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CECC-K: 22 December 1995

CECC-K (27-40)

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: The Imposition of OSHA's Multi-Employer Policy on Federal Agencies

1. The Occupational Safety and Health Administration of the Department of Labor has announced that it will begin issuing notices of violation to federal agencies for safety infractions committed by government contractors at construction jobsites. The Chief Counsel has reviewed this policy and concluded that OSHA lacks the statutory authority to promulgate this rule. Accordingly, he has recommended that the Army General Counsel elevate this issue to the Department of Defense for review. Until that review has been completed, there will be no changes in our oversight functions of contractors' safety practices.

2. I have attached a copy of this opinion for your information. Our safety Office informs us that OSHA has indicated that it will begin issuing notices of violation to federal agencies in a more aggressive manner than has occurred to date. Please notify this office (CECC-K) if any of your activities receives a notice of violation from OSHA inspectors.

3. POC for this action is KIarlissa Krombein, who may be reached at (202) 761-0027.

FOR THE COMMANDER:

/s

Encl

Martin R. Cohen
Assistant Chief Counsel
for Litigation

CECC-K (27-1)

MEMORANDUM FOR CESO-ZA

SUBJECT: Applicability of OSHA's Multi-Employer Policy to Federal Agencies

1. For the last several years, the Occupational Safety and Health Administration (OSHA) has issued "notices" of unsafe conditions to the Corps for safety infractions which have occurred at jobsites where government contractors are performing construction work. You have requested this office to provide you with a legal analysis regarding OSHA's authority to issue Multi-Employer Worksite Notices of Violation, and clarification regarding the issue of what is a "controlling employer" within the meaning of the OSHA regulations.

I. THE MULTI-EMPLOYER DOCTRINE AND ITS APPLICABILITY

2. In 1970, Congress enacted the Occupational Safety and Health Act (hereinafter OSH Act.) The purpose of the legislation was to prevent on the job injuries, and the scope and breadth of the Act are accordingly broad. The central provision of the Act is Section 654, which provides in part that "(a) Each employer-- (1) shall 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; [and] (2) shall comply with occupational safety and health standards promulgated under this chapter." An employer subject to these duties is defined in Section 652 as "...a person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State."

3. To ensure that employers carry out their obligations under the Act, Congress empowered the Secretary of Labor "...to set mandatory occupational health and safety standards applicable to businesses affecting interstate commerce....," to "provid[e] for the development and promulgation of occupational health and safety standards; [and to] provid[e] an effective enforcement program...." 29 U.S.C. 651(b)(3) (emphasis added.) That enforcement is specified in Section 658, which allows the Secretary (after investigation or inspection) to issue citations or notices of unsafe conditions to "employers."

4. The definition of an employer has been broadened by the courts and the Occupational Safety and Health Review Commission in recent years in order to provide an enforcement mechanism in situations where an employee may be exposed to hazards on a jobsite which are created by someone other than his immediate employer. This "multi-employer worksite" doctrine has allowed OSHA to issue notices and citations to contractors having substantial control over a jobsite, notwithstanding the fact that the hazardous conditions may have been created by a subcontractor.

5. By contrast, the federal government's health and safety responsibilities are set out in a separate section of the Act. 29 U.S.C. 668 provides that each federal agency shall "provide safe and healthful places and conditions of employment, consistent with the standards set out under section 655 of this title...." As stated in the legislative history, "Section [668] requires Federal agencies to promulgate safety and health standards consistent with those developed by the Secretary of Labor for private industry." S. Rep. No. 91-1282 (91st. Cong, 2d Sess.), reprinted in 1970 U.S. Code Cong. & Adm. 5195. "The above requirements are intended to establish clear responsibility for the Federal Government's internal safety and health efforts, and provide the Secretary with an active role in coordinating the multiplicity of programs devised by various agencies." Id. at 5196 (emphasis added.) This language makes it clear that agency responsibilities are limited to its own employees. Additionally, since the citation authority given to the Secretary under section 658 clearly references "employers" who are in violation of the provisions of sections 654 and 655, it is evident that Congress did not intend nor allow for OSHA to provide notices of violation or citations to federal agencies. Because the Act establishes two different programs to assure worksite safety, one applicable to private industry and a parallel (although not identical) program for federal agencies, the Secretary's enforcement powers are plainly limited to violations of safety standards by employers who are businesses.

