

## **MISSED OPPORTUNITIES: HOW OSHA SHOULD ENSURE WORKER SAFETY IN THE FISSURED WORKPLACE**

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OSHA has a greater opportunity than other federal agencies to ensure worker safety in fissured workplaces<sup>1</sup> across the country. The Bureau of Labor Statistics reports that in 2013, seventeen percent of all workers killed on the job were working as contractors.<sup>2</sup> But unlike the National Labor Relations Board (NLRB) or the Wage and Hour Division, has been slow to cite fissured employers for health and safety hazards.

The OSH Act directs OSHA to assure “so far as possible every working man and woman in the National safe and healthful working conditions.”<sup>3</sup> The OSH Act applies to “employment performed in a workplace.”<sup>4</sup> OSHA can impose regulatory duties based on an employer’s relationship to the hazards at work without also proving that the regulated entity is the actual or putative employer of the employees who are in harm’s way.<sup>5</sup> To impose legal duties or assign liability, other employment agencies must establish that an employment relationship exists between a worker and a putative employer. However OSHA may cite an entity as a joint employer in appropriate cases, but is not required to do so before it can

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<sup>1</sup>David Weil, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014). The “fissured workplace” refers to three types of employment/business arrangements: when a host employer operates a business that is staffed in whole or in part by employees of a staffing agency; when a franchisor exercises some degree of control of the business operations of a franchisee; and when employees of multiple employers work together to meet supply goals imposed by a business with whom they contract.

<sup>2</sup> *Census of Fatal Occupational Injuries*, Bureau of Labor Statistics (Sept. 17, 2015, 10:00 AM), <http://www.bls.gov/news.release/cfoi.nr0.htm>.

<sup>3</sup> 29 U.S.C. § 651.

<sup>4</sup> 29 U.S.C. § 653(a).

<sup>5</sup> Of course, the entity being cited must be an employer under the OSH Act.

insist on shared responsibility for health and safety hazards. This creates a degree of flexibility (and opportunity for more effective enforcement) not available under the NLRA and FLSA.

OSHA has relied upon this flexibility in several ways to expand the duty to provide safe work places to entities other than an employee's (actual or putative) employer. The best example of this expansive, worker-protective interpretation of the OSH Act is the multi-employer work site policy, discussed more fully below. Several standards impose duties on employers to protect the employees of another employer. For example, the hazard communication standard imposes duties on manufacturers and distributors to inform workers,<sup>6</sup> other than their own employees, of chemical hazards; the asbestos standard imposes duties on property owners to inform contractors of known asbestos hazards<sup>7</sup>; and the recently promulgated confined space in construction standard imposes multi-employer communication responsibilities.<sup>8</sup>

#### I. The Multi-Employer Citation Policy

The Multi-Employer Citation Policy<sup>9</sup> was first adopted in the 1970s and originally used in the construction industry where several subcontractors working under the general direction and control of a general contractor are present at a work site.<sup>10</sup> The policy was last revised in 1999 and although it explicitly applies to all industrial sectors, it is still relied upon most often in the construction industry. It authorizes OSHA to cite an employer for hazards affecting the employees of another when that employer either creates the hazard, controls safety at the work site, exposes the employees to the hazard, or has the means to correct the hazard.

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<sup>6</sup> 29 C.F.R. § 1200.

<sup>7</sup> 29 C.F.R. § 1910.1001.

<sup>8</sup> 29 C.F.R. § 1926.968.

<sup>9</sup> OSHA, CPL 02-0.124, Multi-Employer Citation Policy (Dep't of Labor Dec. 10, 1999), [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=DIRECTIVES&p\\_id=2024](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=2024).

<sup>10</sup> See generally *Solis v. Summit Contractors*, 558 F.3d 815 (8th Cir. 2009).

The policy is been widely accepted by both federal and state courts, in both OSHA enforcement cases and in tort cases. OSHRC has concluded that an employer may be held responsible for the violations that affect the employees of another employer "where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite. " <sup>11</sup> Only the 5<sup>th</sup> Circuit has ruled the multi-employer citation policy invalid and the continuing validity of the 5<sup>th</sup> Circuit's position has been questioned. <sup>12</sup>

The multi-employer citation policy should be an important tool for protecting franchise workers from safety and health hazards. Franchise agreements often give the franchisor – by contract – the right to insist that franchisees comply with all policies of the franchisor including those regarding safety of both customers and workers. Franchisors often exercise this contractual authority by inspecting franchisee locations regularly and insisting – to the point of threatening not to renew or to terminate the franchise agreement – on compliance with corporate policies. In addition, the franchise agreement may require that franchisees purchase all equipment used in the business from the franchisor's catalog. In such cases, the franchisee is limited to purchasing only the safety equipment approved by the franchisor. Further, the franchisor may own the property on which the business is operated and, as such, may be able to dictate what equipment is installed and how it is configured. Each of these "controlling actions" standing alone might make the franchisor a "controlling employer." Taken together, they clearly meet the definition of controlling employer in OSHA's multi-employer citation policy. This is a straight-forward application of long-standing law, not an unprecedented application of a novel legal doctrine.

