



2019 INDIANA SAFETY AND  
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# Safety in the “Gig” Economy

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## Overview

- ▶ DOL has made employment of contingent workers a focus of enforcement activity for both safety/health reasons and also compliance with FLSA and other labor laws
- ▶ OSHA established special webpage concerning temporary workers: [https://www.osha.gov/temp\\_workers/](https://www.osha.gov/temp_workers/)
- ▶ NACOSH also has temporary worker task group to make recommendations to OSHA and NIOSH (e.g., research) – currently idled
- ▶ Report by Center for Progressive Reform (CPR), “At the Company’s Mercy: Protecting Contingent Workers from Unsafe Working Conditions,” drew attention to mortality/morbidity issues  
[http://www.progressivereform.org/articles/Contingent\\_Workers\\_1301.pdf](http://www.progressivereform.org/articles/Contingent_Workers_1301.pdf)



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## BLS Contractor Fatality Data

- ✓ Fatal work injuries involving contractors accounted for 542 of the 4,693 fatal work injuries reported (12 percent).
- ✓ Texas (56), Florida (51), and California (42) recorded the highest number of fatal occupational injuries among contractors.
- ✓ Nearly 1 in 4 of the fatal work injuries involving contractors occurred when a government entity had contracted the decedent, including 50 fatal injuries in state government, 47 in local government, and 11 in federal government.
- ✓ Private construction contractors accounted for 21 percent of contractor fatalities.
- ✓ Falls to lower level accounted for the highest number of fatal work injuries involving contractors (170, or 31 percent), while another 72 incidents resulted from pedestrian vehicular incidents, including 44 incidents involving contractors who were struck by a vehicle in a work zone.
- ✓ Hispanic or Latino contractors accounted for 28 percent of the fatal work injuries among contractors, well above their 16 percent share of the overall fatal work injury total.



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## Risk Management Issues

- Often no worker's comp exclusive remedy available for injuries to workers in "gig" economy – so can bring personal injury and wrongful death actions against host employer or GC
  - But watch for contract waivers for workers classified as "contractors" or "franchisees"
- MSHA/OSHA citations can be introduced in some state tort actions to prove "negligence *per se*."
- Agencies work cooperatively with Plaintiff's attorneys to share information and establish "fault"
- This simplifies a plaintiff's burden of proof on "duty" and "breach" elements of negligence case.
- Negligence *per se* allows the plaintiff to prove the defendant's "breach" of a duty of care



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## Multi-Party Worksite Risk Management

- Why is risk management critical?
- Tort liability considerations
- OSHA citations in multi-employer worksites
  - *Hensel Phelps* case – 5<sup>th</sup> Cir.
  - Similar multiple citation authority under MSHA “strict liability” framework for work at cement plants, stone quarries, sand plants, metal and coal operations
- Maximum OSHA penalty is now \$132,598; MSHA maximum is \$266,275 per violation
- Worker’s compensation issues
- Loss prevention
  - Contractors are disproportionately represented in OSHA fatality cases!



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## Types of Contingent Workers

- ▶ Hired from “temp” agency (LaborReady, Manpower, Kelly etc.) where worker is paid by agency and employer pays agency set rate – benefits and taxes paid by agency.
  - ▶ Issues include: who provides training, who reports injuries to OSHA/MSHA, who provides supervision.
- ▶ Hired through union hiring hall
  - ▶ Training or licensure may be provided through union but documentation to hiring employer may be lacking
- ▶ Migrant workers in farming ... And others who hold Temporary VISAs
  - ▶ Employers may have to ensure payment for fixed period of time
- ▶ Hired “independently” (often in construction ... daily or periodic basis ... workers congregate in “parking lots” etc.)
  - ▶ Many “undocumented” workers fall into this category
- ▶ True independent contractors – meet IRS factors and have true autonomy in providing services to multiple entities.



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## Who Is Accountable?

