

# Reviewing & Reexamining OSHA's Multi-Employer Citation Policy

By Dennis Burks

**M**any construction and nonconstruction employers may be placing their companies at risk of receiving an OSHA citation by not being aware of OSHA's Multi-Employer Citation Policy. Understanding the policy can help limit a company's exposures to the OSHA citation process. As an adjunct instructor at one of the OSHA Training Institute Education Centers, the author has found that many company safety representatives and operations personnel are unaware of this policy.

This article reviews and reexamines the policy so that construction and nonconstruction employers can further understand how it applies to their firm's safety program and its value to their clients.

The primary benefit of implementing an effective occupational safety program is preventing on-the-job injuries. Other benefits include protecting a company from incurring the monetary costs of incidents, loss of productivity and regulatory noncompliance. Avoiding citations is important, as they can lead to monetary fines, being placed in OSHA's Severe Violator Enforcement Program and negative public attention. Also, because clients often use the number and type of OSHA citations when evaluating a company, citations can exclude a firm from the opportunity to be in a client's bidding process.

Understanding the OSHA Multi-Employer Citation Policy can help a company avoid citations. While savvy companies work proactively to limit

their exposure to citations, they also understand that they can add value to their clients by knowing how to limit their clients' exposures.

## Policy Background

Many work locations are under OSHA jurisdiction. The Multi-Employer Citation Policy can result in employers being cited for a safety violation that occurs on a construction or nonconstruction worksite. The policy for multiemployer worksites, which appears in OSHA's *Field Inspection Reference Manual*, was issued Sept. 26, 1994 (CPL 2.103). A directive (CPL 02-00-124) was later issued to further clarify the policy. That directive is the current policy. It provides example scenarios that explain when citations should and should not be issued. Examples provide general guidance and are not intended to be exhaustive. The complete directive can be viewed on the OSHA website ([www.osha.gov](http://www.osha.gov)).

## Policy Mechanics

OSHA uses a two-step process to determine whether more than one employer is to be cited at a multiemployer worksite. The first step (Figure 1) is to determine whether the employer meets the category of:

- creating employer;
- exposing employer;
- correcting employer;
- controlling employer.

It is possible for an employer to meet multiple employer categories (e.g., creating employer, controlling employer). After OSHA determines the employer's role (discussed later in greater detail), the second step is to determine whether the employer's actions or inaction were sufficient to meet the criteria of being part of the citation process.

The extent of the actions will vary, based on the employer's category. The directive states:

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 re-

### IN BRIEF

•Reviewing and understanding OSHA's Multi-Employer Citation Policy can help clarify an employer's safety responsibilities on a construction or a non-construction worksite, and how to reduce the risk of being involved in a citation process.

•A savvy employer that reexamines the OSHA policy will see how it can add more value to the services it provides to clients.

•This article presents the OSHA policy in an easier-to-read format that will help build greater awareness of how to manage the policy.

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quired of an employer with respect to protecting its own employees. (OSHA, 1999)

If the employer's actions meet the criteria in this two-step process, it has obligations concerning compliance with the respective OSHA regulation being questioned.

### Creating Employer

The creating employer is the one that caused a hazardous condition in violation of an OSHA standard. If the employer meets the criteria of a creating employer, the second step is to determine the extent of its action. A creating employer can be cited for exposures to its employees and another employer's employees.

The directive provides two scenarios of a creating employer and shows how the extent of its actions determines citability. The first scenario is a host employer that operates a factory. Another employer (e.g., contractor) is at the factory and has:

- employees being exposed to airborne levels of a chemical in a drum (Photo 1);
- employees' exposures exceeding the permissible exposure limit for the chemical;
- asked the host employer (which has the authority) to correct the situation.

In this scenario, the host employer that created the respiratory hazard exposure by not having its chemical drum properly sealed would be categorized as the creating employer. The host employer did not take any action to correct the exposure to the other company's employees, such as covering the chemical drum. Another action, which this author would recommend, is to remove the drum from the work area. The host employer could have met its OSHA obligation by implementing this simple control. In this example, the host employer would be part of the citation process and would be cited as a creating employer.