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<sup>11</sup> See *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2130 (No. 90-2873, 1994); see also *Blount*, 15 BNA OSHC 1899, 1991-93 (No. 89-1394, 1992); *Gil Haugan*, 7 BNA OSHC 2006 (No. 76-1512, 1979).

<sup>12</sup> See *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. 1981). *But see* *McDevitt Street Bovis*, 19 BNA OSHC 1108 (No. 97-1918, 2000).

Additionally, OSHA could also rely upon the multi-employer citation policy where host employers or creators of supply chains erect systems where the work at their businesses or the delivery of their products is accomplished by the employees of several other employers. For example, where a retail chain owns or operates a warehouse and employee of one entity bring goods to the facility, employees of another entity unload and sort the goods, and employees of a third entity reload and deliver the goods, the multi-employer citation policy allows OSHA to hold each entity responsible for the hazards that it creates or controls. In all these instances, OSHA can cite the employer at the top of the business arrangement if it sets the terms of the agreement and either – through its actions or its omissions – insists upon or officially sanctions ignoring, health and safety concerns.

Reliance on the multi-employer worksite policy has several advantages over reliance on the joint-employer doctrine, at least in cases involving violations of OSHA standards, rather than general duty clause violations. Most importantly, it is easier for OSHA to prove that a lead employer (whether host or franchisor or general contractor) is a creating, exposing, controlling or correcting employer because it does not require proof that the lead employer exercises control over wages, benefits, or other aspects of employment. Equally as important, it focuses OSHA's attention on gaining compliance from the top of the corporate pyramid; by holding a franchisor responsible for violations of safety and health standards in each of its franchise locations, OSHA can gain abatement of hazards at thousands of locations with just one citation.

Despite these advantages, OSHA nevertheless has been reluctant to rely on the multi-employer worksite doctrine in fissured workplaces. Much of this reluctance springs from Office of Solicitor's (SOL's) misplaced concern that *IBP v. Hermann*<sup>13</sup> bars reliance on the multi-employer citation policy outside the construction industry. However, *IBP* does not limit the multi-employer citation policy to the

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<sup>13</sup> *IBP, Inc. v. Herman*, 144 F.3d 861 (D.C. Cir. 1998).

construction industry. Instead, *IBP* – to the extent it is relevant outside the D.C. Circuit – stands for the proposition that a lead employer cannot be cited as a “controlling employer” if its’ only control over a subcontractor was the right to terminate the contract. Franchisors often exercise hands on, regular supervision of a franchisee’s compliance with corporate policies, including safety and health policies, showing far more involvement in the operations of franchise locations than was present in *IBP*.

OSHA could take several steps to enhance the multi-employer citation policy’s application in fissured worksites and better ensure worker safety. First, OSHA should revise the policy to extend it broadly so it clearly covers both traditional and fissured workplaces. Second, SOL should draft a legal justification for broad application of the policy. Third, OSHA should ask the 5<sup>th</sup> Circuit to reverse itself and recognize the validity of the policy.

OSHA should revise the policy to make it explicit that it applies broadly to both construction and other industries and to traditional and fissured workplaces. It should specifically describe the type of evidence Compliance Officers will review to determine who is responsible for OSHA compliance at the site. Ideally, OSHA would do this by codifying the policy in a regulation. OSHA proposed doing so in the 1970s, when OSHRC precedent made its validity uncertain, but withdrew the proposal when OSHRC changed its interpretation.<sup>14</sup> California has a regulation governing multi-employer worksite that makes its application outside construction clear.<sup>15</sup> If OSHA codified the multi-employer policy, the Agency’s interpretation of when it applied would be entitled to *Chevron* deference.<sup>16</sup>

When revising or explaining the policy, OSHA should interpret the policy to the fullest extent of its authority. For example, the Washington Supreme Court recently ruled – interpreting the federal multi-

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<sup>14</sup> *Citation Guidelines in Multi-Employer Worksites Request for Public Comment*, 41 Fed. Reg. 17639 (April 27, 1976).

<sup>15</sup> CAL. CODE REGS. tit. 8, §336.10 (1997).

