

Workshop D

Tuesday, November 8, 1:30–3:00 p.m. and 3:30–5:00 p.m.

MULTIEMPLOYER WORK SITE SAFETY

Presented by



Ron G. Prichard
President
Arcanum Professional Services, Inc.

All companies are required to provide safe workplaces for employees and to take reasonable steps to protect others from injuries arising out of their business activities. In the most controlled environment, living up to these expectations presents challenges, and on a construction site, where dozens of contractors are simultaneously working in a limited space, it is a full-time job. Complicating matters is the legal reality that the more control a party exerts over site safety the greater its liability for safety failures. The question for all parties involved in a multiemployer work site is how to maintain the proper balance between doing too much or too little. This session addresses both multiemployer work site requirements and the need to maintain a dynamic balance between action and inaction. Attendees will gain an understanding of how to comply with the requirements for multiemployer work sites, without creating additional liability.



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Ron G. Prichard
President
Arcanum Professional Services, Inc.

Dr. Prichard is presenting Workshop D, "Multiemployer Work Site Safety," on Tuesday afternoon. He currently serves as a consultant to a diverse mix of businesses in the construction industry, where he enhances the ability to manage a wide variety of risk posed by operations, competition, and clients in a dynamic and changing environment. Dr. Prichard has over 30 years of involvement with the construction industry at various levels. For over 10 years, he has concentrated his efforts on the reduction of operational risks for both owners and contractors.

Dr. Prichard started his construction career as a laborer for a home builder, and has served in a broad spectrum of roles as both a leader and a staff member for many segments of the industry, including as a project support consultant, a general contractor project manager, a technical advisor for an insurer, an owners' representative, and as a risk consultant for insurance brokers. He has successfully managed construction in both the public sector (while serving as an officer on active duty with the U.S. Army Corps of Engineers, and then in the U.S. Army Reserve) and in the private sector.

In a staff role, Dr. Prichard has provided technical support in planning, estimating, scheduling, and delivery of dozens of large construction projects. In addition, he participated in the resolution of more than 30 major contract disputes. He provides support for litigation, mediation, arbitration, and expert testimony for resolution of a variety of claims and disputes.

Dr. Prichard has earned both a bachelor's of science degree from West Point and a master's of science degree from the University of Missouri in Civil Engineering, and a doctorate of philosophy focused on general principles of engineering and the construction delivery process. Additionally, he is registered as a Professional Engineer (Civil). He is coauthor of *Risk Management, Insurance & Bonding for the Construction Industry*, prepared for the Associated General Contractors of America, and is a frequent speaker at construction industry conferences. He also contributes articles on construction safety to IRMI.com.

Notes

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MULTIEMPLOYER WORK SITE SAFETY

Ron G. Prichard
Arcanum Professional Services, Inc.

I. Foundational Elements

- A. What is a multiemployer work site?
- B. Why is safety on such sites a problem?
- C. Why safety matters
- D. Sources of liability
- E. Key terms and definitions

II. OSHA Definitions—Employer Classifications and Citation Approaches

- A. Hazard-specific versus general duty requirements
- B. Controlling
- C. Creating
- D. Correcting
- E. Exposing
- F. Evaluating a situation and determining status

III. ANSI A10.38 Standard

- A. Definitions
- B. Requirements

IV. Legal Implications

- A. Basic definitions of control

- B. The safety dilemma
- C. What constitutes control
- D. What constitutes authority
- E. The focus is on what you do

V. Demonstrating Actual Control

- A. Acts of agents
- B. Vicarious liability
- C. Responsibility to supervise
- D. How to get into trouble

VI. Having Knowledge

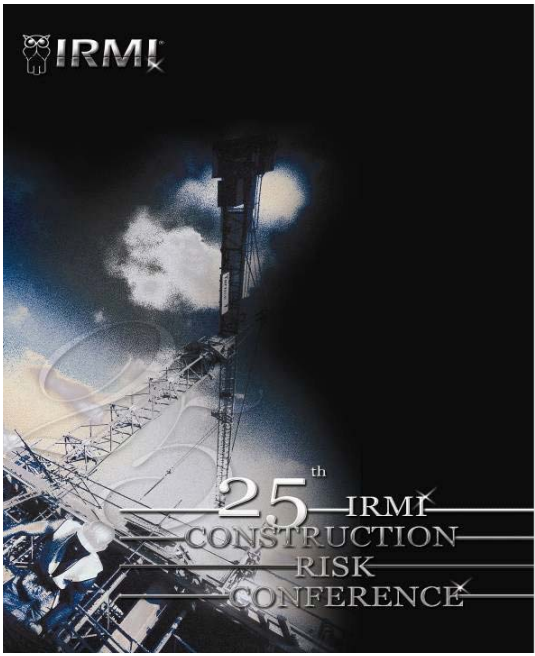
- A. What constitutes knowledge
- B. Why it matters
- C. How you obtain knowledge

VII. How to Protect Yourself

- A. Defining roles
 - 1. Owners
 - 2. Contractors and subcontractors
 - 3. Project personnel
- B. Project documentation
- C. Appropriate selection of method

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Multi-Employer Work Site Safety

Presented By:
Ron G. Prichard
President
Arcanum
Plainfield, IN

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Presentation Topics



- **Fundamental Concepts and A Legal Perspective**
- **OSHA FIRM Guidance**
- **Determining Your Status for Compliance Purposes**
- **The Safety Control Dilemma**
- **Recommendations**


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OSHA Requirements

- **Providing for safe workplaces**
- **Regulating responsibilities of employees and employers**
- **Related to specific “Recognized” hazards**
- **Compliance is related to**
 - **Control of the workplace**
 - **Opportunity to comply**


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What Is a Multiemployer Work Site?