The second scenario in the directive is an employer that is hoisting materials and damages a perimeter guardrail (Photo 2). The employer that damaged the guardrail:

- lacks the authority to fix the guardrail;
- takes immediate and effective steps to keep all its employees and other companies' employees away from the exposure;
- notifies the controlling employer of the situation.

In this scenario's first step, the employer that damaged the guardrail would be categorized as a creating employer because it damaged the perimeter guardrail. In the second step, it took immediate and effective steps to keep all personnel away from the hazard and notified the controlling employer of the hazard. Since the creating employer took action to prevent personnel from being exposed to the fall hazard and contacted the controlling employer, the creating employer would not be citable as a creating employer. If the employer had taken no action, it would be part of the citation process.

Figure 1

## Multiemployer Worksite Employer Categories

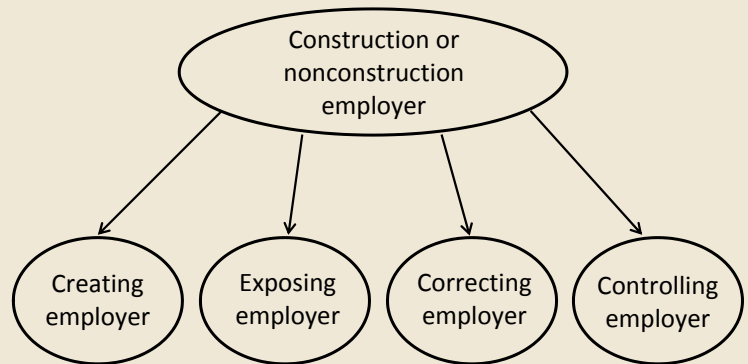


Photo 1 (left): Employees exposed to airborne levels of a chemical in a drum. Photo 2 (right): Hoisting materials damaged perimeter guardrail.

### Exposing Employer

The exposing employer is the second type of employer category. An exposing employer has employees who are exposed to the hazards. An exposing employer that also has been classified as a creating employer would be cited as a creating employer. The exposing employer would be cited, despite another company having created the exposure, if it:

- knew of the hazardous condition;
- failed to exercise reasonable diligence to discover the condition;
- failed to take steps within its authority to protect its employees.

Even if the exposing employer did not have the authority to correct the hazards, it would be cited if it did not:

- ask the creating and/or controlling employer to correct the hazard;
- inform its employees of the hazard;
- take reasonable alternative protective measures;
- remove its employees from the job to avoid the hazard, such as an imminent danger situation.

The directive provides two scenarios that give guidance to exposing employers. The first scenario involves a subcontractor that has:

- inspected and cleaned a work area around a large permanent hole at a plant;
- identified a fall exposure to its employees from the permanent hole (Photo 3, p. 52);
- has no authority to set up a guardrail;
- did not utilize any type of personal fall equipment;



Photo 3 (left): Identified fall exposure to employees from permanent hole. Photo 4 (right): Exposure to unprotected rebar, presenting an impalement hazard.

- asked for guardrails from the controlling employer.

In this scenario, the subcontractor meets the category of an exposing employer. The subcontractor is obligated to comply with OSHA requirements concerning fall exposures for its employees. The subcontractor asked for guardrails and, since they were not provided, the subcontractor should have taken reasonable alternative protective steps such as providing personal fall equipment. The subcontractor would be cited because its employees had a fall exposure and it did not provide personal fall equipment.

The second scenario deals with an electrical contractor that:

- has employees exposed to unprotected rebar, presenting an impalement hazard (Photo 4);
- does not have the authority to cover the rebar;
- has asked the general contractor to correct the situation;
- has instructed its employees to use a different route to avoid the impalement exposure;
- has instructed its employees to keep away from the exposures.

