

**DIVISION OF OCCUPATIONAL SAFETY AND HEALTH
POLICY AND PROCEDURES MANUAL**

**MULTI-EMPLOYER
WORKSITE INSPECTIONS**

P&P C-1C

Issue

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AUTHORITY: California Labor Code Sections 6400, 6401, 6401.7, 6402 through 6404 and Title 8, California Code of Regulations, Sections 336.10 and 336.11.

POLICY: It is the policy of the Division of Occupational Safety and Health (1) to enforce the multi-employer worksite regulations in a manner that promotes workplace safety and health on multi-employer worksites; and (2) to gather sufficient evidence to determine whether employers at a multi-employer worksite are citable for violative conditions observed at that worksite.

PROCEDURES:

A. WHAT IS A "MULTI-EMPLOYER WORKSITE"?

A multi-employer worksite is any worksite, permanent or temporary, where more than one employer (and his or her employees) work, usually but not necessarily at the same time. The most common multi-employer worksites are temporary worksites at which construction activities take place. Other examples include permanent worksites at which outside contractors perform activities at that worksite, including, but not necessarily limited to, construction, environmental or janitorial services, repairs and deliveries.

B. MULTI-EMPLOYER WORKSITE VS. DUAL-EMPLOYER SITUATION

A multi-employer worksite should not be confused with a dual-employer situation. A dual-employer situation exists whenever an employee has two employers at the same time. The most common example of a dual-employer situation is when an employee of a temporary help agency works for another employer at the other employer's worksite. See P&P C-1D. The multi-employer and dual-employer concepts are not mutually exclusive. It is possible to have a dual-employer situation at a multi-employer worksite, e.g., where a temporary

employee is supplied to a construction contractor to work at a multi-employer worksite.

C. CATEGORIES OF EMPLOYERS CITABLE UNDER SECTION 336.10

Before the adoption of 8 CCR Sections 336.10 and 336.11, only the employer whose employees were actually exposed to a violative condition could be cited for a violation. Such an employer is called the "exposing employer" (as defined in Section E.1. below).

Beginning in January of 2000, Labor Code Section 6400 and 8 CCR Section 336.10 now permit the Division to cite, in specified circumstances, an employer who is responsible for a violative condition, e.g., a creating, controlling and/or a correcting employer (as defined in Section E.2., 3. and 4. below), regardless of which employer's employees are exposed to the violative condition.

NOTE: A sole proprietor is not an employee. Therefore, if a sole proprietor is the only person exposed to a violative condition, there is no citable violation. See Labor Code Section 3300(c), which requires that, in order to be regarded legally as an employer, the "employer" must have a "natural person in service."

D. AFFIRMATIVE DEFENSE AVAILABLE TO "EXPOSING EMPLOYERS" UNDER SECTION 336.11

8 CCR Section 336.11 creates a defense for an exposing employer in specified circumstances where the violative condition is not the fault of the exposing employer and has been created, or allowed to go uncorrected, by another employer, and the exposing employer has taken reasonable steps to protect its employees. Section 336.11 obligates compliance personnel to determine whether the "exposing employer" defense applies in a multi-employer situation. If it is determined that the defense applies, then the exposing employer shall not be cited. If an exposing employer disagrees with a Division determination that the Section 336.11 defense is inapplicable and appeals a multi-employer citation on that basis, it is the employer's burden to demonstrate that the defense applies.

E. TYPES OF CITABLE EMPLOYERS AT A MULTI-EMPLOYER WORKSITE

1. Exposing Employer

The "exposing employer" is an employer whose employees were exposed to the violative condition at the worksite regardless of whether that employer created the violative condition. Before the adoption of 8 CCR Section 336.11, the exposing employer was the only category of employer that could be cited by the Division.

EXAMPLE 1: A painting contractor's employees were allowed to work on scaffolding at a building renovation project without required guardrails. The painting contractor is citable as the exposing employer, unless it can demonstrate that the Section 336.11 defense applies. This employer is citable regardless of whether some other employer is also citable.

2. Creating Employer

The "creating employer" is an employer who actually created the violative condition.

EXAMPLE 2: Prior to the painting contractor's employees accessing the scaffolding in Example 1, a drywall contractor removed the required guardrails from the scaffold and then left the site. Only the painting contractor's employees accessed the scaffolding with guardrails removed, and thus, only these employees were exposed to the violative condition. The drywall contractor is potentially citable as a creating employer, regardless of whether the exposing employer, or another category of employer, is also citable.