<sup>16</sup> *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

employer worksite policy as enforced by Washington OSHA -- that jobsite owners have a duty to comply with WISHA for the protection of all employees at the site if they retain control over the manner in which contractors complete their work.<sup>17</sup> OSHA has imposed duties on property owners in standards, but has not traditionally done so in enforcement. Imposing a duty, like that imposed by the Washington Supreme Court in *Afoa*, on property owners who exercise control over the work done on their property, would provide a basis for holding many franchisors responsible for complying with OSHA standards. It is also broad enough to cover other lead supply chain employers. Resting OSHA authority on an employer's ownership of the property and control of the manner in which work is completed on site would avoid an inquiry into how many employees of the franchisor (or other entity viewed as a controlling employer) are present on the site.

Whether or not OSHA revises the policy, SOL should develop a broad, cohesive, explanation of the legal and policy basis for broad application of the multi-employer policy in fissured and other workplaces. A comprehensive statement of the scope of the policy and the legal justification for it, issued in advance of litigation over the application of the policy to specific citations, would maximize the *Skidmore* deference OSHA receives.<sup>18</sup> Currently, SOL usually explains only the application of the policy to specific citations. This "litigating position" is the least effective way to encourage deference to the Secretary's position.<sup>19</sup>

Finally, OSHA should directly ask the 5<sup>th</sup> Circuit to reverse itself. The Fifth Circuit decision questioning the policy is from the 1970s.<sup>20</sup> Other courts have consistently upheld the policy. A strong argument can be made that the 5<sup>th</sup> Circuit's interpretation of the Act is outside the mainstream.<sup>21</sup> More

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<sup>17</sup> *Afoa v. Port of Seattle*, 296 P.3d 800 (WA 2013)(en banc).

<sup>18</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

<sup>19</sup> See *Solis v. Loretto-Oswego Residential Health Care Facility*, 692 F.3d 65 (2d Cir. 2012).

<sup>20</sup> *Southeast Contractors v. Dunlop*, 512 F.2d 675 (5th Cir. 1975).

<sup>21</sup> OSHRC has questioned whether the 5<sup>th</sup> Circuit's decision in *McDevitt Street Bovis*, 19 OSH Cases 1108 ( Rev. Comm'n 2000).

importantly, the 5<sup>th</sup> Circuit's initial decision was reached before the *Chevron/Skidmore* deference regime was adopted by the Supreme Court. With a clear statement of the legal basis for its multi-employer policy, the 5<sup>th</sup> Circuit should defer to OSHA, even if it otherwise thinks another reading of the statute is more appropriate.<sup>22</sup> In any event, the 5<sup>th</sup> Circuit is an outlier and it should not be the "tail that wags the dog."

## II. Joint-Employer Liability Under OSHA in Fissured Workplaces

Proof that two employers have joint responsibility for OSHA violations is required where the hazard is one for which OSHA has no standard and its citation rests on the general duty clause. In many instances, the analysis of who is a "controlling employer" and who is a "joint employer" require the same evidence. For staffing agency/leased employee situations, joint employer might fit more easily. In franchised workplaces, both might apply. The choice seems fact specific.

Moving forward, OSHA should clarify when the joint employer test applies through legal and policy analysis. If necessary, it should distinguish its position from the test OSHRC has articulated. Lastly, SOL should work to ensure that OSHRC and the courts apply the joint employer test articulated by OSHA broadly to protect workers in the fissured workplace.

The current test for joint employer applied by OSHRC was articulated in *Secretary of Labor v. Froedtert Memorial Hospital*.<sup>23</sup> Under that test, two employers may each have legal responsibility to protect workers under the OSH Act; the fact that employees of a staffing agency or a franchisee are not directly employed by the host company or the franchisor is not determinative of each employer's responsibilities under the Act. Instead, when determining whether a putative employer can be cited as

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<sup>22</sup> See *Nat. Grain & Feed Ass'n v. OSHA*, 866 F.2d 717 (5th Cir. 1988) (revising its opinion on rehearing and stating that although it did not agree with OSHA's interpretation of its standard setting authority, it was required to defer to OSHA's clearly articulated interpretation).

<sup>23</sup> *Froedtert Memorial Hospital*, 20 BNA OSHC 1500 (No. 97-1839, 2004).

a joint employer for violations of OSH Act standards, the Review Commission looks to the factors articulated by the Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*.<sup>24</sup> These include:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

According to OSHRC, no one factor is decisive, but control over the manner and means by which a worker accomplishes the assigned tasks remains an important consideration. Other courts apply an “economic realities” test and describe *Darden* as a “non-exhaustive list” of factors to be considered, emphasizing that the “central inquiry is who controls the work environment.”<sup>25</sup>

*Darden* in turn relies upon Restatement of Agency 2d, §220 for a “common law” definition of the master servant relationship to identify who is an employer. Interestingly, the most recent version of the Restatement on Agency 3d Edition, has eliminated the concept of master-servant because, according to the editors, so many states have adopted a statutory definition for different purposes that the concept of master-servant is outdated.