6. The legislative history of the Act does not explain why the government was excluded from the category of "employers" named in Section 652. However, H.R. Rep. No. 90-1270 (90th Cong. 2d Sess.), which accompanied substantially the same proposed legislation in 1968, does provide an acknowledgment that treating the federal government as an employer under the Act would be inappropriate. *Id.* at 20. The only decision interpreting this provision is *Federal Employees for Nonsmokers' Rights v. United States*, 446 F. Supp. 181 (D.C. Cir. 1978), *aff'd* 598 F.2d 310 (D.C. Cir. 1979), *cert. den.*, 444 U.S. 926 (1979). The case was brought by several federal employees groups, who sued the federal government because of alleged injuries they sustained in federal workplaces as a result of the government's policy of allowing smoking in its buildings. The court noted that

"the enforcement scheme of the OSH Act further indicates the congressional intent not to allow employees to bring an action against a federal agency as an employer. The Act establishes an elaborate enforcement procedure in 29 U.S.C. 659 that the Secretary of Labor may use against an 'employer.' However, the term 'employer' does not include the United States. Therefore, although [section] 668(a) does require federal agencies to 'provide safe and healthful places and conditions of employment,' the Act confers no authority upon the Secretary to take enforcement action against federal agencies. The reason for this is that the federal agency area is one 'in which ordinary enforcement and penalty provisions are hardly applicable.'" 446 F. Supp. at 183 (citations omitted.)

It is accordingly apparent that if the Secretary of Labor is not authorized by law to utilize the enforcement procedures under Sections 659 against federal agencies, he is precluded as well from issuing notices or citations to agencies under Section 658, since both provisions assess penalties against "employers."

7. The Department of Labor's Solicitor's Office has explained that the rationale for the extension of the multi-employer worksite policy to the federal sector is based upon Executive Order 12196 (1980). While this Executive Order elaborates on agency responsibilities for establishing an occupational health and safety program for agency employees, it does not enlarge the scope of the Act in terms of extending coverage to contractor employees or in expanding the definition of "employer" found in the Act. It does, however, provide that "[t]he head of each agency shall...[c]omply with all standards issued under [29 U.S.C. section 655] except where the Secretary approves compliance with alternative standards...." It also empowers the Secretary of Labor to

[c]onduct unannounced inspections of agency workplaces when the Secretary determines necessary if an agency does not have occupational safety and health committees; or in response to reports of unsafe or unhealthful working conditions, upon request of occupational safety and health committees; or, in the case of a report of an imminent danger, when such a committee has not responded to an employee who has alleged to it that the agency has not adequately responded to a report [as required elsewhere in the Executive Order.] When the Secretary or his designee performs an inspection and discovers unsafe or unhealthful conditions, a violation of any provisions of this order, or any safety or health standards adopted by an agency pursuant to this order, or any program element approved by the Secretary, he shall promptly issue a report

to the head of the agency and to the appropriate occupational safety and health committee, if any.

The report shall describe the nature of the findings and may make recommendations for correcting the violation. Section 1-401(i).

8. The Executive Order fleshes out the federal government's programs and provides guidance for the implementation of Section 668. Requiring the agencies to abide by the substantive standards issued by the Secretary for private industries under Section 655 comports with Section 668's language requiring agency standards to be consistent with those issued under Section 655.1 Significantly, however, the Order does not provide for the Secretary to extend enforcement powers to federal agencies. OSHA is instead given an alternative method of checking compliance and issuing only reports and recommendations for violations of standards or program elements. And despite the Department of Labor's contention that the Order vastly enlarges the scope of agency responsibilities under the Act, the Order itself states that "[n]othing in this order shall be construed to impair or alter the powers and duties of the Secretary or heads of other Federal agencies pursuant to [section 668...], nor shall it be construed to alter any other provisions of law..." Section 1-702.