EXAMPLE 3: In Example 1, the erection of the scaffolding was subcontracted by the general contractor. The scaffolding contractor did not install the guardrails after erecting the scaffolding because the general contractor ordered the scaffolding contractor to stop and work somewhere else at the project. A couple of days later, forgetting that the scaffold erection had not been completed, the general contractor's foreman ordered the painting contractor to begin work on the scaffold. The general contractor is potentially citable as the creating employer, regardless of whether some other employer is also citable.

3. Controlling Employer

A "controlling employer" is an employer who is responsible for safety and health conditions at the worksite and who has the authority to correct the violation. Evidence of an employer's "control" can be demonstrated in any of three ways:

a. Explicit Contract Provisions Pertaining To Worksite Safety

Control can be demonstrated through explicit contract provisions pertaining to worksite safety. This means that an employer is a controlling employer because it has the power under a written contract to require another employer to adhere to safety and health requirements and to correct violations the controlling employer discovers.

EXAMPLE 4: The general contractor at the worksite in Examples 1 and 2 was responsible by a specific contractual provision to conduct daily worksite safety inspections and to order the immediate correction of hazards identified by the inspections. On several occasions the general contractor received complaints that the individual hired to perform the inspections by the general contractor was not performing them in a timely manner, but the general contractor never made an inquiry in response to the complaint. Then the inspector failed to conduct an inspection on the morning of the day that the painting contractor's employees began to work on the unguarded scaffolding. Had the inspection been conducted, the lack of guardrails could have been discovered before the employees accessed the unguarded scaffolding and the problem could have been corrected. The general contractor is potentially citable as the controlling employer, regardless of whether some other employer is also citable.

b. Any Type of Contract Authority that Directly Affects Worksite Safety

Where there is no explicit contract provision granting the right to control safety, or where the contract says the employer does not have such a right, an employer may still be a controlling employer. In this case, the power to control safety results from exercising, or failing to exercise, contract authority in a manner that directly affects worksite safety. For example, if an employer controls the scheduling of work and fails to adjust the work schedule when that becomes necessary to prevent a worksite safety hazard, then the employer becomes potentially citable as a controlling employer because of the direct connection between the employer's failure to act and the exposure of employees to the worksite hazard. Similarly, an employer who controls the flow of essential information at a worksite can become citable as a controlling employer by failing to deliver information to another employer when that information is necessary to prevent exposure of employees to a worksite hazard.

EXAMPLE 5. A construction manager is contractually obligated to set schedules and determine construction sequencing. However, the contract states that the construction manager does not have a right to require

compliance with safety and health requirements. Subcontractor A asks the construction manager to alter the schedule so that Subcontractor A will not have to start work in an area requiring guardrails until the Subcontractor B, who is responsible for installing the guardrails, has finished installing them. The construction manager is contractually responsible for deciding whether to approve Subcontractor A's request. The construction manager never responds to the request, and Subcontractor A begins work without the guardrails being installed, exposing its employees to the guardrail violation. The construction manager is citable for the violative condition, regardless of whether some other employer is also citable.

EXAMPLE 6: The owner of the worksite in Examples 1 and 2, who is an employer, hired an engineering contractor to perform daily inspections to make sure that structural specifications for the project were being met. The owner did not have responsibility by contract for safety at the site but did attempt to correct safety problems when they were brought to the owner's attention. The engineering contractor did not have authority to order correction of safety hazards. The other contractors at the site neither relied upon the engineering contractor for, nor considered him to be a source of, information about safety hazards at the site. The engineering contractor saw the unguarded scaffolding on the morning before the painting contractor's employees began to work on it, but took no action. Neither the owner of the worksite nor the engineering contractor is citable as a controlling or correcting employer.

c. Actual Practice

Regardless of whether a contract exists, or if a contract exists, regardless of what provisions it contains, an employer's control over worksite safety can be shown to exist by obtaining evidence of the employer's actual practices at the worksite. It is not necessary to rely on contract provisions as evidence of an employer's authority when such authority is clear from actual behavior among employers at the worksite.

EXAMPLE 7. The general contractor at the worksite in Examples 1 and 2 was not responsible under any specific or general contractual provision to identify or order the correction of worksite safety hazards. In addition, the exact nature of the general contractor's authority was unclear under the governing written contract. However, the general contractor made it a routine practice to order subcontractors to make changes in their work practices, including the correction of safety hazards. Its authority to do this was not disputed. At the time that the painting contractor's employees began to work on the unguarded

scaffolding, the general contractor was present and giving direction to the painting contractor's foreman. However, the general contractor did not make any attempt to stop the painting contractor's employees from accessing the unguarded scaffolding. The general contractor is potentially citable as the controlling employer, regardless of whether some other employer is also citable.