In this scenario, the electrical contractor would be categorized as an exposing employer. In reviewing the electrical contractor's actions, it tried to get the general contractor to correct the hazard. The electrical contractor took feasible measures within its control to protect its employees. The electrical contractor would not have been cited.

### Correcting Employer

The correcting employer, which is the third category, is an employer involved in a common undertaking on the same worksite as the exposing employer, and is responsible for correcting a hazard. The correcting employer would be responsible for installing and/or maintaining particular safety and health equipment or devices (e.g., guardrails, shoring equipment, ground fault circuit protection, rigging equipment). A correcting employer could exercise reasonable care in preventing and discovering violations, in addition to the obligation to correct the hazard.

The example in this case pertains to a carpentry contractor involved in the following circumstances:

- hired to erect and maintain guardrails throughout a large 15-story project;
- daily inspects (morning and afternoon) all floors plus areas where material is delivered;
- other subcontractors are required to report damaged and missing guardrails to the general contractor that contacts the carpentry contractor for repairs;

- immediately repairs damaged guardrails after they are reported;
- guardrails were damaged after an inspection;
- the damaged guardrails were not reported to the carpentry contractor;
- the carpentry contractor did not see the damaged guardrails;
- an OSHA inspection occurs the morning before the carpentry contractor inspects the damaged guardrail area;
- other contractor employees are exposed to the fall hazards of the damaged guardrail.

In this scenario, the carpentry contractor meets the definition of a correcting employer. In the second steps, the contractor exercised reasonable care in preventing and discovering violations. The carpentry contractor would not be cited for the damaged guardrails and the exposures of other contractor employees since the carpentry contractor could not reasonably have known of the violation.

### Controlling Employer

The last category is the controlling employer. Four types of controlling employers are listed in the directive (see Figure 2):

- control established by contract;
- control established by a combination of other contract rights;
- architects and engineers;
- control without explicit contractual authority.

The directive defines a controlling employer as an employer that has general supervisory authority over the worksite, including the power to correct safety and health violations. This would include the power to require other employers to correct violations. The power or control can be by:

- a contract that identifies responsibilities in writing;
- the absence of explicit contractual provisions by the exercise of control in practice.

If the employer meets the definition of a controlling employer, the second step is to examine actions taken. Exercising reasonable care to prevent and detect violations at a worksite would be the action taken by a controlling employer. Although the controlling employer should be actively involved in the safety of the worksite, taking action to prevent and detect violations would be expected more from the employer that has employees on the worksite. The employer with workers on the site should be inspecting for hazards more frequently and, therefore, would likely have more knowledge of the applicable standards or trade expertise than the controlling employer. An example of an employer that could have more knowledge of applicable standards or trade expertise than a controlling employer could be an asbestos abatement contractor.

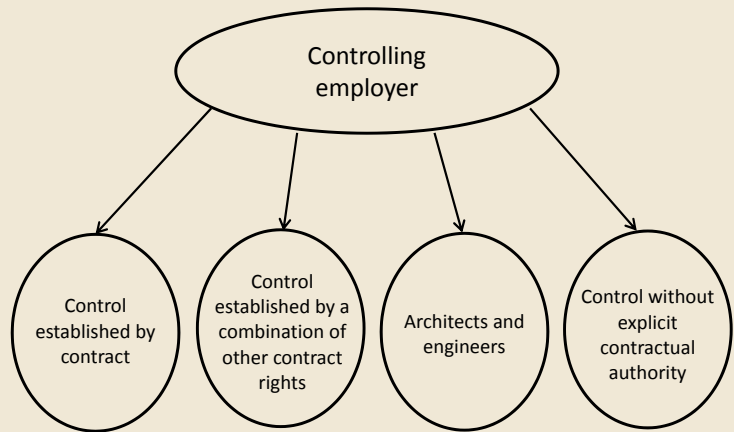
A good question that a controlling employer may have concerning this policy is how frequently and closely does a controlling employer need to inspect to meet its standard of reasonable care. Several considerations are listed in the directive:

- Scale of the project.
- How quickly the different project phases ad-



Figure 2

## Controlling Employer Types



vance, and how many new or severe types of hazards are being created as the project progresses.