9. It is true that because the Act's purposes are remedial, the Secretary is accorded great deference in the interpretation of the statute. In *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980), the Secretary of Labor had promulgated a regulation which permitted an employee to absent himself from an unsafe area if he had a reasonable apprehension of death or serious injury, and a belief that no other practical alternative to protect his safety existed. Noting that no section of the Act specifically authorized such an action, the Supreme Court nevertheless affirmed the validity of the regulation. The Court based its conclusion on the fact that "[t]he regulation clearly conforms to the fundamental objective of the Act-- to prevent occupational deaths and serious injuries." *Id.* at 11. The Court also reasoned that the regulation was an "appropriate aid to the full effectuation of the Act's 'general duty' clause," Section 654(a)(1)." *Id.* at 12. This section, according to the Court, "was intended itself to deter the occurrence of occupational deaths and serious injuries by placing on employers a mandatory obligation independent of the specific health and safety standards to be promulgated by the Secretary." *Id.* at 13. Accordingly, "[i]n the absence of some contrary indication in the legislative history, the Secretary's regulation must, therefore, be upheld, particularly when it is remembered that safety legislation is to be liberally construed to effectuate the congressional purpose." *Id.*

10. It is also axiomatic that a regulation must find support in the underlying statute, and, if the interpretation is at odds with the statute, the regulation will be struck down. *Addison v. Holly Hill Fruit Products*, 322 U.S. 607 (1944). As the Supreme Court noted of the statutory provision involved in that case, and the Department of Labor's attempt to expand its meaning, "that phrase is not so complicated nor is English speech so poor that words were not easily available [to Congress] to express the idea or at least to suggest it....The details with which the exemptions in the Act have been made preclude their enlargement by implication." *Id.* at 618. More

recently, in *United States v. Shear*, 962 F.2d 488 (5th Cir. 1992), a supervisory employee was convicted of violating OSHA standards, and was convicted under the Act as an "employer." The Fifth Circuit reversed the conviction, holding that the language of the statute was clear and could not be stretched without violating congressional intent. The court, after noting that the definitions of "employer" and "employee" are carefully defined in the statute,² cautioned that

"It also strikes us as unseemly and unwise for the courts and the Executive Branch to bring in through the back door a criminal liability so plainly and facially eschewed in the statute creating the offense. We blink at reality if we ignore the obvious difference in potential political consequences between the statute as enacted and one in which section 666(e) were written to apply not merely to 'any employer' but rather to 'any employer or employee' or 'whoever' or 'any person.' Proper functioning of the democratic process counsels that in these matters Congress, not the courts, should make such basic 'hard' decisions." 962 F.2d 488, 496.

11. Because the statutory definition of "employer" is unambiguous, it is apparent that a federal agency is not an "employer" subject to the Act (except for its obligations to its own employees under Section 668). Additionally, the provisions setting up two different enforcement mechanisms to ensure compliance under the Act (civil and criminal penalties for private employers, compliance inspections and reports for federal agencies) demonstrate that OSHA lacks the authority to issue notices or citations to federal agencies for safety deficiencies noted on federal premises. Such notices are improper, regardless of whether federal employees are present at the site, whether the site is a federal workplace as defined in the Act, or whether contractor employees are exposed to unsafe conditions at the site.

12. It is worth noting that legislation to amend the Act and include federal agencies within the definition of "employer" has been introduced in at least the last two sessions of Congress. H.R. 287, 104th Cong. 1st Sess. (1995); S. 1950, 103d Cong. 2d Sess. (1994). Section 4(a) of the most recent bill would alter the OSH Act as follows: "[d]efinition of employer.-(29 U.S.C. 652(5)) is amended by striking out 'but does not include the United States or' and inserting in lieu thereof 'and does include the United States....'" This is a further indication that the Act does not presently apply to agencies except as provided under Section 668 and the Executive Order. If the Executive Order had enlarged the applicable scope of the Act to the extent urged by the Department of Labor, an amendment to bring the United States within the penumbra of the law would hardly have been necessary.