4. Correcting Employer

The "correcting employer" is an employer who has the specific responsibility to correct the violative condition.

EXAMPLE 8: The individual who conducted the daily worksite safety inspections for the general contractor in Example 4 was not the general contractor's employee, but the employee of a subcontractor hired by the general contractor to perform the safety inspections. The subcontractor is potentially citable as a correcting employer, regardless of whether some other employer is also citable.

EXAMPLE 9: Before the drywall contractor came to the worksite in Examples 1 and 2, an asbestos contractor was hired to remove spray-on asbestos from the ceiling pan and parts of the interior walls of the building. In the course of installing new wallboard, the drywall contractor's employees disturbed an area of asbestos that the asbestos contractor was specifically obligated to remove, and were substantially exposed to asbestos before the omission was discovered. The asbestos contractor is potentially citable as the correcting employer, regardless of whether some other employer is also citable.

NOTE: It is important to remember that the four categories of employers at a multi-employer worksite are not necessarily mutually exclusive. Each type of employer may or may not exist at the particular worksite under inspection. In addition, an employer may fit into more than one category. For example, an employer may be both a creating and a correcting employer, or a correcting and controlling employer.

F. CONDUCTING A MULTI-EMPLOYER WORKSITE INSPECTION

1. Opening Conference

For information on how to conduct an Opening Conference at a multi-employer worksite, see P&P C-1A, Section C.3.a.

2. Documenting Evidentiary Foundation for Employer Citability

a. General

When a violative condition is observed at a multi-employer worksite, compliance personnel shall obtain and document evidence of all of the following items with respect to each potentially citable employer:

- (1) Name and address of the employer;
- (2) Description of the type of activity performed by the employer at the worksite;
- (3) A copy of the contract or contracts describing the respective roles and obligations of all the employers at the worksite.

NOTE: When considering citing a "controlling" employer, compliance personnel shall evaluate all provisions of the written contract between the owner or general contractor and the controlling employer.

(4) For each violative condition found, the specific facts that describe the employer's involvement in creating or failing to correct the violation, including those facts that identify the employer as an exposing, creating, controlling and/or correcting employer;

(5) For each violative condition found, a specific determination as to whether the employer is an exposing, creating, controlling and/or correcting employer.

NOTE: If an employer fits into more than one category for a violation, each applicable category shall be identified.

(6) For each violative condition found for which a creating, controlling or correcting employer has been identified, evidence which will determine the degree of responsibility on the part of each creating, controlling and correcting employer for the violative condition(s) as follows:

(a) Awareness of Violative Condition

When, if ever, did the employer become aware of the violative condition? Awareness of the violation indicates greater responsibility. Similarly, the longer an employer is aware of a violation without correcting it, the greater will be the employer's responsibility.

(b) Foreseeability

How foreseeable was the occurrence of the violative condition? Did the violation exist as a matter of custom and practice at the worksite?

Even if an employer is not aware of the violative condition, if it is foreseeable the employer may have some responsibility for it. The more foreseeable a violation is for an employer, the greater will be the employer's responsibility for it. The most foreseeable violations are those which occur most frequently in the employer's particular line of work, those which are recognized and addressed as a matter of standard practice in the employer's industry and those which have existed for a substantial period of time at the worksite.

(c) Reasonable Steps to Protect Employees

Did the employer exercise reasonable steps to protect employees given the information known and available to the employer? An employer who is aware of the violation and takes no action to correct it or prevent employee exposure to it has a high degree of responsibility for the violation. In general, an employer's responsibility for a violation diminishes as the evidence becomes clearer that the employer acted reasonably to protect employees given (1) the information known by or available to the employer before the violation occurred, (2) the foreseeability of the violation, (3) the employer's degree of control over the violation or employee exposure to it, and (4) the actual steps taken by the employer to protect employees from the violative condition.

(7) Any other evidence which supports or weighs against citing the employer for the violation.

b. Exposing Employer Defense

For exposing employers, compliance personnel shall additionally document answers to the following questions, to the extent that the preceding documentation does not fully answer them:

(1) Did the exposing employer create the violative condition?

(2) Did the exposing employer have responsibility or the authority to correct the violative condition?

(3) Did the exposing employer have the ability to correct or remove the violative condition?