There is no magic to OSHRC’s formulation of the “joint employer” test and no reason to believe that OSHRC’s articulation of the standard is more faithful to the Restatement than other formulations would be. Different courts and agencies read *Darden* differently. Each emphasizes different factors or weighs similar factors differently. Indeed, the NLRB’s recent decision in *Browning-Ferris* illustrates how

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<sup>24</sup> *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992).

<sup>25</sup> *Loomis Cabinet v. OSHRC*, 20 F.3d 938 (9th Cir. 1994).

– while remaining faithful to the *Restatement* test – different interpretations of who is a joint employer are possible. The beauty of that decision for OSHA is that it provides a roadmap for interpreting the Section 220 of *Restatement of Agency 2d*, consistent with *Darden*, in a manner that recognizes the changing nature of work organization in the 21<sup>st</sup> Century.

*Froedert* suffers from the same flaw that the NLRB identified in the Board’s “joint employer” decisions over the past 30 years. The test for “joint employer” and its application have narrowed over the past several decades, meaning that the common law “joint employer” test relied upon by some agencies requires direct proof of control over the workplace, rather than the indirect control more common in fissured workplaces. As the NLRB recognized, nothing in the *Restatement* required this narrower definition.

*Froedert* is not a thoughtful and careful evaluation of the “joint employer” test appropriate under the OSH Act. Relying on *Darden*, OSHRC has upheld some OSHA citations against joint employers and rejected others. In most cases, it recites the same standard and either says the facts meet the test or they do not. OSHRC has made no effort to analyze the different circumstances in which the *Restatement* suggests that a master-servant relationship can be found. If OSHA wants to move beyond *Froedert* it should start by developing a comprehensive legal and policy analysis of who is a joint employer under the OSH Act. It must then explain how its definition differs from OSHRC’s, if it does, and why OSHA’s definition better furthers the remedial purpose of the OSH Act.

The NLRB’s recent decision in *Browning-Ferris* provides a roadmap for doing so. The NLRB roadmap ties the test for “joint employer” to the *Restatement* in a manner consistent with *Darden*. Aligning OSHA’s interpretation of joint employer with that of another agency, such as the NLRB, particularly where the statute each agency administers relies upon the same definition of “employee” will make OSHA’s interpretation seem more reasonable when challenged. In the past, OSHA has

advocated for the NLRB's single employer standard and the Second Circuit, in dicta, has suggested that aligning the two standards might make sense.<sup>26</sup>

Another approach would be to look to state law definitions of employer. State law in many instances defines "employer" broadly by statute, at least for purposes of workplace safety. In the state law context, host employers and franchisors may want to be viewed as a joint employer (or in this context the term is often "statutory employer") because this definition shields them from tort liability for workplace accidents under workers' compensation law. For example, an employer guide on the website of the New York State Workers' Compensation Board states that "for workers' compensation insurance purposes, the term *employee* generally includes day labor, leased employees, borrowed employees, part-time employees, unpaid volunteers (including family members) and most subcontractors."<sup>27</sup> Tennessee defines a statutory employer by statute and makes all contractors on the site a statutory employer such that they have immunity from suit for workplace injuries.<sup>28</sup> A Massachusetts appellate court recently held a host employer was immune from tort liability for a workplace injury where it had been added as an additional insured to a staffing agency's workers' compensation policy.<sup>29</sup>

At a minimum, an entity that is shielded from liability for workplace injuries as an "employer" should have a duty – in the same capacity – to prevent those injuries. OSHA regional offices (or Regional SOL offices) should become familiar with the law in the states it covers. Other doctrines of state law, such as the duty of care owed by a property owner to a business invitee, may also suggest an ongoing duty to

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<sup>26</sup> See *Solis*, 692 F.3d at 65.

<sup>27</sup> *Workers' Compensation Coverage*, New York State Workers' Compensation Board, [http://www.wcb.ny.gov/content/main/Employers/Coverage\\_wc/emp\\_empDefinition.jsp](http://www.wcb.ny.gov/content/main/Employers/Coverage_wc/emp_empDefinition.jsp) (last visited Sept. 30, 2015).

<sup>28</sup> See TENN. CODE ANN. §50-6-113 (2014).

