

Facilities, Construction Property Practice Group

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AALRR Alert



Multi-Employer Worksites and the Value of Diligence

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A recent California Occupational Safety and Health Appeals Board (“Board”) case has shed further light on successfully establishing a due diligence affirmative defense for citations issued on multi-employer worksites. A multi-employer worksite is any worksite, permanent or temporary, where more than one employer (and its employees) works. Construction sites are the most common example of a multi-employer worksite. Multi-employer worksites create unique issues because workers may be exposed to hazardous conditions created by other employers. Beginning in 2000, Cal-OSHA followed the lead of Fed-OSHA in issuing citations regardless of which employer’s employees were exposed to the violative condition. Employers that may be cited include (1) the employer whose employees were exposed to the hazard (**exposing** employer); (2) the employer that actually created the hazard (**creating** employer); (3) the employer who was responsible, by contract or through actual practice, for safety and health conditions on the worksite, which is the employer who had authority for ensuring the

hazardous condition is corrected (**controlling** employer); and (4) the employer who has the responsibility for actually correcting the hazard (**correcting** employer).

Due Diligence Defense for the Controlling Employer

The California Court of Appeal first recognized the **Due Diligence Defense** for the controlling employer in 2011. In subsequent decisions, the Board has identified the following factors as being significant in the application of this defense: (1) the employer implemented and relied on a functioning testing methodology to monitor subcontractor performance and stayed well-informed on the results of the testing; (2) the employer researched the safety history of the subcontractor; and (3) the hazard was latent and unforeseeable, rather than patent. A recent Board decision has identified additional factors by citing to the Fed-OSHA policy which considers factors such as: (4) whether the employer conducted periodic inspections of appropriate frequency; (5) whether the employer implemented an effective system for promptly correcting hazards; and (6) whether the employer effectively

enforced compliance with a system of enforcement and follow-up inspections. Fed-OSHA also considers the scale of the project, nature and scope of the work, how much the controlling employer knows about the safety history and practice of the employer and their level of expertise. As described above, this is a fact intensive evaluation done on a case-by-case basis.

In January 2016, the Board issued a decision wherein a controlling employer prevailed on its due diligence affirmative defense. The case involved a school site with multiple structures over a 10 acre site with more than 20 contractors. The Board found the following factors persuasive: First, the controlling employer had a full-time safety coordinator who spent 70% of his time in the

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field and the employer also utilized superintendents in specific areas. Second, the employer utilized a Job Safety Analysis (“JSA”) which was usually filled out each day to identify safety issues and deficiencies and the safety coordinator checked for discrepancies and ensured hazards were addressed. Third, the employer enforced compliance and utilized a system of sanctions for safety and health violations. Fourth, the safety coordinator engaged in ongoing training. Finally, the violative condition was latent. In considering all of the factors, the Board concluded the employer had demonstrated the due diligence defense.

Exposing Employer Affirmative Defense

An exposing employer may have a defense where the violative condition was not the fault of the exposing employer and was created, or allowed to go uncorrected by another employer, and the exposing employer has taken reasonable steps to protect its employees. Cal-OSHA considers the following factors for this defense: (1) whether the exposing employer created the violative condition; (2) whether the exposing employer has the responsibility or authority to correct the violative condition; (3) whether the exposing employer has the ability to correct or remove the violative condition; (4) whether the exposing employer demonstrates that the appropriate employers were notified of the violative condition; and/or (5) whether the exposing employer takes appropriate

alternative measures, to the extent feasible, to protect employees from the violative condition or instructs employees on how to recognize the violative condition. If an employer can satisfy some or all of these factors, it may be able to avoid the citation.

Multi-employer sites present unique and ever changing conditions. However, if you are an exposing or controlling employer, you may be able to establish an affirmative defense and avoid a costly citation and penalties by incorporating the factors mentioned above into your safety program.