- ▶ In OSHA's eyes, the host employer/GC is fully accountable but additional citations may issue in duplicate to subs or temp agency.
- ▶ Both entities can be cited for failure to provide worker training, personal protective equipment (PPE), and oversight of safe work practices
- ▶ Big issue is who documents training ... and whether such documents will be available if needed during OSHA/MSHA inspection and accident investigation
- ▶ Contract provisions that incorporate ANSI A10.33 may also be enforceable under OSHA's General Duty Clause (Sec. 5(a)(1) of the OSH Act)
- ▶ OSHA has formed alliance with American Staffing Association to address issues proactively. Annual Activity Report issued 10/31/2018.



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## Issues Concerning Contingent Workers

- Often centralized in construction, agriculture, warehouse, manufacturing, oil/gas, and mining.
- CPR report reveals that contingent workers are:
  - disproportionately racial minorities,
  - may not be fluent in English, and
  - often come from vulnerable socio-economic backgrounds
    - Afraid to report safety or labor law violations or to refuse to do an unsafe act
    - May be threatened with retaliatory deportation ...



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## Misclassification Issues: Contractor v. Employee

### IRS “Economic Realities” Test for Contractors:

- ✓ Instructions/Training
- ✓ Whether Services Rendered are Personal
- ✓ Whether Location is Specified
- ✓ Continuing Relationship
- ✓ Set Hours of Work
- ✓ Method of Payment
- ✓ Whether tools and materials provided
- ✓ Services available to general public or multiple employers
- ✓ Right to Discharge or to Terminate Relationship



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## Recordkeeping Issues

- ▶ OSHA has issued guidance document:  
[https://www.osha.gov/temp\\_workers/OSHA\\_TWI\\_Bulletin.pdf](https://www.osha.gov/temp_workers/OSHA_TWI_Bulletin.pdf)
- ▶ Staffing agency and host employer are “JOINT EMPLOYERS” of individual but injuries and illnesses should be recorded on only one employer’s injury and illness log. 29 CFR 1904.31(b)(4)
- ▶ Under 1904.31(b)(4), the employer who provides “day-to-day supervision” must record the injury or illness of temporary employees, but on one of them. It varies as to who takes that responsibility.
- ▶ The non-supervising employer (generally the staffing agency) still shares responsibility for its workers’ safety and health.
- ▶ Staffing agency should maintain frequent communication with workers and the host to ensure that injuries and illnesses are properly reported
- ▶ To assign responsibility, OSHA will scrutinize day-to-day supervision:
  - ▶ Day-to-day supervision occurs when “in addition to specifying the output, product or result to be accomplished by the person’s work, the employer supervises the details, means, methods and processes by which the work is to be accomplished.”



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## GDC and Contractors/Temps

- OSHA’s “General Duty Clause”
  - Section 5(a) of the OSH Act requires each employer to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” 29 U.S.C. § 654 (a)(1).
  - Pending legislation (PAW Act – HR 1074 – introduced 2/7/19) would permit OSHA to site a host employer for a contractor’s violation of the General Duty Clause.



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## Hazard Communication Standard

- ▶ Both the temporary agency and the host employer are responsible for ensuring that employees are effectively informed and trained regarding exposure to hazardous chemicals per *Inspection Procedures for the Hazard Communication Standard, 29 CFR § 1910.1200, CPL 02-02-038*.
- ▶ The host-employer holds the primary responsibility for training since the host employer uses or produces chemicals, creates and controls the hazards, and is best suited to inform employees of the chemical hazards specific to the workplace environment.
- ▶ The temporary agency, in turn, maintains a continuing relationship with its employees, and is, at a minimum, expected to inform employees of the requirements of the standard.



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## PPE & Medical Surveillance

- ▶ Personal Protective Equipment (PPE) –
  - ▶ Host employers are responsible for providing PPE for site-specific hazards to which employees may be exposed.
  - ▶ Host employer may specify the services that it wants the lessor employer (agency) to supply, including provision of PPE.
  - ▶ Contracts should clearly describe the responsibilities of both parties in order to ensure that all requirements of OSHA's regulations are met.
- ▶ Host employer must offer and perform the required medical surveillance or evaluations.
- ▶ The lessor employer (agency or union) must ensure that the records of the required medical surveillance or evaluations are maintained in accordance with the appropriate OSHA standards.
- ▶ Temp agency must maintain cumulative exposure data (eg. 30 day lead exposure, 6 months noise exposure, etc.), when the employee works for several different companies during the year.