13. The regulations promulgated to implement Section 668 and delineate agency responsibilities for occupational safety and health are contained in 29 C.F.R. Part 1960. 29 C.F.R. 1960.1 contains several provisions describing the scope and purpose of the regulatory scheme. Subparagraph (f) of the section formerly contained a proviso which stated that part 1960 and the Executive Order did "...not apply to employees or working conditions of employees of private contractors performing work under government contracts...."

On 5 July 1995, OSHA amended the regulation by deleting this proviso. 60 Fed. Reg. 34851. Section 1960.1(f) now reads

"No provision of the Executive Order or this part shall be construed in any manner to relieve any private employer, including Federal contractors, or their employees of any rights or responsibilities under the provisions of the Act, including compliance activities conducted by the Department of Labor or other appropriate authority."

The purpose of the amendment was ostensibly "... to permit implementation of its multi-employer worksite policy in the federal sector..." and "...ensure that the health and safety responsibilities of federal agencies on multi-employer worksites are comparable to those of private employers in comparable circumstances." Id. However, there is no mention of this policy in this part of the regulations, and it is far from clear that the change in language actually accomplishes the goal stated by Labor in its preamble to the change. A plain reading of the amended regulation is that it merely states the obvious: private employers are subject to the Act notwithstanding the fact that they may be performing federal contracts. On its face, this provision has absolutely nothing to do with the multi-employer worksite policy, and the only indication that it does comes in the preamble's bald assertion that the amended regulation extends the policy to the federal sector. The inclusion of this provision is all the more puzzling because 29 C.F.R. 1975.3(b) and 1975.5(a), which define the extent of coverage under the OSH Act and are found in the same Part of the regulations, still recognize that the United States is not a covered "employer" under the Act, except for its responsibilities to federal employees under Section 668.

14. Because of my doubts concerning the legality of OSHA's application of the multi-employer doctrine to federal agencies, and because the issue has implications beyond the Corps of Engineers, I am forwarding this opinion to Army General Counsel with a request that the opinion be reviewed and forwarded to DoD General Counsel for clarification of the policy and coordination with the Solicitor's Office at the Department of Labor.

II. WHAT IS A "CONTROLLING EMPLOYER?"

15. You also requested guidance on the question of what factors are critical in defining a "controlling employer" subject to the multi-employer worksite rule. The following section analyzes OSHA's policy and the case law applying that concept, as well as the elements and available defense of a multi-employer notice of violation or citation. For purposes of this discussion only, I have assumed that the Corps is in fact subject to the multi-employer worksite policy.

16. "[T]o prove a violation of OSHA the Secretary of Labor need only show that a hazard has been committed [sic] and that the area of the hazard was accessible to the employees of the cited employer or those of other employers engaged in a common undertaking." *Brennan v. Occupational Safety & Health Rev. Com'n*, 513 F.2d 1032, 1038 (2d Cir. 1975). The OSHA Field Inspection Reference Manual (FIRM) provides that notices or citations will be issued under three conditions at multi-employer worksites, whether or not the employer's own employees are exposed to the hazard: a) if the employer

creates the safety hazard, b) if the employer is contractually or customarily responsible for health and safety at the worksite; or c) if the employer has the responsibility for actually correcting the hazard. FIRM Chapter 5, Section

F.2.a. It is the second condition which has served as the basis for the notices which have been issued to the Corps. To date, contractor-created safety violations at the Sunflower Army Ammunition Plant and at the Town Brook Local Protection Project in Quincy, Massachusetts have resulted in notices directing the Corps to alleviate worksite hazards.³

17. OSHA views the Corps as the entity contractually responsible for ensuring that workplace hazards are abated. The Resident Engineer's Management Guide (EP 415-1-260) does contain several procedures under paragraphs 9-6 (Compliance Inspections) and 9-7 (Unsafe Practices) which could lead to the conclusion that the Corps exercises the requisite degree of control over a contractor's actions to make the agency subject to the multi-employer doctrine. These procedures include the issuance of stop work orders to contractors when hazards are discovered, and the ability to direct contractors to reassign a reckless worker or move workers away from unsafe areas. It is this retained contractual authority to intervene in construction activities and require the contractor to abate safety hazards which triggers OSHA's determination that the Corps is a controlling employer.