(4) Can the exposing employer demonstrate that the appropriate employers were specifically notified, or were aware, of the violative conditions to which the employees of the exposing employer were exposed?

(5) Did the exposing employer take appropriate alternative measures, to the extent feasible, to protect employees from the violative condition, instruct the employees to recognize the violative condition, and, where necessary, inform the employees how to avoid the dangers associated with it.

G. CITATION POLICY

1. Exposing Employer -- When to Cite

Each exposing employer shall be cited for each violative condition to which that employer's employees were exposed, unless it is determined that the answers to the questions in Section F.2.b.(1) through (3) are "No", and the answers to questions F.2.b.(4) and (5) are "Yes."

2. Creating, Controlling and Correcting Employers

a. When to Cite

Each creating, controlling and correcting employer shall be cited for each violative condition as to which it has been determined, pursuant to Section F.2.a.(6), that the employer's degree of responsibility for the violative condition warrants issuance of a citation.

b. Sample Citation Allegations

The following are sample citation allegations based on the Examples in Section E. If compliance personnel issue a citation to a creating, controlling and/or a correcting employer, they shall utilize the following basic approaches:

(1) Creating Employer

"On (date) employees were exposed to scaffolding without guardrails. (Creating employer) removed the guardrails from the scaffolding at (location), which resulted in the employees of (the exposing employer) being exposed to the violation."

(2) Controlling Employer

"On (date) employees were exposed to scaffolding without guardrails, (Controlling employer) was responsible for safety and health conditions at the site (by explicit contract provisions, by other type of contract authority that directly affects safety and health, or by actual practice) and failed to protect the employees of (exposing employer) from unguarded scaffolding."

(3) Correcting Employer

"On (date) employees were exposed to asbestos which was not worked wet. (Correcting employer) was specifically designated to remove asbestos at (location) and failed to do so, resulting in the employees of (exposing employer) contacting and handling asbestos in a dry state."

(4) Combination of Creating Employer and Controlling Employer

"On (date) employees were exposed to scaffolding without guardrails. (Creating employer) removed the guardrails from the scaffolding at (location), which resulted in the employees of (the exposing employer) being exposed to the violation. The employer was also responsible for safety and health conditions at the site and failed to protect the employees of (exposing employer) from unguarded scaffolding."

NOTE: If other citation allegation formats are utilized, they shall be written as concisely as possible, consistent with the requirements of particularity. See P&P C-1B, Section B.3.

c. Penalty Calculations

When determining "extent" and "likelihood" for the purpose of penalty calculations, the total number of employees exposed to the violative condition, regardless of who is the employer, shall be used.

H. PRE-ISSUANCE CITATION REVIEW

1. Compliance Personnel

After completing the gathering of the evidence listed in Section F.2.a. and b., compliance personnel shall make a recommendation for the issuance of citations for exposing, creating, controlling and/or correcting employers to the District Manager as soon as possible following completion of the inspection.

2. District Manager

a. General

The District Manager shall review all recommendations from compliance personnel for issuance of citations to exposing, creating, controlling or correcting employers at a multi-employer worksite to determine the appropriateness of citation issuance and shall complete District review as soon as possible after receiving the citation issuance recommendations from compliance personnel.

b. Creating, Controlling and Correcting Employer

If the District Manager determines that a citation should be issued to a creating, controlling or correcting employer, the District Manager shall forward the proposed citation, along with a copy of the Documentation Worksheet (See P&P C-1B) to the Regional Manager for review and concurrence.

c. Exposing Employers

(1) When a citation is to be issued to an exposing employer at a worksite which is the subject of citations to creating, correcting and/or controlling employer, the District Manager shall forward the proposed citation, along with a copy of the Documentation Worksheet to the Regional Manager for review.

(2) The District Manager shall review all proposals not to cite an exposing employer pursuant to Section G.1. If the District Manager believes that a citation should not be issued because the employer meets the exposing employer defense, the District Manager shall consult with, and receive concurrence from the Regional Manager, before making the decision not to cite the exposing employer.

3. Regional Manager

The Regional Manager shall ensure a prompt and complete review of, and response to, all District proposals to cite a creating, controlling or correcting employer, and all District proposals not to cite an exposing employer.

I. CITATION APPEALS

Any citation issued to a creating, correcting or controlling employer, whose own employees are not exposed to the violative condition, which is appealed by the employer shall be immediately referred to the Legal Unit for representation. See P&P C-23, Section C.2.c.(1)(f).

