

## Fifth Circuit Upholds OSHA's Multi-Employer Citation Policy

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The Fifth Circuit has now joined the seven other Courts of Appeals that have rejected challenges to the Occupational Safety and Health Administration's ("OSHA") [Multi-Employer Citation Policy](#). In *Acosta v. Hensel Phelps Constr. Co.*, a unanimous panel overruled decades-old precedent to hold that OSHA has authority under the Occupational Safety and Health Act of 1970 "to issue a citation to a general contractor at a multi-employer construction worksite who controls a hazardous condition at that worksite, even if the condition affects another employer's employees." *Acosta v. Hensel Phelps Constr. Co.*, No. 17-60543, 2018 WL 6168044, at \*1 (5th Cir. Nov. 26, 2018).

The decision has important implications within the Fifth Circuit (Texas, Mississippi, and Louisiana). OSHA may now rely on the Multi-Employer Citation Policy to cite employers for hazardous conditions that endanger their sub-contractors or other non-employees. This shift broadens the scope of potential liability for employers who control multi-employer worksites. Affected employers should carefully consider their responsibilities under the Multi-Employer Citation Policy and verify they are providing the appropriate duty of care to non-employees who may be exposed to hazardous conditions.

### Background

The City of Austin contracted with a general contractor to build a new public library. The general contractor hired a subcontractor for certain work, including some excavation at the worksite. During a safety inspection, OSHA found the subcontractor's employees working beside an excavated wall without required protection from cave-in hazards. Despite safety concerns raised by the subcontractor, the general contractor gave instructions to continue work. Relying on the Multi-Employer Citation Policy, OSHA issued the general contractor a willful citation even though none of the company's employees was exposed to the hazard.

The Multi-Employer Citation Policy is a directive covering workplace violations that involve multiple employers. The policy permits the agency to cite employers who are "controlling," "exposing," "creating," or "correcting" safety hazards. Each category of employer is described in detail by the

policy through illustrative examples. Under the policy, employers owe different duties of care to certain non-employees depending on the employer's responsibility for the hazardous condition.

## **Fifth Circuit Sides With OSHA**

The contractor appealed the citation to the Occupational Safety and Health Review Commission. The Commission noted that the citation would ordinarily be upheld. Applying Fifth Circuit precedent, however, the Commission held that an employer could not be liable for an OSHA violation for a subcontractor's employee's exposure to a hazardous condition. *Hensel Phelps Constr. Co., Respondent.*, 26 O.S.H. Cas. (BNA) ¶ 1773 (O.S.H.R.C. A.L.J. Apr. 28, 2017).

OSHA appealed the Commission's decision to the Fifth Circuit seeking to overturn long-standing precedent that had precluded use of the Multi-Employer Citation Policy. Applying *Chevron* deference, the court sided with OSHA's interpretation that the Occupational Safety and Health Act grants the agency authority to cite controlling employers at multi-employer worksites.

The court reasoned that at a multi-employer worksite only the general contractor has supervisory authority and thus should bear the burden of complying – and directing its subcontractors to comply – with OSHA's requirements. The panel also distinguished as obsolete prior case law that precluded application of the Multi-Employer Citation Policy because those cases arose prior to *Chevron*.

## **Implications**

Employers in the Fifth Circuit who control multi-employer worksites must now carefully consider the duty of care owed to subcontractors and other non-employees. The Multi-Employer Citation Policy outlines detailed guidance on what degree of oversight employers must provide non-employees based on their degree of control over a safety hazard. Employers should expect OSHA to immediately begin relying on the Multi-Employer Citation Policy to cite employers at multi-employer worksites in Texas, Louisiana, and Mississippi.

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