- How much the controlling employer knows about the safety history, safety practices and level of expertise of the employer it controls.

- Controlling an employer that has a history of noncompliance normally would require more frequent inspections.

- Greater inspection frequency also may be needed at the beginning of the project if the controlling employer had never worked with the other employer and does not know its compliance history.

- Less frequent inspections may be appropriate where the controlling employer sees strong indications that the other employer has implemented effective safety and health efforts, such as a consistently high level of compliance.

- Other employer indicators would include the use of an effective, graduated system of enforcement for noncompliance with safety and health requirements coupled with regular jobsite safety meetings and training.

The directive also provides information on evaluating whether a controlling employer has exercised reasonable care in preventing and discovering violations. Issues in this evaluation would include:

- conducting periodic inspections of appropriate frequency, based on previously listed factors;

- implementing an effective system for promptly correcting hazards;

- enforcing the other employer's safety and health requirements with an effective, graduated system of enforcement and follow-up inspections.

### Controlling Employer Established by Contract

The first type of controlling employer is a controlling employer established by contract. In the following three cases from the directive, the controlling employers have a specific contract right to control safety. This means they would be able to prevent or correct a violation or to require another employer to prevent or correct the violation.

The first case involves a controlling employer established by contract and a sandblasting employer performing work that OSHA defines as both general industry and construction work. The contract requires the sandblasting employer to comply with safety and health requirements. The controlling employer under contract has the right to take various actions against the sandblasting employer for failing to meet contract requirements, including the right to have noncompliance corrected by using another employer and back-charging for that work. The sandblasting employer:

- has worked for the controlling employer for several years;

- provides periodic and other safety and health training for its employees;

- has an enforcement program;

- consistently had a high level of compliance at its previous jobs and at this site.

The controlling employer:

- monitors the sandblasting employer with weekly inspections, telephone discussions and a

weekly review of the sandblasting employer's inspection reports;

- has a system of graduated enforcement that has been applied to the sandblasting employer for the few safety and health violations that were committed in the past few years;

- is unaware of a respiratory protection requirement violation that occurred 2 days before making the next inspection of the sandblasting employer;

- did not receive any notification from the sandblasting employer of equipment problems from an OSHA inspection.

In reviewing the controlling employer's actions:

- has taken reasonable steps to ensure that the sandblasting employer meets safety and health requirements;

- inspection frequency is appropriate due to the low number of workers at the site, lack of significant changes in the nature of the work and types of hazards involved;

- knows the sandblasting employer's history of compliance and its effective safety and health efforts on this job.

The controlling employer in this case would have exercised reasonable care and is not citable for the respiratory protection violations.

The second case involves a controlling employer that has the same contractual authority over its painting contractor as the previous case concerning the sandblasting contractor. In this case, the controlling employer:

- has never worked with the painting contractor before;

- conducts inspections that are sufficiently frequent considering the factors listed;

- finds the painter contractor has violated fall protection requirements and shares this information with the painter contractor but takes no further action.

The controlling employer in this case has general supervisory authority over the worksite and contractual right of control over the painting contractor. The controlling employer meets its obligation to discover violations but failed to take reasonable steps to require the painting contractor to correct the hazards. The controlling employer in this case also would be part of the citation process involving the fall protection violations of the painter contractor.

In the third case, a general contractor has full contract authority over an electrical subcontractor. The electrical subcontractor:

- installs an electrical panel box exposed to the weather;
- implements an assured equipment grounding conductor program, as required under the contract;
- fails to connect a grounding wire on a receptacle, not apparent from a visual inspection (Photo 5);
- represents it is conducting all the required tests on all receptacles;
- has implemented an effective safety and health program;
- is familiar with the applicable safety requirements and is technically competent;
- has ensured that the receptacles are correct, after being asked by the general contractor.