18. A point which is frequently made in discussing the Corps' role in contract oversight is that our functions are more analogous to those of "construction managers" than they are to the role played by "general contractors." However, it does not appear that an argument based on this distinction would persuade OSHA that the Corps is not a controlling employer. Construction managers have also been held subject to penalties under the Act, even if they are working "in a supervisory capacity and [do] not perform the actual work of construction," since "functions as a construction manager were 'an integral part of the total construction' [and] it was 'engaged in construction work' within the meaning of the regulations." *Bechtel Power Corp. v. Secretary of Labor*, 548 F.2d 249, 250 (8th Cir. 1977), cert. den., 434 U.S. 819 (1977). See also, *Kulka Construction Management Corp.*, 15 OSHC (BNA) 1870 (1992). (Construction manager which retained control over actual jobsite safety through periodic on-site inspections and review of subcontractors' safety plans held responsible for hazardous conditions.)

19. To successfully defend a citation issued under the multi-employer worksite doctrine, an employer must show that "1) it did not create or control the hazardous condition, and 2) it could not abate the condition in the manner contemplated by the standard; and 3) it protected its exposed employees by realistic alternative means; and 4) it did not, nor with the exercise of reasonable diligence, could it have known of the condition." *Anthony Crane Rental, Inc.*, 1993 OSAHRC LEXIS 222 (1993). All of these conditions must be satisfied before a citation will be voided, and it is likely from the foregoing discussion that the Corps would not be able to prevail on the argument that it lacked control over the hazardous condition. In sum, if the multi-employer doctrine is applicable to federal agencies, OSHA has grounds on which to consider the Corps a

controlling employer based upon our present contract oversight practices.

III. IMPLICATIONS OF ADOPTING CHANGES IN CONTRACT INSPECTION

20. OSHA has indicated that it will begin to perform frequent field inspections of federal construction sites and issue notices of violation to the agencies where warranted. Therefore, modifications to our contract inspection procedures to respond to OSHA's policy change could take several forms. The following section discusses the likely implications of continuing our current procedures, attempting to increase compliance inspections, or diminishing our oversight functions.

21. Obviously, keeping current procedures in effect will result in the Corps continuing to be cited by OSHA for violations at contract jobsites. Given OSHA's new emphasis on the multi-employer worksite policy, it can be anticipated that we will receive a greater number of notices simply because of OSHA's increased presence at our sites. Accordingly, abatement of hazards under this scenario may require a slightly greater use of resources, because OSHA will expect the Corps to take follow-up action with its contractors to be sure that all cited hazards have been eradicated.

22. If the Corps determines that it should increase monitoring of contract performance, this change could be anticipated to have a number of effects. Initially, revising our procedures to expand safety inspections would be contrary to our policy of reducing actual supervision of contract performance by adopting quality assurance (as opposed to quality control) methods to obtain verification that the contractor is in fact meeting his contractual obligations. If the Corps increases its oversight functions in response to OSHA's determination to compel agencies to exercise greater control over contractor activities, significant additional staffing would likely be required as well. There is also the possibility that stepping up safety inspections could actually increase problems in correcting safety deficiencies, if contractors come to believe that the Corps is taking over the actual responsibility for job safety and consequently diminish their own efforts to detect and correct deficiencies.⁴