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## Statistical Data - Construction

- ▶ CPR report indicates that 28 percent of construction workers are now employed on a “contingent” basis.
- ▶ BLS data show that these contingent workers earn about 33-percent less per hour than the average for the industry, and often only a few days of work are available per week.
  - ▶ Just 15 percent of contingent workers in construction had health insurance, compared to 58 percent of wage-and-salary workers in the sector.
- ▶ 19 percent of contingent workers in construction surveyed reported that they suffered work-related injuries that required medical treatment—well above the 6-percent rate for all construction workers.
  - ▶ Insufficient training is a major reason for high injury and fatality rates among contingent workers



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## Statistical Data - Warehousing

- ▶ According to CPR data, nearly 1 in 7 warehouse workers in NJ reported having an on-the-job injury
- ▶ Fatality rate in warehousing and storage is nearly twice the national average.
- ▶ Nonfatal injury and illness rates are also higher than average, a rate of 5.8 injuries per 100 workers in 2010.
- ▶ 31 percent of such workers never reported being injured (perhaps due to the short-term nature of the relationship with the employer), but 29 percent who did report injuries said they were disciplined or fired as a result



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## Anti-Discrimination Provisions

- ▶ Sec. 11(c) of OSH Act protects temporary workers, too.
- ▶ Both host employers and agencies are prohibited from discriminating against workers for exercising their rights under the OSH Act. The PAW reinforces this provision.
- ▶ These rights include reporting an injury or illness, filing an OSHA complaint, participating in an inspection or talking to an inspector, seeking access to employer exposure and injury records, and raising a safety or health complaint with the employer.
- ▶ There also can be no discrimination against workers in terms of denial of bonuses or compensation in incentive/discipline programs.
- ▶ OSHA new policies on drug testing of injured workers applies to temp workers too ... but contractual requirements may supersede other restrictions



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## Employment & Tax Issues

- ▶ Workers employed on such an informal basis may be viewed by the US Department of Labor and the Internal Revenue Services as being “misclassified” as independent contractors (1099 workers) instead of employees (W-2 workers).
  - ▶ Some states, such as Maryland and PA, now fine employers for such misclassification
- ▶ Other consequences include the requirement to make retroactive tax contributions on behalf of the worker
  - ▶ any contingent workers who are hired outside a temporary agency relationship must either be brought on as actual employees, with all benefits and protections, or else
  - ▶ should sign a waiver acknowledging their independent contractor status and agreement to provide their own worker’s compensation coverage and pay their own tax contributions.
  - ▶ Otherwise, an audit may ensue that will make OSHA inspections look mild by comparison!



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## CPR Report Recommendations

- ▶ OSHA should establish rules to ensure that employers:
  - ▶ provide all workers with a minimum level of job task training and site-specific hazard training,
  - ▶ provide appropriate PPE, and
  - ▶ inform workers about the methods for reporting hazards and injuries.
- ▶ OSHA should conduct enforcement “sweeps” of industries where it finds contingent workers are prevalent, issuing enhanced penalties against employers with large numbers of contingent workers who fail to make special provision for inclusion of those workers within the companies’ safety and health programs.
- ▶ OSHA should improve its foreign language capabilities so its enforcement officers can converse freely (and privately) with non-English speaking contingent workers concerning working conditions and worker rights.
- ▶ Bar employers from VPP if an applicant uses significant numbers of contingent workers in high-hazard jobs.



