatory agencies.
3. The contract firm may have a history of accidents due to their employees not being trained or not knowing the rules. If they have a high incident rate, they could increase your liability while they work at your site.
4. The contract firm may not be familiar enough with the requirements to do their work at your site. Your site may have hazards that are different than those they normally encounter and they might not know which additional requirements (OSHA and others) might be required while at your site.
5. The contract personnel may not have the necessary certifications or competencies that are required to safely conduct their work at your site. They may lack the training required to safely conduct the work.
6. The contract personnel that are sent to your site may not be aware of the site-specific hazards and rules that are needed to ensure their safety while working at your site.
7. The contract personnel may be unsupervised while at your site. Providing the necessary job supervision may be a key element of an effective safety system.

Protecting yourself and your firm from the additional liability created through the use of contractors is simply developing a program that addresses each of these concerns and others that you might have. As you review the various contractors that you are considering for a project, it is important to keep in mind that the programs that the contractor firms have may not be as good as you like. Their safety training programs or written programs may not be as good as yours, but at

least we need to make a reasonable effort to find out what they do have and whether we can risk the exposure. In effect, it is important to evaluate them and determine if they meet the requirements outlined in the applicable OSHA (and other) regulations that apply to your site or to your project. Based on a review of these issues it is easy to come up with a model program such as the one that follows. While implementation of this is no guarantee that your exposure will go to zero, it will however help to control and reduce it and help ensure a more safe and compliant workplace with less liability from third party lawsuits.

### 1. Required safety programs

One of the first steps in qualifying contract firms to work at your site or on your project is to ensure that they have the required written safety programs. It is easy to make a list of the ones that are required for all employers in a particular field. Consider the following as a partial list of major written programs that could be required.

- Written safety program or Injury and Illness Prevention Plan – General Duty
- Written Hazard Communication Program - 29 CFR 1910.1200
- Written Emergency Action Plan – 29 CFR 1910.38
- Code of Safe Work Practices – 29 CFR 1926
- Written Industrial Truck Program – 29 CFR 1910.178
- Written Respiratory Protection Program – 29 CFR 1910.134
- Written Confined Space Entry Program – 29 CFR 1910.146

So in your initial assessment of the contractors that you are considering, ask them whether they have these programs and if they would be available for your inspection if required. While some safety professionals may ask for these to be provided, we do not recommend that since you don't have time to conduct the formal review that is needed. And if you have them and don't read them, you may expose yourself to liability in that you did not check them out. A reasonable approach seems to be to ensure that they have them and get them only if needed.

### 2. Safety Track Record

While it is true with safety performance as it is with stocks and other financial investments, past performance is not a perfect indicator for future performance in any field. However we fool ourselves if we don't at least ask about their history. Ask for the latest OSHA 300A logs and confirm that they don't have a history of regulatory citations. If the firm that you are considering for your project is already on OSHA's radar due to a pattern of non-compliance or recent citations, you may want to avoid having them at your site.

### 3. Insurance and workers compensation programs.

One of the easiest ways to ensure that firms have acceptable safety performance is to confirm how they measure up against others in their industry. This can be done through an assessment of their experience in paying out claims. The workers compensation experience modification rate or X-mod can show you whether their history has been one higher than the industry norms. Check this out and set a standard number that is acceptable to you. Any value less than 1 in this system

indicates that the firm is doing better than many others. Numbers higher than 1 indicate that the firm is paying out more than others and may need to be avoided.

#### 4. Project-specific requirements

One of the most troubling issues of contracting for outside firms to assist is that we often do not tell them the conditions that they will be expected to work in. Take for example hiring a firm to come to your site and install a new piping system. The employer who contracts for the job should be given information on the job-specific requirements that you know about and which they may not be aware of. If they will need to wear a respirator, if they will be working at heights, if they will be required to wear chemically resistive PPE, if they will need to comply with site Lock Out programs, and other facts need to be conveyed to them before they even bid on the job. A project specific checklist such as the one in the Appendix will help give them the required information to help them do their job in a safe and compliant manner. If you don't tell them of the issues, they may not come equipped with the right equipment or the properly trained personnel.

