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# MULTI-EMPLOYER WORKSITE LIABILITY ISSUES WEB CAST

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Presented by Mark Lies and Duane MacEntee - Sponsored by Stainless LLC

# Presenters

## Duane MacEntee



Duane is President and Chief Operating Officer with Stainless LLC, a leading tower design and fabrication company.

He has enjoyed over 20 years as an operations, risk management and regulatory compliance executive within the telecommunications, transportation and aerospace industries. Duane earned his B.S. in Engineering Technology from the University of Central Florida, his M.B.A. from the Florida Institute of Technology and his law degree from North Carolina Central University.

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## Mark A. Lies, II



Mark is a Labor and Employment Attorney and Partner with Seyfarth Shaw.

He specializes in Occupational Safety and Health Law and related employment law and personal injury. He graduated from the University of Notre Dame in 1968 and DePaul University School of Law in 1974. He was a Commissioned Officer in the U.S. Navy and is a Vietnam Veteran.

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# OSHA Regulations...

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May appear somewhat confusing



...but your responsibility to comply with safety standards have been in existence for a long while.



# Accountability

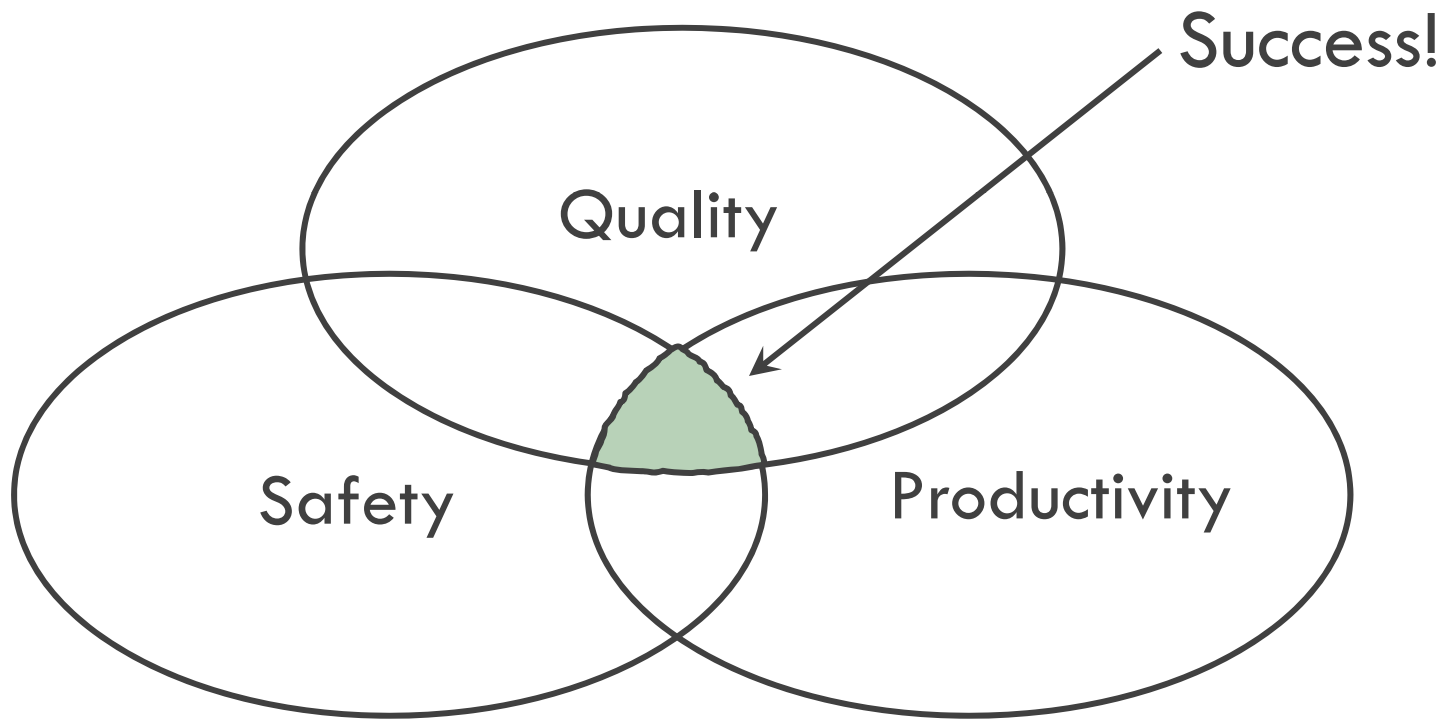
“If a builder has built a house for a man and his work is not strong, and if the house he has built falls in and kills the householder, that builder shall be slain.”