- **Any project where there are employees working for more than a single employer**
- **Any construction site with more than one contractor present on-site, or involved in the actual project**

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The Business of Business

- **Business is all about transactions**
- **All transactions involve relationships**
- **Relationships entail duties for each party in the relationship**
- **Duties generate legal obligations**
- **Legal obligations lead to liability**
- **Liability requires an entity to be responsible for its actions**
- **Responsibility compels answering for acts and the repair of any injury caused by those acts**

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Construction Liability - Sources

- **Statutory and Regulatory Rules**
- **Contractual**
- **Civil**
 - **Negligence**
 - **Recklessness**
 - **Professional standard of care**

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ANSI A10.33 Safety & Health Requirements of Multiemployer Projects

- **Project Constructor shall:**
 - **Have a Safety and Health Program specific for the scope of the project**
 - **Encourage correction or abatement of all hazardous conditions**
 - **Conduct, or have conducted, daily project inspections**
 - **Report, document and investigate all injuries, illnesses and accidents**


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ANSI A10.34 Protection of the Public on and Adjacent to Construction Sites

- **Project Constructor shall**
 - **Prepare a public hazard control plan**
 - **Ensure that all contractors coordinate their efforts and actions to protect the public**
 - **Evaluate each contractor's planned activity for its impact on the public**


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OSHA CPL 2-0.124

- **Multiemployer Citation Policy**
- **More than one employer may be cited for**
 - a hazardous condition that
 - Violates any OSHA standard
- **A 2-step process is used to determine if there will be a citation**
 - Status of employer
 - Actions taken versus standard of care
- **Burden of proof lies with OSHA**


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The Key Definition

- **Control**
 - To have the power over another entity
 - To have the authority to direct, guide or manage an entity
 - To regulate the methods used to perform work


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Definition of the Standard of Care

- **The uniform standard of behavior upon which the theory of negligence is based**
- **It requires the actor to do what the “reasonable person of ordinary prudence” would do in the actor’s place**
- **It is judged against a moving standard, one case at a time**


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Step 1: OSHA Role Definition

- **Evaluate the situation surrounding the hazardous condition**
- **Determine what role the employer was acting in**
 - **Creating employer**
 - **Exposing employer**
 - **Correcting employer**
 - **Controlling employer**
- **If in one of these roles, move to Step 2**


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Step 2: Analysis of Actions of Employer

- **What did OSHA 1926 require of the employer in the situation?**
- **What did the employer actually do?**
- **Were the actual actions sufficient to satisfy OSHA compliance requirements?**

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Step 2: OSHA Analysis Examples

- **Employers must not create violative conditions**
- **Employers must not expose employees to hazardous conditions**
- **Employers must act to correct all hazards which they have knowledge of**
- **Employers must exercise reasonable care to prevent and detect violations on the site**

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Factors Related to Reasonable Care

- **Scale of the project**
- **The nature and pace of work**
- **Controlling contractor's knowledge of the safety history and safety practices of the employers it controls**
- **More frequent inspections required if it is known that there is a history of noncompliance**
- **Effective efforts and a high level of compliance reduces the degree of involvement required**

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Factors Related to Reasonable Care

- **Conducted periodic inspections of appropriate frequency**
- **Implemented an effective system for promptly correcting hazards**
- **Enforces compliance with safety & health requirements with an effective, graduated system of enforcement and follow-up**

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General Rule for Contractor Employee Safety



- **Safety of employees is the responsibility of the contractor who employs them, not the entity who engages the services of the contractor, unless**
 - **The owner retains direct control over aspects of the work**
 - **An injury occurs in a common area under the owner's direct control**
 - **The owner has the contractor engaged in inherently dangerous work, even if there is no control by the owner**

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The Safety Dilemma



- **Do I use the independent contractor shield, a defense with respect to injuries of contractor workers, or**
- **Do I get directly involved in prevention of injuries, but create a greater potential for exposure to liability**

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Safety Duties are Nondelegable



- **General contractors and their subcontractors have concurrent safety duties**
 - **Joint and several liability**
 - **Redundancy is a key factor in promoting site safety**
 - **Knowledge of a site safety problem requires action be taken to correct**

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What You Don't Know Can Hurt You



- **Ignorance is not an acceptable reason for noncompliance**
- **Having knowledge means:**
 - **Knowing that safety violations or dangerous conditions exist and then not acting**
 - **Knowing that a contractor is ignoring applicable guidelines related to safety, that corrective measures need to be taken, and remaining silent**
 - **Approving acts that are dangerous or unsafe**
 - **Acting so as to avoid having knowledge is imputed as positive knowledge**
 - **Doctrine of deliberate ignorance**

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Defenses for Multiemployer Citations



- **Prove that, even with due diligence, you were unaware of the hazard**
- **Show that you informed the offending employer of the hazard, when you expected it to be corrected, and that you followed up on that expectation**
- **Show that you protected your employees [and those of other employers] until the hazard was corrected**

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What Counts Is What You Can Prove!



- **Proof requires documentation**
 - There must be some type of record to show what was done
- **What you do not put into a record can hurt you**
- **If you do produce a record, you must follow up**
 - If the required action is not taken, you must act on this failure (and document that also)
- **You cannot prove what did not happen**
 - Any effort to do so constitutes fraud
- **Records must be made contemporaneously with the events being documented**
 - After the fact record making is considered to be an attempt at cover-up

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Recommendations



- **Know and do your duties**
- **Ensure that anyone you engage does so as well**
- **Avoid breaches of duty or unintended assumptions of duty**
- **Define the “controlling contractor”**
- **Maintain, as you go, the required standard of care**
- **Exercise the appropriate level of oversight required for your position**

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