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## OSHA Guidance on Contingent EEs

- ▶ A key concept is that each employer should consider the hazards it is in a *position to prevent and correct*, and in a position to *comply* with OSHA standards.
  - ▶ E.g., staffing agencies might provide general safety and health training, and host employers provide specific training tailored to the particular workplace equipment/hazards.
- ▶ The key is *communication* between the agency and the host to ensure that the necessary protections are provided.
- ▶ Staffing agencies have a duty to inquire into the conditions of their workers' assigned workplaces.
- ▶ Ignorance of hazards is not an excuse – while staffing agencies need not become experts on specific workplace hazards, they should determine what conditions exist at their client (host) workplaces, what hazards may be encountered, and how best to ensure protection for the temporary workers.
- ▶ The staffing agency has the (general) duty to inquire and *verify* that the host has fulfilled its responsibilities for a safe workplace.
- ▶ And, just as important: Host employers *must treat temporary workers like any other workers* in terms of training and safety and health protections.



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## OSHA Multi-Employer Citations

- ✓ **OSHA has Multi-Employer Policy – recently upheld by US Ct of Appeals in 2018 Hensel Phelps case (5<sup>th</sup> Cir)**
- ✓ **Agency will cite employers in any of four categories:**
  1. Controlling Employer
  2. Creating Employer
  3. Exposing Employer
  4. Correcting Employer



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## The Hensel Phelps Case

- ✓ Sub-Subcontractor's employees were exposed to a cave-in hazard from an unprotected excavation. Subcontractor was not cited even though they had demanded employees work at the excavation.
- ✓ OSHA cited HP (GC) and the Exposing Employer. Case was tried on stipulated facts.
- ✓ ALJ vacated the citation against HP because of a prior case in the 5<sup>th</sup> circuit that ruled "OSHA regulations protect only an employers' own employees." The precedent supporting HP case was pre-Chevron.
- ✓ 5<sup>th</sup> circuit engaged in a thoughtful legal analysis and overruled its prior precedent **upholding** OSHA's multi-employer policy.



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## OSHA Multi-Employer Citations

### Controlling Employer:

- "General supervisory authority over the worksite"
- Includes the power to correct safety and health violations or require others to correct them.
- Control can be established by contract or by exercise of control in practice.

### Creating Employer:

- Party causing a hazardous condition that violates an OSHA standard.
- Employer is citable even if the only exposed employees are those of other employers.



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## OSHA Multi-Employer Citations

### Exposing Employer: One

whose own employees are exposed to the hazard.

- Exposing employer can be cited if fails to
  - (1)ask the creating/controlling employer to correct the hazard;
  - (2)inform its employees of the hazard; and/or
  - (3)take reasonable alternative protective measures and remove its employees from the hazardous area.

### Correcting Employer:

- "Engaged in a common undertaking on the same worksite, as the exposing employer and is responsible for correcting a hazard."
- Usually occurs where an employer is given the responsibility of installing and/or maintaining particular safety/health equipment or devices.
- Controlling and correcting employers often are a single entity.



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## MSHA Contractor Policy

- Enforcement action against a production-operator for violation(s) involving an independent contractor is taken:
  - (1)when the production-operator has contributed by either an act or by an omission to the occurrence of a violation in the course of an independent contractor's work;
  - (2)when the production-operator has contributed by either an act or omission to the continued existence of a violation committed by an independent contractor;
  - (3)when the production-operator's miners are exposed to the hazard; or
  - (4)when the production-operator has control over the condition that needs abatement. In addition, the production-operator may be required to assure continued compliance with standards and regulations applicable to an independent contractor at the mine.



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## Statutory Employer Laws

### Statutory Employer Law Overview

- Worker's Compensation is an exclusive legal remedy for workplace injuries/illnesses incurred by employees (with some exceptions).
- State statutory employer laws may extend coverage to contractors/subs and bar tort actions if WC is provided.
- Some worksites have WC wrap-up programs that give contractors more authority to demand safety programs or activities since they are paying the bills.



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## Statutory Employer Laws

Analyze by considering:

- Whether the contractor's employee is performing work that is a part of the owner's trade, business or occupation, or
- Whether the subcontractor's employee is performing work that is not part of the owner's trade, business or occupation, but is part of the work that the general contractor agreed to perform for the owner.