King Hammurabi of Babylon

*18th Century B.C.*



# Doing the Job “Right”



Trilogy for Success

# Program Objectives

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- OSHA enforcement initiatives and trends
- What to expect with a new administration
- New penalty and liability policies
- Civil liability issues

# OSHA ENFORCEMENT INITIATIVES AND TRENDS

# Employers and Employees On-Site

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- Owner
- Owner's representative
- General contractor
- Subcontractors
- Leased employees
- Borrowed employees
- Safety consultants



# OSHA Liability

- Initially, employer responsible for its own employees and had to ensure they were protected against:
  - “Recognized hazards” to employee safety and health (General Duty Clause)
  - Hazards identified in specific regulations (29 CFR 1926, e.g. falls, electrical, lead, silica, etc.)
  
- Liability was expanded under “Multi-Employer Workplace Doctrine” and now each employer is potentially responsible for the safety and health of another employer’s employee, if the employer:
  - Creates the hazard
  - Exposes an employee to the hazard
  - Is responsible to correct the hazard, or
  - Is the controlling employer on the site



# OSHA Liability

## ➤ Creating Employer

- Caused hazardous situation
- Companies creating a violation may be cited

## ➤ Exposing Employer

- Exposes own employees to a hazard
- Can be cited for violation even if the hazard was created by another employer
- Can be cited if knew of or failed to exercise reasonable diligence to discover the hazard, or
- Failed to take steps within its authority to protect employees



# OSHA Liability

## ➤ Correcting Employer

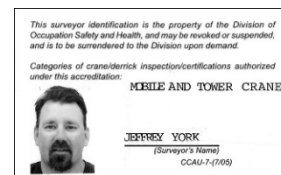
- Employer on the site who is responsible for correcting a hazard
- Must exercise reasonable care in preventing and discovering hazards and meet its obligations

## ➤ Controlling Employer

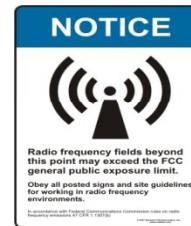
- Exercise reasonable care to prevent and detect violations on site
- Factors relating to reasonable care
  - Scale of project
  - Nature and pace of work
  - Knowledge of contractor history & expertise
- Evaluation of reasonable care
  - Enforces compliance with graduated system of enforcement & follow-up?
  - Effective system for promptly correcting hazards?
  - Appropriate frequency of inspections?

# OSHA Liability

- Hard hats
  - Work boots
  - Personal protective equipment
  - Rigging equipment
  - Fire extinguisher, 1st aid kits, MSDS
  - Qualified climbers/riggers
  - 1st aid/CPR holder
- Crane/hoist operator cards
  - Crane/hoist/fork lift inspection certificates
  - Gin pole and hoist load charts
  - Condition of tools/cords/equipment
  - Pre-job hazard survey
  - Job site signage



Boom Length and Lift Radius	Chart Capacity Lost When Crane Out of Level By		
	1°	2°	3°
Short Boom, Minimum Radius	10%	20%	30%
Short Boom, Maximum Radius	8%	15%	20%
Long Boom, Minimum Radius	30%	41%	50%
Long Boom, Maximum Radius	5%	19%	15%



# Aggressive Enforcement

- Use of interpreters
- Emphasis on repeat citations
- Requests for root cause analysis and company insurance audits
- Cautionary tale: Use of knowledge of previous inspection to justify willful citation
- Employee by employee citations
- Enhanced use of general duty clause

# WHAT TO EXPECT WITH A NEW ADMINISTRATION



# Ergonomics Standard

- Clinton Administration's Ergonomics Standard failed.
- The campaign of Sen. Barack Obama's (D-III) said he would "reinstate OSHA's ergonomics rule" while supporting a policy protecting small businesses that might be adversely affected by a new regulation.
- Sen. Joseph Biden Jr. (D-Del) said he does not favor a new standard. "We don't need new initiatives, we need new inspectors to go in and make sure [employers] are abiding by the existing law."