The general contractor is a controlling employer since it has general supervisory authority over the worksite, including a contractual right of control over the electrical subcontractor. The general contractor made some basic inquiries into the safety of the electrical equipment and determined that the electrical subcontractor had:

- technical expertise;
- safety knowledge;
- implemented safe work practices;
- conducted inspections with appropriate frequency.

The general contractor asked the electrical subcontractor if its work was correct and was assured by the electrical contractor that it was. The general contractor was not obligated to test the outlets to determine if they were correct under these circumstances. In this case, the controlling contractor exercised reasonable care and would not be cited for the electrical grounding violation.

#### Controlling Employer Established by a Combination of Other Contract Rights

The second type of controlling employer is a controlling employer established by a combination of other contract rights. The directive notes that a citation should only be issued regarding a controlling employer established by a combination of other contract rights after consulting with the OSHA Regional Solicitor's office (which provides litigation and legal services for enforcing labor statutes such as occupational safety and health). This type of controlling employer involves no explicit contract provision granting the right to control safety. Even though the contract says the employer does not have such a right, the employer still may be a controlling employer.

The directive continues by stating that the ability of an employer to control safety in this circumstance can result from a combination of contractual rights that gives broad responsibility involving almost all aspects of the job. The responsibilities are broad enough that its contractual authority necessarily involves safety. The authority to resolve disputes between subcontractors, set schedules and determine construction sequencing are particularly significant because they are likely to affect safety, according to the directive.

Two scenarios are provided for this type of controlling employer. The first is a construction manager who is contractually obligated to:

- set schedules and construction sequencing;
- require subcontractors to meet contract specifications;
- negotiate with trades;
- resolve disputes between subcontractors;
- direct work;
- make purchasing decisions.

In this scenario, the contract states that the construction manager does not have a right to require compliance with safety and health requirements. A contractor asks the construction manager to change the schedule to not start work until the subcontractor who is installing guardrails is finished. The construction manager is contractually responsible for deciding whether to approve the contractor's request.

In determining whether the construction manager is defined as a controlling employer, the following considerations should be examined:

- The combination of rights actually given to the construction manager in the contract provides broad responsibility over the site.
- The broad responsibility results in the ability of the construction manager to direct actions that necessarily affect safety.

In this scenario, the construction manager's decision relates directly to whether the contractor's employees will be protected from a fall hazard. The construction manager would be a controlling employer and would be part of the citation process for the fall hazard exposure.

The second scenario is an employer whose contractual authority is limited to reporting on subcontractors' contract compliance to the owner/developer and making contract payments. The employer:

- does not exercise any control over site safety;
- reports safety and health infractions to the owner/developer.

In this scenario, the contractual rights of the employer are insufficient or lacking concerning control over the subcontractors. Reporting safety and health infractions to the owner/developer does not exercise or apply control over safety. This employer's contractual rights are insufficient to control the subcontractors and the employer did not exercise control over safety. The employer would not be a controlling employer and would not be part of the Multi-Employer Citation Policy.

#### Architects & Engineers

The third type of controlling employer involves architects and engineers. The directive states that architects, engineers and other entities are controlling employers only if the breadth of their involvement in a construction project is sufficient to bring them within the parameters discussed in the previous scenario involving the construction manager. The directive provides two examples concerning architects and engineers.

The first scenario is an architect firm contracted with an owner to:

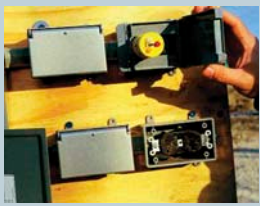


Photo 5: Failure to connect grounding wire on a receptacle, not apparent from a visual inspection.

