



# The Unforeseeable Employee Misconduct Defense to an OSHA Citation and OSHA's Multi-Employer Worksite Doctrine

Philip J. Siegel, Esq.

HENDRICK, PHILLIPS, SALZMAN & SIEGEL  
230 Peachtree Street, N.W.  
Suite 2500  
Atlanta, Georgia 30303  
pjs@hpsslaw.com  
(404) 522-1410 ext. 141



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# The Unforeseeable Employee Misconduct Defense



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## New Maximum Penalty Amounts

- **2022 Serious Violations: \$14,502**  
(was \$7,000)
- **2022 Repeat and Willful Violations: \$145,027**  
(was \$70,000)
- **Adjusted Annually**



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## The Unforeseeable Employee Misconduct Defense

### Four Elements:

- ✓ **Work rule**
- ✓ **Training**
- ✓ **Self-inspections**
- ✓ **Effective discipline**



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## First Element: Work Rules

- Consider your safety manual
- Language
- Acknowledgment of receipt



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## Second Element: Training

- Document!
- Identify the topics covered
- Focus on most common hazards
- Create an attendance sheet
- Provide re-training when necessary



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## Third Element: Job Site Audits

- Random
- Document!
- Frequency
- Who's in charge?



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## Fourth Element: Discipline

- Be prompt
- Effectiveness
- Document!



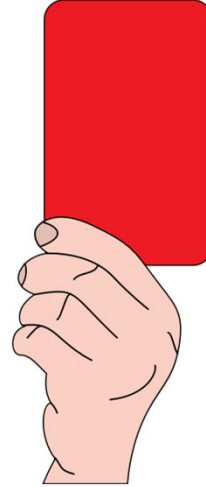
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## Supervisory Misconduct

- Consider the “knowledge” issue
- Key considerations:
  - ✓ Length of employment
  - ✓ Safety history
  - ✓ Training
  - ✓ Oversight



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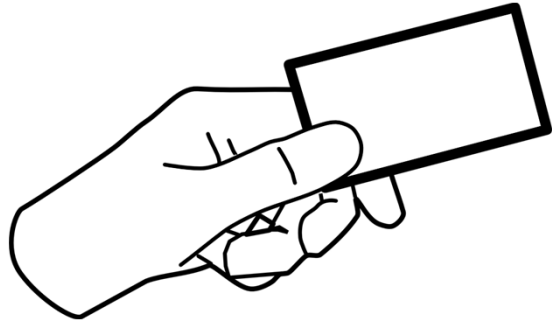
## OSHA's Multi-Employer Worksite Doctrine



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## OSHA's Multi-Employer Worksite Doctrine

- You can be cited as:
  - ✓ The creating employer
  - ✓ The exposing employer
  - ✓ The correcting employer
  - ✓ The controlling employer



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## The Creating Employer

- Creates the hazard
- Employee exposure not required
- Duty: not to create violative conditions



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## The Exposing Employer

- Employees are exposed
- Consider temporary employees
- “Exposure” is access to the zone of danger or reasonably anticipated access to the zone of danger
- Duty of the exposing employer depends on whether the employer also created the hazard or had authority to correct it



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## The Correcting Employer

- The correcting employer has responsibility for correcting a hazard
- The hazard may have been created by another employer
- Employee exposure not required
- Correcting employers must exhibit reasonable care in preventing and discovering violations
- Discovered violations must be corrected

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## The Controlling Employer

### You can be cited as the controlling employer if:

- ✓ You exercise sufficient control over the worksite to prevent or detect and abate a hazardous condition created by a subcontractor
- ✓ You could reasonably be expected to prevent violations due to your supervisory authority and control of the worksite



## The Controlling Employer

### Liability can be avoided if:

- ✓ You are exercising reasonable care to prevent and detect violations
- ✓ Standard of care
- ✓ What is reasonable?
- ✓ Consider: the scale of the project, nature and pace of the work, knowledge of work practices of subs





## The Controlling Employer

### Are you doing the following?

- ✓ Conducting safety inspections of subcontractors
- ✓ Where violations are discovered, are subcontractors penalized?
- ✓ What steps are taken by the company to ensure discovered violations are abated?



## Questions?



## Presented by

Philip J. Siegel, Esq.  
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## Complete the Online Evaluation



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