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OSHA issues guidance on recordkeeping for temporary workers

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Last year, I reported in this publication about federal OSHA's new temporary worker initiative ("TWI"). One part of the TWI addresses which employer—the host employer or the temporary staffing agency—is responsible for injury and illness recordkeeping (OSHA 300 log, etc.).

I reported that OSHA said it depends upon which employer is supervising the temporary employee. If the host employer has full supervisory control over employees, then the host employer is responsible for injury and illness recording and reporting.

But if the temporary staffing agency exercises day-to-day supervision over employees, then it is responsible for injury and illness recording. In other scenarios where both the staffing agency and host employer share the supervisory role, OSHA stated that the employers should reach an agreement regarding their respective responsibilities.

On March 11, 2014, OSHA issued its first TWI bulletin, and it addresses recordkeeping responsibility. The Bulletin says that in most cases, the host employer is the one responsible for recording the injuries and illnesses of temporary workers, because in most cases it supervises the work of the temporary worker on a "day to day basis."

Day-to-day supervision occurs when, "in addition to specifying the output, product or result to be accomplished by the person's work, the employer supervises the details, means, methods and processes by which the work is to be accomplished."

Thus, even if the staffing agency has a representative at the host employer's worksite, if that representative is not supervising the "details, means, methods and processes" by which the work is accomplished, then recordkeeping is the host's responsibility.

The Bulletin goes on to say that "the non-supervising employer (generally the staffing agency) still shares responsibility for its workers' safety and health. The staffing agency, therefore, should maintain frequent communication with its workers and the host employer to ensure that any injuries and illnesses are properly reported and recorded. . . . Ongoing communication is also needed after an injury or illness so the recording employer can know the outcome of the case."

In addition, the Bulletin says that the staffing agency and host employer must set up a way for employees to report work-related injuries and illnesses promptly, and they must tell each employee how to report work-related injuries and illnesses.

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Information about injuries and illnesses should "flow between the host employer and staffing agency." Thus, if a temporary worker sustains an injury or illness and the host employer knows about it, the host employer should notify the staffing agency, so that the staffing agency knows about the hazards facing their workers.

Likewise, if a staffing agency learns of an injury or illness, it should inform the host employer so that future injuries might be prevented and the case will be recorded.

Finally, the Bulletin offers direction about a "best practice": The staffing agency and host employer should establish notification procedures to ensure that when a worker informs one employer of an injury or illness, the other employer is apprised as well. The details of how this communication is to take place should be clearly established in contract language.

A word of caution is in order. Even if employers adopt this best practice, and even if they incorporate it into their contracts, it appears that a failure to communicate—even if it is a breach of contract—will not prevent OSHA from issuing a citation to the employer responsible for recordkeeping, viz., the supervising employer, if it fails to properly record the injury or illness.

Similarly, it appears that staffing agencies and their clients cannot effectively allocate responsibility for recordkeeping unless they also have agreed that the party with that responsibility also has responsibility for day-to-day supervision of temporary employees, and then only if that party actually carries out that responsibility.

Legislature mainly silent on workplace safety issues

The Kentucky General Assembly at this writing is in recess and will return to Frankfort April 14 for a two-day "veto" session and will adjourn sine die on April 15, bringing an end to the 2014 session. Eight bills pertaining to safety and health on the job were introduced during the session, but only one of them was enacted into law — Senate Bill 105, which deletes newspaper carriers from being considered employees of independent news agencies for workers' compensation purposes.

While the controversial bills to ban smoking statewide in public places and places of employment (House Bill 173 and Senate Bill 117) failed to garner enough votes for passage this session, it is an issue that is gaining ground with the public, according to polls, and therefore will almost surely be a significant issue confronting state lawmakers in future sessions.

Other bills related to OSHA that were introduced in the 2014 session but failed were HB 27 — to establish a "rebuttable presumption" for firefighters that cancer is an occupational disease; HB 123 — relating to breast cancer treatment education; HB 251 — relating to firefighters to get workers' comp insurance for paid and volunteer firefighters, and name cancer an occupational disease; SB 63 and HB 557 — would have stopped the Labor Cabinet from taking certain funds from the Workers' Compensation Funding Commission, the agency which collects funds from business and industry as WC Special Fund assessments.

Federal OSHA plans national safety 'stand-down'

On June 2-6, 2014, OSHA will host a National Safety Stand-Down for Fall Prevention in Construction. A "safety stand-down" is a voluntary event for employers to stop work and talk directly to employees about fall hazards and how to prevent them. Managers are encouraged to plan the stand-down for a time that works best for their workplace during the week of June 2-6. Suggestions on how to conduct a stand-down are available online at <https://www.osha.gov/StopFallsStandDown/suggestions.html>.

Falls are the leading cause of death in the construction industry. Of the 775 construction fatalities in the US in 2012, a third (34.7 percent, or 269) were from falls. Prevention is a priority with OSHA — the fall prevention standard is in the top 10 most frequently cited violations.

CITATIONS & FINES

JAVIER PARGA GARCIA
 1407 Blackberry, Louisville
 Inspection site: 9803 Saturn Dr., Louisville
 12-20-13 \$46,200

Serious Willful

- Two employees were working on roof at least eight feet above ground with no fall protection. \$42,000

Serious

- Employees were not properly trained in fall protection. \$4,200

SECURITY SAFE OUTLET
 DBA SMOKIN' GUNS
 4115 Lexington Road, Paris
 Inspection site: 4115 Lexington Road, Paris
 12-19-13 \$20,000

Serious

- Exit door was barred and chained with padlocks. \$1,500
- Exit door did not have exit sign. \$0
- Unused openings on electrical panel were not properly closed. \$2,500
- Working space around electrical panel was used for storage. \$2,500
- Employer did not conduct initial determinations of employees' exposure to lead. \$3,500
- Employer did not keep all surfaces maintained and as free as practical from lead accumulation. \$2,500
- Employees dry swept shooting range when other effective methods, such as vacuuming, were available. \$2,500
- Employees exposed to lead were not informed of appendices of lead regulation. \$2,500
- Employer did not develop, implement and maintain a hazard communication program. \$2,500
- Employees were not properly trained on work-place hazards. \$0

Other

- Electrical panel had circuits that were not labeled to identify the equipment they energize. \$0

UNITED PARCEL SERVICE
 911 Grade Lane, Louisville
 Inspection site: 911 Grade Lane, Louisville
 12-20-13 \$14,000