

# DOSH DIRECTIVE

Department of Labor and Industries  
Division of Occupational Safety and Health

*Keeping Washington safe and working*

## 1.15

# Dual Employers and DOSH Enforcement

February 15, 2019

### I. Purpose

This Directive establishes inspection and enforcement policies for assessing situations where two or more employers may share liability for safety or health violations that expose employees to workplace hazards.

### II. Scope and Application

This Directive applies to all DOSH operations statewide and replaces all previous instructions on this issue, whether formal or informal. It supplements the guidance on “creating, correcting, and controlling” employers that is provided in the DOSH Compliance Manual.

This Directive has been reviewed for applicability, and remains effective with a new issue date of February 15, 2019.

### III. Background

Under the 1973 Washington Industrial Safety and Health Act, employers are responsible for the workplace safety and health of their employees. Employers may also have a responsibility for the safety and health of other employees as a creating, correcting, or controlling employer. In applying these responsibilities, the department must determine whether the employer of record (primary employer), or any other involved employer, did not reasonably meet their obligations under the statute.

Dual employer situations have increased over recent years with the growth of temporary services and employee leasing agencies, which provide employees to work at a site under the supervision and control of another employer. A dual employer situation exists when two or more employers may be cited for violating a safety or health standard that created a hazard to which employees were exposed.

In assessing such situations, CSHOs must consider the roles of the:

- Employer of record, who contracts with the employee to perform work in exchange for wages or a salary and issues the employee’s pay check, secures workers’ compensation insurance for the employee, and usually retains hiring and firing authority; **and**
- On-site employer (secondary or host employer) who controls the employee at the worksite.

Citations related to dual employer situations are distinct and different from citations issued to general and upper-tier contractors in construction under the “*Stute*” decision, which is the subject of separate guidance.

#### IV. Enforcement Policies

##### A. The primary employer:

1. Must ensure employees are covered by an effective and appropriately tailored written Accident Prevention Program (APP) and receive all required training and Personal Protective Equipment (PPE) in order to safely perform work for the secondary employer. However, the primary employer can fulfill their obligation for training and PPE by taking reasonable steps to ensure the secondary employer provides the employees with the required training and appropriate PPE for the work to be done.
2. Will generally not be cited for safety or health violations that expose their employees to a hazard at the secondary worksite, as long as the primary employer meets the requirements in Section IV-A.1 above, and does not exercise supervision and control over the employees' work activities at the secondary worksite.
3. May be cited for safety or health violations at the secondary worksite whenever they:
  - (a) Did not take reasonable steps to ensure the requirements above were met.
  - (b) Disregard information about uncontrolled hazards at the worksite.
  - (c) Supervise or control their employees at the secondary worksite (for example, in situations where the primary employer provides a crew, complete with a supervisor, to perform particular activities, or where the primary employer provides specialized staff not subject to the direction of the secondary employer).

**B.** The secondary employer will be cited for safety or health violations at the worksite when responsible for supervising or controlling the primary employer's employees at the worksite.

**C.** There are situations where DOSH will issue citations to both the secondary and primary employers. For example, if neither the primary employer nor the secondary employer took steps to ensure the appropriate selection and use of respiratory protection to protect employees from inhalation hazards while engaged in assigned work duties.

**D.** Situations where neither employer would be cited for safety or health violations are truly unforeseeable situations, or situations involving unpreventable employee misconduct. Otherwise, at least one employer will be cited for any documented safety or health violation that exposed an employee to a hazard.

#### V. Special Consultation and Compliance Protocols

**A. Determine whether a dual employer situation exists.** When safety or health violations are documented and employee exposure may involve a dual employer situation, CSHOS are expected to find out and document if there is evidence that a secondary employer was supervising, or was supposed to be supervising, the employees' work.

1. If the answer is *no*, then there is no dual employer issue.
2. If the answer is *yes*, then CSHOs are expected to apply the guidance in the remainder of this directive.

**B. Evaluate the nature of the dual-employer relationship.** CSHOs are expected to evaluate the level of secondary employer involvement by documenting answers to the following questions:

1. Was the primary employer aware or should they have been aware of the hazardous condition(s) found at the secondary worksite?
  - If so, the primary employer shares responsibility for the violation because they did not take reasonable steps to protect their employees from the hazard in question.
2. Did the primary employer control or influence work at the worksite?
  - If so, the primary employer shares responsibility for the worksite conditions and any violations that result from them. The primary employer who exercises control at the worksite cannot be relieved of safety and health obligations by a contract that assigns the responsibility for those issues to the secondary employer.
3. Did the primary employer have authority by contract, custom, or practice to enter the secondary worksite to supervise the employees' work?
  - If so, the primary employer may have a greater responsibility to take steps to identify and correct violations on the worksite.
4. Did the violation arise because the secondary employer relied on the primary employer for guidance about workplace safety or health?
  - If so, the primary employer may be responsible for the violations. In such circumstances, the secondary employer may be relieved of responsibility by demonstrating the affirmative "creating employer" defense.
5. Did the primary employer take steps to correct or prevent employee exposure to the hazardous condition found at the secondary worksite?
  - If so, then the primary employer may have reasonably fulfilled their obligations.