- prepare contract drawings and specifications;
- inspect the work;
- report to the owner on contract compliance;
- certify completion of work;
- not have authority or means to enforce compliance;
- not have authority to approve/reject work;
- not exercise any other authority at the site;
- call the general contractor's attention to hazards observed during its inspections.

The architect's responsibilities appear limited in light of the many other administrative responsibilities necessary to complete the project. The scenario also states that the architect's responsibilities are insufficient to confer control over the subcontractors and it does not exercise control over safety. The responsibilities are insufficient to make the architect a controlling employer. Merely pointing out safety violations did not make the architect company a controlling employer.

The second scenario involves an engineering firm that has the same contractual obligation as the construction manager scenario previously discussed, but also includes:

- setting schedules and construction sequencing;
- requiring the subcontractors to meet contract specifications;
- negotiating with the trades;
- resolving disputes between subcontractors;
- directing work;
- making purchasing decisions.

Although the engineering firm does not have authority over safety, the combination of rights in the contract provides broad responsibility over the site and results in the ability to direct actions that necessarily affect safety. The engineering firm would be considered a controlling employer and has an obligation that affects the safety of other employers.

#### Control Without Explicit Contractual Authority

The fourth type of controlling employer is control without explicit contractual authority. The directive notes that this type of employer's citation should only be issued after consulting with the Regional Solicitor's office. Control without explicit contractual authority exists when an employer does not have explicit contract rights with respect to safety, but in actual practice exercises broad control over subcontractors at the site.

In this example, the construction manager:

- does not have explicit contractual authority to require subcontractors to comply with safety requirements;
- does not have explicitly broad contractual authority at the site;
- has control over most aspects of subcontractors' work, including aspects that relate to safety.

The construction manager in this case would be categorized as a controlling employer due to exercising control over most of the subcontractors' work, which includes safety. An analysis of reasonable care would determine whether a citation should be issued after consulting with the Regional Solicitor's office.

#### Multiple Roles

The directive states that a creating, correcting or controlling employer will often be an exposing employer. Further, it states that an exposing, creating and controlling employer also can be a correcting employer if it is authorized to correct the hazard.

#### Challenging the Policy

OSHA's Multi-Employer Citation Policy is not well-received by some employers. Similar to any law or citation, it can be challenged to be reinterpreted or invalidated.

A well-known challenge of the policy is Occupational Safety and Health Review Commission (OSHRC), *Secretary of Labor v. Summit Contractors Inc.* (OSHRC Docket No. 05-0839), a case involving an employer cited for safety violations in which none of its employees were exposed to a hazard. The contesting employer was a general contractor on a jobsite that was cited as a controlling employer by virtue of its authority over the jobsite. The employer also was cited as a creating employer because it obtained equipment that was in violation of OSHA 1926.404(b)(1)(ii) involving ground fault circuit interrupters. The citation was contested with OSHRC, which judged the citation valid. The case was appealed to the U.S. Court of Appeals for the District of Columbia Circuit, *Summit Contractors Inc. v. Secretary of Labor and OSHRC* (2011) (Docket No. 10-1329). A judgment was filed on Dec. 14, 2011, that Summit's challenges to OSHRC were without merit.

Another case that is valuable to know is *Secretary of Labor v. Ryder Transportation Services* (OSHRC Docket No. 10-0551). In this case, an outside electrical contractor's employee was conducting work on the roof of its client when he fell through an unguarded skylight to his death. The client was cited under OSHA's Multi-Employer Citation Policy for failing to protect the electrical contractor's employee. The administrative law judge agreed that the policy applied and that the client was classified as a controlling employer. On Feb. 28, 2011, this case alleging serious violation of OSHA 1910.23(a)(4), concerning the unguarded skylight, was vacated due to failure to establish that the client knew of the violation condition. OSHA has appealed the decision, claiming that the client had knowledge of the electrical contractor's employee exposure. The decision is not final, pending the next level of review.

Being aware of current appeal decisions of the policy will help direct a company's safety responsibilities and avoid potential liability.

