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## **ALL EMPLOYEES ARE CREATED EQUAL: OSHA'S NEW INITIATIVE ON TEMPORARY EMPLOYEES**

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### **I. Introduction**

Due to increasing employee benefits and health care costs, as well as employee turnover, employers are more frequently using temporary employees to address staffing shortages or an unexpected increase in production. In these situations, a workplace often has multiple employers, the host employer and the staffing agency. On April 29, 2013, OSHA announced a new health and safety initiative to protect temporary employees from workplace hazards. Based on statistical data on temporary employees suffering fatal injuries during the first days on the job, OSHA's initiative seeks to ensure temporary employees are protected from workplace hazards and are provided appropriate training. In light of this development, host employers can expect OSHA to further scrutinize their use of temporary employees and the type of training provided to those employees.

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## **II. OSHA's Multi-Employer Policy**

Section 5(a) of the Occupational Safety and Health Act broadly requires employers to furnish each of its employees a workplace free from recognized hazards and to comply with all occupational safety and health standards developed by OSHA. Thus, the Act creates two types of obligations: 1) a “general duty” obligation running *only* to the employer’s own employees; and 2) an obligation to obey all OSHA standards with respect to *all* employees, regardless of their employer.

This second obligation formed the basis for OSHA’s “multi-employer worksite policy,” under which the Agency decided it had the authority to issue citations not only to employers who exposed their own employees to hazardous conditions, but also to employers who created a hazardous condition that endangered employees, whether its own or those of another employer. This policy gave OSHA the ability to issue citations to multiple employers even for violations that did not directly affect the employer’s own employees. By 1994, OSHA’s policy instructed its compliance officers to issue citations to any employer who:

- 1) exposed its own employees to a hazardous condition (“exposing employer”);
- 2) created a hazardous condition that endangered any employer’s employees (“creating employer”);
- 3) was responsible for correcting a hazardous condition even if its own employees were not exposed to the hazard (“correcting employer”); or
- 4) had the ability to prevent or abate a hazardous condition through the exercise of reasonable supervisory authority (“controlling employer”).

Although the multi-employer doctrine has particular import on the construction industry, OSHA has continuously expanded the scope of its multi-employer worksite policy to impose

liability on all host employers, including manufacturers who subcontract out maintenance work, such as office property managers who subcontract out window cleaning and who maintain any level of control over the “means and methods” by which the subcontractor performs the actual work. For instance, OSHA has applied the multi-employer worksite policy to factory settings, where it cited the factory operator where an employee of a subcontracted cleaning company was killed while performing sanitation work at the factory. *See IBP, Inc. v. Herman*, 144 F.3d 861 (D.C. Cir. 1998). More recently, OSHA applied the multi-employer doctrine at a maintenance garage fixed-facility when an outside contractor HVAC employee suffered a fatal fall injury through a skylight while inspecting the rooftop HVAC system. *Secretary of Labor v. Ryder Trans. Servs.*, OSHRC Docket No. 10-0551 (ALJ, February 28, 2011).

### **III. OSHA’s Temporary Employee Initiative**

Under OSHA’s new temporary employee initiative, OSHA inspectors are required to inquire whether the inspected worksite has temporary employees and determine the type of hazards to which those employees may be exposed. OSHA defines a “temporary” employee to be any employee paid by a temporary help agency, regardless of whether their job is long-term or for one day.

When the inspector encounters temporary workers during the inspection, (s)he is expected to document the name of the temporary workers’ staffing agency, the agency’s location, and the supervising structure under which the temporary workers are reporting, including whether the temporary workers are supervised on a day-to-day basis by the employer or the staffing agency.

Inspectors are also to review records and conduct temporary employee interviews to determine whether temporary employees have received the required training in a language and vocabulary they can understand. In this instance, OSHA may utilize interpreters.

Finally, OSHA has created a new electronic code to denote when temporary employees are exposed to safety and health violation so OSHA can better track temporary employee exposure to hazards.

#### **IV. Effect of OSHA's Initiative On Host Employers**

OSHA's new temporary employee initiative places new obligations on host employers. Certainly, host employers should expect OSHA to treat temporary employees the same as full-time employees. Thus, host employers must now evaluate their use of temporary employees and whether those employees may be exposed to potential health and safety hazards. Further, OSHA will also likely expect host employers to provide health and safety training to all employees, no matter what the duration of the employment. This training must also be provided in the language and vocabulary the temporary employees can understand. Thus, if an employer uses a staffing company that employs a largely Hmong or Ethiopian population, the host employer may need to translate its materials into the temporary employees' native language to ensure all employees understand the training, although there currently is no regulation that requires translation of written safety policies or training materials. The employer may also have to determine whether these employees are literate and if they cannot read the employer may have to utilize interpreters to provide verbal training that the employee can understand. In other words, OSHA will require host employers to treat temporary and full-time employees the same with regards to protection from hazards and health and safety training, regardless of whether the employee is on-site for one day or one year.

## **V. Recommendations**

To avoid potential liability under OSHA's new initiative, the host employer should consider the following actions:

- Conduct a job hazard analysis to determine what job duties the temporary employees will be engaged in and what occupational hazards they may be exposed to.
- Once the job hazard analysis has been completed, determine what training must be provided to each temporary employee based on his or her anticipated job duties, skill level, and experience.
- Ensure that the language of the contract with the staffing company clearly confirms which entity has the responsibility to provide safety training and personal protective equipment (PPE) to the temporary employees.
- Analyze the staffing company's policies and training materials to determine what type of training has previously been provided and whether that training is OSHA compliant and actually request to review the documentation of this training. Unless the host employer confirms that such training has occurred, it is vulnerable to citation if it has relied on the staffing company to provide the training and no such training has occurred.
- Confirm with the staffing agency that employees being provided have the requisite skill level and experience for the anticipated job.
- Provide the temporary employees documented health and safety training, covering, at a minimum, training of all potential hazards. For instance, if a host employer anticipates an employee will be used to lift and transfer boxes, the host employer will likely want to provide safety training on proper lifting techniques. On the other hand, if the host employer expects the temporary employee to conduct maintenance on a machine(s), the host employer may consider whether it is necessary to provide the temporary employee machine specific lockout/tagout training.
- Consider translating the host employer's written training materials so that they are in the temporary employee's native language and explained in a manner easily understood.
- Enforce safety rules and discipline temporary employees for violations.

## **VI. Conclusion**

Under the Obama Administration, OSHA has more aggressively enforced compliance with workplace safety and health laws and regulations. The newly invigorated temporary employee initiative worksite policy will be another tool employed by the Agency in its mission of imposing additional obligations on host employers to ensure that all employees, temporary or full-time, are provided adequate health and safety training and protected from unsafe working conditions. Thus, host employers should more closely scrutinize their use of temporary employees and whether those employees are receiving sufficient training and protection.