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## Tort Liability Considerations

- Negligent supervision and negligent training cases presume that an employer is subject to liability for negligent acts of its supervisors and/or trainers where it knows or should have known that its employee's conduct would subject third parties to an unreasonable risk of harm.
- It is critical to document the training given to contract workers, training directions provided to outside contractors, and to determine the line of supervision appropriate to each part of a particular project and each work area.



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## Solutions: Prequalification

Liability exposure can be minimized by prequalifying contractors and staffing agencies, and reviewing their safety “track record”

The following steps are critical to ensuring a safe multi-employer worksite:

- *Knowledge of the particular worksite’s practices and procedures,*
- *A diligent evaluation of the safety programs, practices and track record of the general contractor and all subcontractors involved in a project,*
- *A company-wide policy for contractor utilization, written contracts that implement the policies and provide for enforcement, and,*
- *Procedural guidelines for use in contractor selection, orientation, auditing and contract enforcement.*



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## Prequalification Criteria

- Other considerations –
  - OSHA 300 Log (or MSHA 7000-1 forms) and Worker's Comp EMR
  - Technical/professional certifications of contractor personnel (licenses, permits, bonding)
  - Corporate involvement in trade organizations and professional safety organizations; and
  - Verification of references.



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## Contractual Requirements

- Terms and conditions in the contract should clearly state that all laws and regulations will be substantially complied with. Include:
  - Comply with provisions of 30 CFR Parts 1-199.
  - Comply with provisions of 29 CFR, Part 1910 and/or 1926.
  - Comply with State and local regulations pertaining to personnel safety that apply to the work or service the contractor is providing.
  - Address PPE and other relevant issues
  - ANSI A10.33 (S&H Management Programs for Multi-Employer Worksites)
  - Indemnification provisions



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## Temp & Contractor Orientation

- Ensure that all required general training to “qualify” contingent and contractor employees has been provided and completed prior to the start of work (preferably by outside agency for liability reasons)
  - Ideally, medical evaluation & fit testing for persons who must wear respirators will be done in advance, but must be on make/model to be used
- Provide orientation to site-specific requirements and ensure that they understand the worksite systems
- Contractors should be responsible for furnishing all tools and equipment needed for the contracted work activity.
- Use of Company tools and equipment by Contractors should not be allowed except when no practical alternative exists.
- ***Tools/equipment must be inspected before being given to contractor/temp, ensure task training on use, and reinspect for damage after use!***
- Any use of Company tools and equipment should be properly documented
- Remember that contingent workers may be subject to same rules as “permanent employees” in eyes of OSHA/MSHA!



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## On-Site Activities

- Contractor/contingent workers should be responsible for maintaining good housekeeping at all of their work areas
- Contractor/contingent workers should conduct the mandated workplace examinations each shift for their unique active work areas and notify host employer if there are any site-specific hazards that need correction (e.g., unsafe trenches, deficient berms)
- Contractors and temps should notify host employer immediately if any “accident” occurs to make sure that OSHA/MSHA are timely notified
- Host employer should intercede if its personnel observe any safety hazards that pose an imminent danger
  - For less serious violations, host employer should immediately notify contractor’s crew supervisor (if present) and request “cease,” “correct” or “leave”



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## Conclusion

- Failure to forge a safety partnership prior to initiation of work, and a lack of clear role delineation and legal responsibilities and status can mean disaster for the host employer or “GC”;
- Use of contingent workers and contractors complicates worker’s compensation and insurance claims, and may subject the employer and its agents to criminal prosecution.
- Misclassification of workers as “contractors” instead of employees can result in heavy fines, back wages, and IRS audits
- Contractor and Contingent Worker Risk Management is critical to workplace safety and to legal liability reduction.
- Prequalification of contractors can help weed out “bad actors” and minimize exposure to citations and third party tort litigation.
- Coordination of safety efforts is key to protecting all persons at an employer’s workplace.



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## Questions???

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