#### 5. Training and professional competencies.

As part of the project-specific discussions, it is critical that you outline the required training programs that are necessary for your project. Through the project-specific checklist, you can ask the contractor for their certification that their employees have been trained and do possess the necessary skills, knowledge, and abilities to do the job safely. If you review the sample checklist in the Appendix, you can see that we ask that the employer to sign a statement attesting to the facts that their employees do meet the OSHA training and other requirements. While you cannot be responsible to conduct the training, a reasonable requirement would be for the contractor to tell you that his employees have received the training required to do the job. Remember that it is OSHA's intent that the employer certify their own employees so it may not be a good idea to attempt to train others. Remember that this is a step of simply setting the bar for them. Keep in mind that you can also request to audit their training programs to ensure they meet minimum standards. But don't be surprised if their training is not as good as yours.

#### 6. Site-specific orientation for individual employees.

Once those employees reach your site, you have an obligation to ensure that they know of the site-specific hazards and procedures. While this is not training or certification, site familiarization and orientation is part of the process of qualifying those employees to work at your site. Your program should include orientation to the site hazards and meet the Hazard Communication requirements, review of site-specific work rules such as Lock Out procedures, and of the site emergency procedures. While this is often accomplished through the use of a video or computer presentation, this process is best done with personal intervention by someone familiar with the site and its procedures. Don't simply go through the motions and put them in front of a computer or video. That shows that your safety programs are less important than they are. Also, interact with the contractor to ensure that they are not introducing hazards to your site through the materials they are bringing to do their job. Remember, you are the controlling employer in this case and need to ensure that you don't expose other employees (including your own) to those hazards.

#### 7. Accountability and oversight

A final step in an effective contractor safety program involves monitoring and measuring safety performance. As part of your program you should take time to review the activities of the firms involved to ensure their compliance with your site rules. At the end of the project, debrief the firm and ensure that everything was in order. Many of us are not aware that such a debrief is required by some OSHA regulations including entry into a permit required confined space. If you are not doing this, you may be missing information that could improve your program and help ensure compliance while reducing your liability.

## **D. Conclusion and Summary**

Awareness of a hazard is generally not enough to protect us from that hazard. That is true whether the hazard is one we create or one that is created by others working at our site. To help provide protection, we need to ask the questions that are listed above. This can be done in a simple process that involves four easy steps. These include:

1. Each firm that is being considered for use at your site or on your project should submit a packet that is reviewed by safety, engineering, and maintenance staff at the site. Safety statistics, OSHA logs, insurance classifications, regulatory citations, and a range of other factors are used to qualify the firms and should be part of the information provided and reviewed. From this review of the safety performance for the firm, that firm is placed onto a list of qualified firms that can be used for specific projects.
2. Once qualified, the engineer or project manager determines the scope of a project and is required to send the firm a project-specific checklist where they are advised of the specific OSHA and site requirements for the project. With that information they can more correctly bid on the project since they will know some of the requirements that will be in place. The documents require them to confirm that their staff is qualified in areas such as Hot Work, Confined Space, Fall Protection, Industrial Truck, Crane, and a host of other topics. At this stage it may also be appropriate to provide them with your general overall written programs for contractors working at your site such as your site Contractor Safety Manual if available.
3. Once the individual crews arrive on the site, they should be given the site orientation program. Depending on the scope of your project, this program may need to be adjusted to include the specific requirements and rules for the site activities that are expected to occur. Additionally, personnel working in life critical jobs (permits required) should receive additional orientation on the permit systems that will be used during the project and of their need to comply with site rules. Additionally, personnel should be interviewed to ensure that their jobs will not create hazards that other employee groups may be exposed to.
4. During the project, someone should be responsible to conduct field audits and complete a safety overview checklist based on the safety performance that is observed. This documents that was or was not compliant during the project. Based on the results of that and other audits, the firm may be invited to resubmit their packet for use the following year.

## Project Safety Requirements – California Projects

The project that you are working on is expected to involve a variety of activities that may require your staff to obtain additional training and certification. Please confirm that your safety programs include the following elements for the items that are selected. If necessary, site Safety staff may ask to see copies of these materials or to audit your programs as requested.

