

December 4, 2018

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TEXAS LAW★ALERT

FIFTH CIRCUIT REVERSES COURSE ON THE MULTI-EMPLOYER WORKSITE DOCTRINE

Pursuant to OSHA's rulemaking authority set forth in 29 U.S.C. § 654(a)(2), the Secretary of Labor adopted the multi-employer worksite doctrine, which basically provides that a general contractor or premises owner who does not have any employees exposed to a risk is responsible nevertheless where the general contractor/premises owner could reasonably be expected to prevent or detect and abate the violation. Since 1999, OSHA's manual has identified four types of employers, beyond an employee's actual employer, who were also subject to citation by OSHA. Those four are: exposing employer; correcting employer; creating employer; and controlling employer. Prior to late last month, the Fifth Circuit had expressly rejected OSHA's multi-employer worksite doctrine. *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. Unit A 1981). In that case, the court noted that the only class of employees protected under OSHA regulations was an employer's own employees.

On November 26, 2018, everything changed. In *Acosta v. Hensel Phelps Constr. Co.*, 2018 WL 6168044 (5th Cir. 2018), the Fifth Circuit held that the Secretary of Labor has the authority to issue citations to a controlling employer at a multi-employer worksite for violations of OSHA regulations regardless of whether the controlling employer's own employees were affected by the violations, abrogating *Melerine*. In this case, Hensel Phelps entered into a contract with the City of Austin to build a new public library. Hensel Phelps, as the general contractor, maintained control over the worksite through the presence of on-site management personnel. Hensel Phelps subcontracted with HEW to do certain work on the project. HEW, in turn, subcontracted with CVI to complete part of that work. Due to the failure to follow OSHA regulations regarding excavations, employees of CVI were exposed to a cave-in hazard. OSHA cited CVI as the actual employer and Hensel Phelps under the multi-employer worksite doctrine as the controlling employer. Concluding that the statute was subject to the Secretary of Labor's interpretation and that said interpretation was entitled to deference, the Fifth Circuit held that the Secretary of Labor has the authority to issue multi-employer worksite citations.

The net effect is now the Fifth Circuit's endorsement of OSHA's authority to cite contractors and premises owners who did not actually employ an injured worker.

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