**C. Violations that appear to be shared between both employers.** As a general principle, all employers who knew or should have known about the safety or health violation, and who had or who controlled employees that were exposed to the hazard, are responsible and should be cited.

1. Secondary employers are normally responsible for safety or health violations and should be cited for each hazard that employees were exposed to. It does not matter whether the employees were their own or another's, or if it is determined that the primary employer is also liable for the violation.
2. A primary employer cannot be cited for safety or health violations at another worksite if the department cannot document exposure of the primary employer's employees. This is true even if the primary employer did not ensure that the secondary employer would provide effective APP coverage, adequate training, and appropriate PPE.

In such a case, the primary employer should be messaged about the responsibility to ensure APP coverage, training, and PPE.

3. If the primary employer's employees were exposed to a hazard at the secondary site, the decision whether to cite the primary employer for the safety or health violation will be based on the nature of the violation, the level of involvement the primary employer had with the secondary worksite, and the primary employer's knowledge of the hazard.
  - a. If the analysis in *Section V.B.*, above, suggests that there is no significant involvement of the primary employer at the secondary employer's worksite, safety or health violations should be cited as follows:
    - (1) APP, Training and PPE Violations. The primary employer must generally be cited for any failure to comply with APP or any other safety and health standards requiring the provision of PPE or training. However, do not cite the primary employer if they were unaware of the violations **and** took "reasonable action" to ensure that the secondary employer would provide APP coverage and all required training and PPE.
      - Reasonable action is demonstrated by steps that as a whole result in a reasonable degree of certainty that APP coverage, training, and PPE will be provided to the employee as required. Reasonable action may include the following examples:
        - Making explicit arrangements in writing with the secondary employer to provide all required APP coverage, PPE and appropriate training.
        - Establishing a system where employees are not allowed to begin work at a secondary worksite until the primary employer receives a copy of the secondary employer's APP and confirmation that all required training was completed, including a description of the type of training. If the primary employer documented an on-site inspection that included reviewing the secondary employer's APP, this is an acceptable substitute for a physical copy of the secondary employer's APP on file.
      - Establishing a system of periodically monitoring the secondary employer to ensure compliance with agreements about employee safety.
      - Communicating to employees about the types of training that must be received before beginning work at the secondary site, and instructing employees to contact the primary employer immediately if the secondary employer requests that work begin before the training is received, or if employees feel that the work is unsafe.
    - (2) Other Violations. If the primary employer is cited for not providing or not taking reasonable steps to provide effective APP coverage, appropriate training, or PPE, the primary employer may also be cited for other types of safety or health violations identified at the secondary worksite. In such cases, CSHOs are expected to cite the primary employer if their employees were exposed to hazards that directly relate to the deficiencies for which the primary employer is liable.

- b. In addition to the situations described in *Section V.C.3.a.*, above, the primary employer can be cited if they had knowledge or clearly should have had knowledge of the violation.

Do not cite the primary employer if all of the following conditions are present:

- (1) The primary employer took reasonable steps to abate the hazard, including giving the secondary employer a reasonably short timeline to correct the hazard, and the correction timeline had not yet passed without further action when the hazard was identified by DOSH.
  - (2) The primary employer, due to lack of direct control over the worksite, was unable to bring about immediate hazard correction.
  - (3) The hazard was not an imminent danger situation. Imminent danger would require the primary employer to prohibit the employee from going to work at the secondary site until the imminent danger situation was corrected.
- c. In addition to the situations described in *Sections V.C.3.a. and V.C.3.b.* above, the primary employer may be cited if they were able to exercise control over the worksite, had authority to enter the site to supervise employees' work, or gave deficient advice or guidance related to employee safety or health issues.

**VI. Who to Contact**

CSHOs dealing with complex issues involving dual employers are encouraged to contact the Compliance Operations Manager for assistance. If DOSH staff have questions or need additional guidance or interpretive assistance, they are encouraged to contact DOSH Technical Services.

**VII. Review and Cancelation**

This DOSH Directive will be reviewed for applicability two years from the issue date, and will remain effective unless superseded or canceled.

Approved:



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