#### Different Perspective of the Policy

If a company provides services to an owner, one of the probable goals is to position the company to continue to obtain the owner's work and trust. An obvious way to provide value to an owner is to implement an effective company program where safe work procedures are in place, where employees are trained in hazard recognition and where hazards are being addressed. Having employees motivated

Having employees motivated to make safe choices concerning their tasks adds value to services provided to the owner.

to make safe choices concerning their tasks adds value to services provided to the owner.

Owners want to avoid any connection to an OSHA citation. Knowing and applying the Multi-Employer Citation Policy can help a company do that. Applying the OSHA directive discussed in this article will support a healthier and longer relationship with an owner by minimizing the liabilities associated with the policy. The policy provides several examples of how to avoid being part of the citation process.

The following examples illustrate how a company can limit its owner's exposures to multiemployer citations.

An engineering firm is inspecting a bridge structure under construction for an owner. To complete an inspection task, the guardrails must be taken down. The guardrails are taken down and the engineering firm's employees are appropriately using fall arrest equipment (harness, lanyard and anchorage) to minimize fall exposure. The owner's employees are sometimes in the area where the guardrails have been removed. The engineering firm has planned in advance concerning the potential fall hazard, which exposes the owner's employees. The owner has been notified of the fall hazard location, exposure times and has taken action to ensure that its employees are not exposed. The action of the engineering firm has prevented the possibility of its owner from being categorized as an exposing employer if an OSHA inspection occurred during this job.

Another example is a subcontractor providing construction services to a heavy construction road contractor. The subcontractor and client have worked together for several years on various projects. The client has taken the authority to correct safety hazards at the project on itself and inspects the large project daily. The subcontractor has no contractual or assumed authority to correct or identify safety hazards, but noticed during a lunch break that an excavating subcontractor's track hoe on the project has damaged the shoring on a 10-ft-deep trench.

The construction services subcontractor does not have a competent person, defined by the OSHA excavation standards, but questions the damaged shoring. The client responsible for correcting safety hazards on the project inspected the trench earlier that morning before the damage. The construction services subcontractor knows that after lunch, workers will be in the trench supported by the damaged shoring. Although the subcontractor is not contractually required to identify or correct hazards, it contacts the client concerning the shoring. The client immediately examines the shoring and decides it needs to be replaced before permitting work to proceed. An unannounced OSHA inspection occurs later in the day at the trench with no violations cited. The client was able to exercise its role as a correcting employer because of a question the subcontractor brought to its attention.

When the client knows efforts are being taken concerning issues that would affect its safety per-

formance on a project, it plays a large role in establishing value and perhaps a distinction in service with the client.

## Conclusion

OSHA's Multi-Employer Citation Policy applies to general industry and construction employers that are involved with other employers. A general industry employer having another employer on its property conducting maintenance work could face a multiemployer citation. A construction employer subcontracting work to another employer could receive a multiemployer citation. Knowing and understanding the different employer classifications in the policy will determine the responsibilities a company will need to be prepared for and what does not apply.

Clarifying the responsibilities of the other employer will eliminate assumptions that can lead to unaddressed exposures and unexpected liabilities. Preplanning and assigning the employer's safety responsibilities will help eliminate missed costs for those responsibilities, which could affect the employer's profit on the project. Analyzing a project's hazards and how serious they are will influence the importance of clarifying safety responsibilities.

For situations that might appear unclear or unique under this policy, consult with a safety, contract or legal professional. A small item overlooked can make the difference in whether an employer will be involved in the citation process.

This article covers most of the significant points of OSHA's Multi-Employer Citation Policy. The objective is not to provide legal advice but to help SH&E professionals and operations personnel better understand how the policy works and its value, and to encourage studying it in great detail. As noted, a more thorough look at the directive can be accessed at [www.osha.gov](http://www.osha.gov). Understanding the roles of the employer helps everyone to have a safer worksite. **PS**

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