

MARCH 2, 2012

## OSHA Outlook 2012 Multi- Employer Liability Exposure

**In 2011, OSHA made it well known that it was inspecting construction sites with a new lens: an extremely clear and focused one.** OSHA citations for egregious and significant violations hit a ten-year high in the 2011 fiscal reporting year. Stringent application of its regulations is expected to continue in 2012, in part because of a recent D.C. Circuit decision likely to reinvalidate multi-employer liability citations.

Multi-employer liability for hazardous conditions has been a safety concern since 1971. At that time, OSHA determined that an employer, especially on construction site projects, was liable for a hazardous condition in violation of OSHA regulations even when its employees were not exposed to the danger. In 1976, OSHA narrowed its definition of multi-employer liability to include those situations where an employer could reasonably be expected to prevent or remedy the hazard or where the employer's supervisory position gave it controlling authority over the location.<sup>1</sup> This narrowed definition remained undisturbed until 2007 when a Commission majority attempted to

<sup>1</sup> There are four categories of multi-employer liability for a hazardous condition: (i) creating employer who caused the danger; (ii) exposing employer who permitted worker vulnerability to the danger; (iii) correcting employer responsible for abating the danger; and (iv) controlling employer with supervisory authority over the worksite.

invalidate multi-employer liability altogether. Although the Commission's attempt failed, it was hardly a resounding win for OSHA. The Commission's arguments against OSHA's long-standing precedent for multi-employer liability had a chilling effect on citations for several years.

In *Summit Contractors, Inc.*, No. 10-1329, 2011 U.S. App. LEXIS 25011 (D.C. Dec. 14, 2011), OSHA's multi-employer liability policy was finally reexamined. This time, however, OSHA received the validation it had hoped for since 2007. In *Summit*, the general contractor had been cited under multi-employer liability for failing to provide ground fault circuit interrupters ("GFCI") for outlets used to power electrical tools. The general contractor disputed the citation because none of its employees were exposed to the potential electrical hazard.

The Court of Appeals disagreed because the general contractor was both a creating employer and a controlling employer. The Court found that the general contractor was the creating employer because it purchased outlets without GFCI; it was the controlling employer because, had the general contractor acted with reasonable diligence, it would have identified the improper equipment.

# LABOR & EMPLOYMENT LAW ALERT

---

The general contractor was responsible for inspecting the site and, therefore, was liable for the hazardous condition.

By upholding the multi-employer citation issued to the controlling employer, the Court signaled support for OSHA's broad interpretation of its policy. Employers, especially general contractors, should take note that they may be held liable for hazardous conditions if they are responsible

for the inspections that should find the violation, even if none of their employees are on site. To help protect against the broad application of multi-employer liability, employers should: (i) review all contract and subcontracts to confirm their responsibility for site inspection; (ii) re-examine their safety programs, including inspection procedures and policies, and (iii) develop clear reporting and documentation procedures with subcontractors. ■

*For more information about any of the topics covered in this issue of the Labor and Employment Law Alert, please contact:*

*Jed L. Marcus  
jmarcus@bressler.com  
973.966.9678*

*Michael T. Hensley  
mhensley@bressler.com  
973.660.4473*

*Tracey Salmon-Smith  
tsmith@bressler.com  
973.660.4422*

*Andrée Peart Laney  
alaney@bressler.com  
973.245.0686*

*Dennis Kadian  
dkadian@bressler.com  
973.660.4456*

*Emily J. Wexler  
ewexler@bressler.com  
973.660.4470*

---

**For more information about any of the topics covered in this issue of the Labor and Employment Law Alert, please contact:**



*Jed L. Marcus*



*Michael T. Hensley*



*Tracey Salmon-Smith*



*Andrée Peart Laney*



*Emily J. Wexler*



*Dennis Kadian*

The information contained in this Client Alert is for general informational purposes only and is neither presented nor intended to constitute legal advice or a legal opinion as to any particular matter. The reader should not act on the basis of any information contained herein without consulting first with his or her legal or other professional advisor with respect to the advisability of any specific course of action and the applicable law.

The views presented herein reflect the views of the individual author(s). They do not necessarily reflect the views of Bressler, Amery & Ross, P.C. or any of its other attorneys or clients.

17 State Street  
New York, NY 10004  
212.425.9300

325 Columbia Turnpike  
Florham Park, NJ 07932  
973.514.1200

2801 SW 149th Avenue  
Miramar, FL 33027  
954.499.7979

[www.bressler.com](http://www.bressler.com)

©2012 Bressler, Amery & Ross, P.C.  
All rights reserved.

ATTORNEY ADVERTISING