23. Additionally, greater involvement in a contractor's performance could increase the third-party liability of the United States under the Federal Tort Claims Act. Although the OSH Act does not purport to enlarge the scope of any other state or federal law, the impact of an OSHA violation could expose the government to increased tort liability in one of several ways. Increased supervision could vitiate the FTCA's "independent contractor" defense, which presently insulates the government from liability in most actions brought by contractor's injured employees. See, e.g., *Phillips v. United States*, 956 F.2d 1071 (11th Cir. 1992) (extensive involvement by Corps inspection personnel of contractor's safety efforts sufficient to defeat independent contractor defense as to the safety portion of the contract). Secondly, imposition of the multi-employer doctrine on the federal government could adversely impact the "discretionary function" defense, since a federal court could defer to OSHA's determination that another government agency has an absolute duty to cure safety defects of which

it is aware or of which it could become aware with the exercise of reasonable diligence. At the very least, a notice issued by OSHA could be used by an injured employee as evidence of the proper standard of care, and the breach of that standard by the Corps. See, *Industrial Tile, Inc. v. Stewart*, 388 So.2d 171 (S. Ct. Ala. 1980) (regulations can be admitted to show the relevant standard of care, as well as to show defendant's breach of that standard); and *Walton v. Potlatch Corp.*, 781 P.2d 229 (S. Ct. Idaho 1989) (violation establishes negligence per se, and can be used against a controlling employer as well as a direct employer.)⁵

24. Conversely, decreasing retained authority over contractors may or may not result in eliminating OSHA inspections and issuance of notices of violation. The responsibility for jobsite safety is already placed on the contractor by FAR Clauses 36.513 and 52.236-13. However, it has been held that

"the Act, not the contract, is the source of [the employer's] responsibilities. ...An employer may carry out its statutory duties through its own private arrangements with third parties, but if it does so and if those duties are neglected, it is up to the employer to show why he cannot enforce the arrangements he has made. If he cannot make this showing, he must take the consequences, and his further remedy lies against the private party with whom he has contracted and whose breach exposes the employer to liability."

Central of Georgia Railroad Co. v. Occup. S. & H. R. Com'n, 576 F.2d 620, 625 (5th Cir. 1978). It is unclear whether OSHA would treat a change in agency practice as determinative of the control issue, and there is a possibility that such notices would continue to be issued based upon an "inherent authority to control" argument similar to that used in the *Central of Georgia* case.

25. Nevertheless, the most likely means of precluding OSHA from giving the Corps further notices of violations would be to renounce all retained authority to issue stop work orders for safety violations, and instead refer unsafe conditions to OSHA inspectors for enforcement against the contractors and subcontractors on the jobsite. This would require revisions in guidance sent to the field, as well as several changes in EM 385-1-1 and the Resident Engineer's Management Guide. (Revision of the FAR clauses does not appear to be necessary, since they already include jobsite safety as the sole responsibility of the contractor. However, OSHA has refused to accept contractual assignment of responsibility as the governing factor in determining the issue of control.) However, a policy of renouncing the authority to stop work for safety violations would have the perverse effect of impeding the Act's goals by increasing the amount of time it would take to have a hazardous condition corrected. A policy of transferring authority to deal with safety violations to another federal agency also has the potential to impair our partnering efforts with construction contractors and inject additional problems into our relationships with our customers.

26. As noted earlier, I am forwarding this opinion to Army General Counsel with a request for further evaluation and action as appropriate, since it does not appear that OSHA's

extension of the multi-employer worksite policy into the federal sector rests upon a firm statutory footing. Pending further review of this matter within Army and DoD, I suggest that your office, together with CEMP-C, send a memorandum to the field outlining OSHA's new policy and explaining that further discussions regarding this issue will be held at the Headquarters level. I do not believe that significant changes in our methods of ensuring contract compliance should occur until Army and DoD have had the opportunity to examine this issue and prepare a unified legal and policy position. Karlissa Krombein of my staff will be available to assist you in this undertaking, and to participate as needed until this inquiry is concluded. She may be reached at (202) 761-0027.

LESTER EDELMAN

Chief Counsel

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*Send comments to: Webmaster
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