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Do OSHA Regulations Apply to Independent Contractors?

In a 2001 standard interpretation letter, Russell Swanson, then-director of OSHA's Directorate of Construction, made it clear that self-employed workers are not subject to OSHA's construction safety standards.

"If a construction worker is truly self-employed — is not an employee — and has no employees working for him or her, OSHA has no authority to require that individual to abide by OSHA construction requirements," Swanson wrote.

That seems simple enough. After all, the construction safety standards devised and enforced by the Occupational Safety and Health Administration were built to protect *employees*. Independent contractors aren't employees, as any tax professional will tell you.

But what about subcontractors working under a general contractor? What about equal partners on the same job site?

The issue is simultaneously more complex and more simple than we often make it out to be. It's simple because you can sort of boil down which businesses OSHA covers based on a single part of a single law; it's complex because the definition of the term "employee" is complex, and there are other mitigating factors to consider.

Here's what you need to know to figure out if you or your company must comply with the OSHA construction standards to the letter, or if you can implement your own safety protocols, instead.

The General Duty Clause

Let's start simple. The General Duty Clause of the OSH Act of 1970, which expresses the purpose and spirit of all OSHA safety regulations, tells us who these standards apply to: "Each employer."

What must these employers do? They must "furnish to each of [their] 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 [their] employees."

Furthermore, employers are required to "comply with occupational safety and health standards promulgated under this Act." That's the part that tells us who's required to follow the regulations set forth by OSHA.

So there's the short answer: According to the General Duty Clause of the OSH Act of 1970, every employer has to follow the OSHA rules. And what's an employer? It's someone who employs employees.

And that's where the confusion begins.

Defining “Employee” and “Employer” According to OSHA

The OSH Act does define the terms “employer” and “employee,” although, in the end, the legal definitions don’t help contractors figure out how responsible they are for certain OSHA standards. The legal definitions in the OSH act are as follows:

- “The term ‘**employer**’ means a person engaged in a business affecting commerce who has employees, but does not include the United States (not including the United States Postal Service) or any State or political subdivision of a State.”
- “The term ‘**employee**’ means an employee of an employer who is employed in a business of [the] employer which affects commerce.”

The problem here is that not everyone who works on a construction site will be considered an “employee,” a fact that every contractor knows only too well. So what separates independent contractors from employees? They’re both “employed in a business...which affects commerce.”

The OSH Act is silent on this question, leaving the courts to draw the final lines between employers — who are covered by OSHA standards — and contractors, for whom the issue is less clear.

Separating the Self-Employed Independent Contractor from the Employee

Depending on the statute in question, the U.S. legal system may use any one of three methods to determine whether a worker is an employee or an independent contractor: the Common Law Test, the Economic Reality Test, or a hybrid of the two. For instance, the IRS tends to use the Common Law test to determine whether employers must withhold taxes from paychecks, which is mandatory for employees, but not for independent contractors.

Because OSHA is a division of the Department of Labor, which typically tests worker-designation claims against the Economic Reality Test, contractors should pay special attention to this particular set of factors.

Regardless of the Federal law in question, each of these worker-designation tests are designed to answer the same question: Who is in control of the worker’s work process? If it’s the person paying for the work, the worker is probably an employee. If the person paying for the work asks for a particular result, but does not dictate the process leading to that result, then the worker is more than likely an independent contractor.

When you’re facing the potential of a hefty OSHA fine, though, it’s worth getting into the granular details. Because the DOL generally looks to the Economic Realities Test to determine whether a worker is an employee or a contractor, we’ll focus on that program.

The Economic Realities Test looks at six questions:

- **Is the worker’s work an everyday part of the paying party’s business?** If so, that’s an argument in favor of designating the worker as an employee. If the worker provides labor that isn’t an integral part of the company’s profit-generating activities, the worker may be an independent contractor.

- **Who owns the tools used in the work?** Workers who use their own tools are more likely to be independent contractors. If the paying party provides all the tools and equipment required to do a job, that argues in favor of the "employee" designation.

- **Does the worker face a risk of loss or a chance of profit in doing the work?** Independent contractors assume the risk and opportunities associated with taking a job. Employees, on the other hand, are paid the same regardless of outcome.

- **Does the work require specialized knowledge and skill?** Employees may be unskilled; independent contractors generally are not.

- **Is the work done on a project-by-project basis, or does the worker have a more permanent relationship with the paying party?** Workers who provide services through a limited, job-by-job arrangement are more likely to be independent contractors. Workers who perform tasks as part of an ongoing agreement may be employees.

- **Who controls the work process?** This is the big one. If a manager can dictate work processes — whether they exercise that right or not — they are more likely to be in an employer/employee relationship for legal purposes. If the manager simply dictates an outcome, and the worker has leeway to choose processes to achieve that outcome, the worker is probably an independent contractor.

Courts will look at all six factors when classifying a worker in a specific case. Generally speaking, though, these are the questions you need to ask yourself to determine whether you count as an employer — who must follow OSHA standards to the letter on job sites — or a self-employed worker.

In the construction field, however, there's another complicating factor.

OSHA's Multi-Employer Citation Policy

The trouble with OSHA regulations on a construction site is that most of these workplaces aren't controlled by a single employer. If an electrical subcontractor violates an OSHA standard, for instance, who should be cited? The subcontractor alone? The general contractor? The job site owner?

The 1999 OSHA Multi-Employer Citation Policy was written to answer these questions. This document lays out a two-step process to determine which employers on a job site are responsible for a hazard that leads to an OSHA citation:

1. First, the OSHA team will classify each employer on the jobsite into one of five categories: the Creating Employer, the Exposing Employer, the Correcting Employer, the Controlling Employer, or None of the Above. If an employer falls into any of the first four categories, they may be citable for an OSHA violation.
2. The second step, then, is figure out if an employer or employers classified as creating, controlling, exposing, or correcting hazards met their obligations under OSHA standards. Any employer or group of employers who does not may be citable under OSHA policy.

So how do you know which sort of employer you are? The categories are as follows:

- **Creating Employers** are those who introduced the hazard into the workplace. Maybe they failed to add guardrails around a ditch, or maybe they damaged crucial personal protective equipment. This is the employer whose team first broke the OSHA rule; as such, they are often citable.
- **Exposing Employers** are those whose workers have contact with the hazard created by the Creating Employer(s). These employers are citable only if they are *also* the creating employers, or if they knew about the threat and failed to address it, or if they otherwise failed to protect employees to a reasonable point.
- **Correcting Employers** are those whose contracts include fixing citable OSHA violations. If this employer fails to take adequate steps to discover and correct hazards, they might also be citable.
- **Controlling Employers** are often, but not always, general contractors or builders themselves. They're the ones who wield final authority over the entire project. Controlling employers must take "reasonable care" to keep worksites safe. Often, that means they are not responsible for unsafe working conditions that arise during the course of the work.

The main takeaway is this: Even if you're an independent contractor, you might find yourself on the hook for an unsafe workplace alone or with several other employers. And, of course, building managers or general contractors can write requirements to follow all applicable OSHA standards into contracts.

In short, OSHA regulations do not always apply to independent contractors — but it's safest to work as if they do.

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