- 1. **Respiratory Protection Program.** Our firm has a Respiratory Protection Program that meets or exceeds the requirements of Title 8 of the California Code of Regulations (CCR), Section 5144 or Title 29 of the Code of Federal Regulations (CFR), Part 1910.134. This program includes a written Respiratory Protection Plan, annual training of involved personnel, medical monitoring of personnel, annual fit testing for the type of mask that is expected to be worn, and an inspection/maintenance program for respiratory protection equipment.
- 2. **Permit Required Confined Space Program.** Our firm has a Permit Required Confined Space entry program that meets or exceeds the requirements of Title 8, Section 5157 or 29 CFR, Part 1910.146. This program includes a written Permit Required Confined Space Plan and training of affected staff as required.
- 3. **Lock Out/Tag Out – Control of Hazardous Energy.** Our firm has a Lock Out/Tag Out program that meets or exceeds the requirements of Title 8, Section 3114 or 29 CFR, Part 1910.147. The required elements of this program include training of affected and involved personnel, written procedures, and the issuance of individual locks and tags.
- 4. **Hot Work Program.** Our firm has a Hot Work program that ensures compliance with 8 CCR 6777, Hot Work Permits, or, 29 CFR 1910.119(k). Compliance with these programs will include training of the hazards, use of fire extinguishers and annual certification, and the use of a Hot Work Permitting system.
- 5. **Fall Protection/Elevated Work.** Our firm has an Elevated Work Program that complies with the various aspects of Title 8 CCR and Title 29 CFR, inclusive of 8 CCR, Article 24 and 29. Compliance with these programs would include training, written procedures, and equipment inspection and maintenance.
- 6. **Line Entry Programs.** Our firm has a Line Entry Program meeting or exceeding the requirements brought forth within the Federal and/or the State of California Process Safety Management regulations. Compliance with this program includes off-site and on-site training.
- 7. **Excavation.** Our firm has an excavation program meeting or exceeding the minimum requirements found in Federal Title 29, Part 1926, Subpart P. Additionally, our company is able to present or secure a permit from the State of California's Division of Industrial Relation meeting the requirements found in Title 8, section 341.
- 8. **Crane Safety** Our firm has a Crane safety program meeting or exceeding the requirements found in California's Title 8, Group 13 of the General Safety Orders, or, the Federal Title 29, part 1910, Subpart N.



- 9. **First Aid** Our firm has a First Aid program which adheres to one or more of the following regulations, whichever is warranted: 8 CCR 3400, 8 CCR 1512 or Federal Title 29, Subpart K.
  
- 10. **Hearing Protection** Our firm has an appropriate Hearing Protection and/or Hearing Conservation Program meeting or exceeding the requirements of 29 CFR 1910.95, 8 CCR 5095 or 8 CCR 1521. At minimum, our employees receive appropriate hearing protection equipment and training.
  
- 11. **Powered Industrial Truck** Our firm has a Powered Vehicle safety program meeting or exceeding the requirements of Title 8, section 3668 and Title 29 CFR, part 1910.178. Compliance with this program requires training and certification.
  
- 12. **Personal Protective Equipment (PPE)** Our firm has qualified personnel and written guidelines for selecting the appropriate PPE: steel toed safety shoes (ANSI Z41-1991), Hard hats (ANSI Z89.1-1969), eye protection (ANSI Z87.1 -1989) and chemical-resistive boots, gloves, and suits that has been tested according to current revision of ASTM F 739 and is suitable for used in the following environment(s) and situations: (Samples given)
  - a.  Strong Acidic/Alkaline/Corrosive
  - b.  Odorous/Ammonia/Hydrogen Sulfide
  - c.  Oxygen Depleted
  - d.  Elevated Temperature/Thermal
  - e.  Electrical Hot Work
  - f.  SO2/SO3
  - g.  Oxidizing
  
- 13. **Other Special Issues:** \_\_\_\_\_

By signing this document I certify to the site that the personnel that will be assigned to the project will meet the requirement as noted above and that all training and programs are in place. I agree to allow the inspection and/or auditing of those programs by site personnel at a mutually agreed upon time and manner.

Signature	Name – Print	Date
Title	Firm/Organization	