Sources: The Hill; The Ergonomics Report™



# NEW PENALTIES AND LIABILITY POLICIES

# Protecting America's Workers Act

- First introduced in 2005, House and Senate in 2009
- Increased protection for whistleblowers
- Changes to civil penalty structure
  - Willful violation min. \$50K up to \$100K, can go up to \$250K
- Recent criminal actions
  - Scaffold or excavation collapse
  - Electrocution involving failure to train electrical workers
  - Failure to provide or enforce use of personal fall arrest system
- Criminal sanctions
  - Amputation, disfigurement, loss of brain capacity
  - Changes crime from misdemeanor to felony (min. one year jail time)
  - Subject to federal sentencing guidelines for imprisonment as well as monetary penalties



# Criminal Law Liability

## ➤ OSHA

- Potential liability if:
  - Fatality
  - Violation of specific regulation
  - Violation was willful and caused fatality
- Penalty
  - 6 months imprisonment, and/or
  - \$500k fine/fatality - corporation
  - \$250k fine/fatality - individual
- Obstruction of justice for interfering with inspection
- Falsification of records
- Lying to federal inspector
- Misrepresentation of subcontractor status to avoid OSHA liability

## ➤ State Law

- Murder
- Attempted murder
- Battery
- Assault
- Reckless endangerment

## ➤ Double Jeopardy

- Does not apply
- Possible federal/state prosecution

# Whistleblower Laws

## ➤ Potential employer liability if

- Employee engages in “protected activity” (e.g., makes complaint about safety or health violation to employer; files complaint with OSHA; participates in OSHA inspection), and
- Employee suffers “adverse action” (e.g., termination, discipline, loss of benefits), and
- Employer takes adverse action and retaliates against employee because of protected activity
- Employee may file 11(c) Complaint with OSHA seeking damages
- OSHA will investigate complaint
- If OSHA finds reasonable cause that there was retaliation, case may be filed in federal court
- All states have whistleblower laws that may apply

# Whistleblower Suits

- Employee right to refuse work if there is imminent danger
- Changes under pending legislation include:
  - Scope of protected activity to include reporting injuries or unsafe conditions to employers
  - Compensatory damages
  - Private right of action



# OSHA State Plans

- Increased enforcement in California, Oregon, Washington
- Obligations to have safety committees
- Independent enforcement strategies
- Increasing use of state criminal code



# CIVIL LIABILITY ISSUES

# Civil Liability

## ➤ Negligence

- Duty
  - Duty not to create an unreasonable risk of harm to others due to one's own actions
- Breach of Duty
  - When an unreasonable risk of harm has been created
- Causation
  - Where foreseeable harm is proximately caused by such actions
- Damages

## ➤ Reasonableness/ Foreseeability

- Reasonable person standard
- Foreseeability of harm

## ➤ Vicarious liability

- Employer - Employees
  - Employer generally liable under the doctrine of respondeat superior
- Owner - Independent Contractors
  - Owner generally not liable, but the exceptions can swallow the rule.
  - Negligence of owner
  - Non-delegable duty
  - Inherently dangerous activity
  - Collateral negligence
- Oversight vs. directing the manner and means of work

WHAT CAN YOUR COMPANY DO?

# Unavoidable Employee Misconduct

- More important than ever to establish strong unavoidable employee misconduct defense
  - Program for the specific hazard, e.g. fall, electrical
  - Training and documentation – there may be a cultural, literacy or language barrier
  - Need to use translators, interpreters
  - Need enforcement – new supervisors many times have had no training in delivering discipline
  - Supervisor need to identify and correct hazard
  - Maintain records of enforcement/discipline

# Protective Measures

- Thorough investigation and confirmation of subcontractor qualifications (e.g., OSHA Logs, WC records, OSHA website)
- Review of subcontractor safety and health programs and employee training for specific workplace hazards
- Contract language clearly defining subcontractor obligation for worksite safety and health compliance (and duty to identify and correct hazards)
- Contract language requiring subcontractor to defend General Contractor in OSHA proceedings/pay penalties, resulting from subcontractor non-compliance

# Additional Protective Measures

- Creation and monitoring of jobsite safety compliance process by subcontractor
- Review of subcontractor safety performance (e.g., OSHA Logs, disciplinary action)
- Creation of “hotline” for all employees to make anonymous safety and health complaints
- Creation of written notice of “non-retaliation” policy for employee complaints regarding safety
- Contract requirement for appropriate liability insurance by reputable carrier and Certificate of Insurance naming General Contractor as “Additional Insured”

# QUESTIONS?

*Questions and answers not addressed during today's session will be posted on the NATE Web site next week*

*[www.natehome.com](http://www.natehome.com)*

*If you have additional questions, please email [industryrelations@natehome.com](mailto:industryrelations@natehome.com)*

*Thank you for your time.*