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## CAL/OSHA'S CONTROLLING EMPLOYER DOCTRINE DURING THE COVID-19 CRISIS

As construction work continues in California during the COVID-19 crisis, how can construction companies ensure progress towards timely completion of their projects without jeopardizing the safety of their workers and the employees of their subcontractors? Due diligence is the key to avoiding a citation in these unprecedented times. This article summarizes Cal/OSHA's enforcement perspective for multi-employer construction sites, and provides specific safety measures aimed at keeping workers safe, and your company free from Cal/OSHA liability.

### WHAT IS THE CAL/OSHA CONTROLLING EMPLOYER DOCTRINE?

Cal/OSHA considers most construction sites in California "multi-employer worksites," where more than one employer and their employees work at the same time. Cal/OSHA has a broad and sweeping policy of enforcing its safety regulations against multiple contractors on the same construction worksite.

According to Cal/OSHA, there are four types of citable employers on multi-employer worksites: the exposing employer, the creating employer, the controlling employer, and the correcting employer. The most troubling of these categories is the "controlling employer," viewed by Cal/OSHA as the employer (usually the general contractor or construction manager) responsible for safety and health conditions at the worksite and who has the authority to correct violations.

Evidence of an employer's "control" can be demonstrated in three ways:

- (1) Explicit contract provisions pertaining to worksite safety;
- (2) Any type of contract authority that directly affects worksite safety; and
- (3) Actual practice.

For example, Cal/OSHA states: "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." Cal/OSHA's primary example of an "actual practice" in a controlling employer situation is "when a general contractor makes it a routine practice to order subcontractors to make changes in their work practices, including the correction of safety hazards."

### LIABILITY IS NOT AUTOMATIC, AND DUE DILIGENCE IS THE BEST DEFENSE

Controlling employer and related liability is broad, but it is not strict liability. Due diligence is a defense. In this regard, the longer an employer is aware of a violation without correcting it, and the more foreseeable the violation, the greater an employer's risk of a citation. 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 an employer's industry, and those which have existed for a substantial period of time at the worksite. Ultimately, Cal/OSHA determines whether a contractor took reasonable steps to protect employees given the information known and available to the employer. An employer who is aware of a violation and takes no action to correct it →

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## IMPORTANT LINKS

### **State of CA Department of Industrial Relations:**

<https://www.cdc.gov/coronavirus/2019-ncov/>

### **Centers for Disease Control and Prevention:**

<https://covid19.ca.gov/>

### **U.S. Department of Labor:**

<https://www.dol.gov/newsroom/releases/osha/osha20200309>

### **OSHA Guidance on Preparing Workplaces for COVID-19:**

<https://www.osha.gov/Publications/OSHA3990.pdf>

### **Labor & Workforce Development Agency:**

<https://www.labor.ca.gov/coronavirus2019/>

### **State of CA Department of Industrial Relations:**

<https://www.dir.ca.gov/dosh/coronavirus/General-Industry.html>

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or prevent employee exposure, is more likely to be responsible. By contrast, the more evidence there is that an employer acted reasonably to protect employees, the less likely a controlling employer-related citation will stand. The key to defending yourself here will be to show the actual and specific steps you took to protect employees from a known violative condition.

## DUE DILIGENCE DURING THE COVID-19 CRISIS

Subject to the unique features of each of your construction projects, here is a list of some enhanced safety practices that will help demonstrate due diligence:

- Adequate gloves and other personal protective equipment;
- Safety meetings of 10 people or less, held in the open air/outdoors whenever possible;
- Distancing protocols to eliminate crowding, including during safety meetings;
- Adequate hand-washing stations;
- Encouraging frequent hand-washing, including ensuring adequate water for this purpose at all times;
- Additional disinfecting cleaning supplies;
- Restricting visitors;
- Trailers should be restricted and office staff should work remotely;
- Certain supervisors or other workers can consider working from their trucks even when on site;
- Staggered shifts;
- Pre-screening questioning;
- Employees who test positive or exhibit symptoms of COVID-19 should be sent home immediately and asked to self-quarantine for at least 14 days. Employers should monitor employees' progress to determine when returning to work is sensible;
- Provide written notice to all employees who worked near or with the individual sent home, without identifying the individual's name or other personal information;
- Obtain medical certification before returning employees to work;
- Carefully track and document all absences and leave requests, including the reasons provided for each;
- Record and/or report the case if required under Cal/OSHA regulations;
- Clean and sanitize as necessary under CDC and other public health guidelines; and
- Maintain a written policy about COVID-19 that is accessible to all workers.

## CONTINUE TO FOLLOW THE GUIDANCE OF CAL/OSHA, FEDERAL OSHA, AND PUBLIC HEALTH AGENCIES

As new details and guidance become available, please visit [ftblaw.com/COVID-19](http://ftblaw.com/COVID-19) for links to important agency information. Finch, Thornton & Baird, LLP, continues to monitor the fast-changing legal landscape for your workplace during these unprecedented times. ■

For more information, please contact Chad T. Wishchuk, Esq. or Marlene C. Nowlin, Esq. at (858) 737-3100.

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