<sup>29</sup> *Molina v. State Garden, Inc.*, 88 Mass. App. Ct. 173 (Mass. App. Ct. 2014).

comply with OSHA standards. OSHA should rely on these concepts before OSHRC in trying to persuade it to broaden who is responsible for protecting workers against on-the job hazards.

### III. Proving An Employer Must Protect Affected Workers

How should OSHA go about trying to persuade OSHRC and the courts to shift to a broader definition of employer that more fully protects workers in the fissured workplace? The Second Circuit provides a roadmap in *Loretto-Oswego*. The burden is on OSHA to articulate, in advance of litigation, a policy describing its policy toward joint employers. Ideally, it would do so by adopting a regulation so it could benefit from *Chevron* deference. Short of that, OSHA should adopt a specific policy – ideally accompanied by a legal explanation of the basis for the policy, so it could benefit from *Skidmore* deference. OSHA has articulated much of this with its recent activities on temporary workers. But, the temporary worker initiative does not address the issues affecting franchise employees or supply chains. OSHA should look at California’s Policy & Procedure on Dual Employer Inspections which includes not only a statement of Cal-OSHA’s interpretation but also the facts that investigators should develop to determine when the policy applies.<sup>30</sup> SOL should explain the new policy by adopting the NLRB’s reasoning in *Browning-Ferris*. Each of these approaches would entitle OSHA to greater deference (of varying degrees) beyond what it gets from litigation positions.

### IV. OSHA Needs to Actively Investigate Non-Traditional Work Arrangements

Each of the potential theories for protecting those who toil in fissured workplaces is fact specific. Not every franchise or subcontracting relationship will fit within a joint employer or multi-employer legal theory. Even if the employment arrangement does fit within one of these theories, OSHA must still

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<sup>30</sup> *Division of Occupational Safety and Health Policy and Procedures Manual*, State of California Department of Industrial Relations (May 1, 1996), <https://www.dir.ca.gov/DOSHPol/P&PC-1D.htm>.

determine which OSH Act duties apply to each putative employer. To do so, OSHA must prove that each employer it cites “knew or should have known” about the violative conditions. The specifics of the relationship between the two employers dictates which employer must comply with various OSHA standards. Unless Compliance Officers ask the right questions early in their investigation, OSHA will prove incapable of protecting workers in the fissured workplace.

For example, the lead standard requires medical exams for employees exposed above the action level for more than 30 days each year. Usually, a host employer would be responsible for ensuring compliance with the medical surveillance requirements of the standard. But, if a staffing agency sent workers to different foundries for 25 days at a time, then relying on the host employer to provide medical exams to workers would be inadequate. In this instance, the duty would fall to the staffing agency to ensure that employees received appropriate medical surveillance. In other instances, where employees worked for each foundry for a longer period of time, both the host employer and the staffing agency might be jointly responsible for compliance with the medical surveillance provisions of the lead standard.

Facts also dictate whether a franchisor can be cited for OSHA violations at franchisee locations. It may be reasonable for OSHA to expect a franchisor (who the facts show is a joint employer) to develop Hazard Communication, Lockout, and PPE policies and training materials and take steps to ensure those policies are implemented. OSHA may decide that the franchisee is responsible for ensuring that exit doors are unlocked, aisles and passageways are not blocked etc.

OSHA cannot expect fissured workers to know which employers are responsible for the hazards to which they are exposed. OSHA’s complaint form asks workers to identify the “establishment” to be inspected, not the employer to be investigated. Currently, OSHA does not routinely inquire as to the work relationships present at an establishment. It focuses on the conditions at the worksite. It needs to

change its perspective to ensure that fissured workplaces are safe. As long ago as 2002, GAO criticized OSHA for not having investigative techniques aimed at identifying non-traditional worksites.<sup>31</sup> The problem continues. By the time an OSHA inspector comes to SOL and asks for help with follow up document requests to the employer, a good portion of OSHA's 6 month statute of limitations for issuing citations has already gone by. If a putative employer who is not operating the establishment at which an inspection occurs stalls in providing documents to OSHA, under current procedures, the Agency has little chance of holding a controlling employer responsible for OSHA compliance.

OSHA needs to fix this problem. For example, its Field Operations Manual should include instructions on what questions to ask management about the structure of the workforce at the location and other entities that might have control over safety and health policy. OSHA might consider how it can open an "investigation" of an off-site employer, on a different, and later date, than the date on which it conducts the worksite inspection. OSHA should talk to workers and their representatives to learn about the structure of the workforce at the beginning of an investigation.

And, OSHA should become more savvy in using internet searches. State law may require the filing of franchise documents. Publicly available documents in pending litigation may reveal details about the workplace. Pending tort litigation, particularly if the violations OSHA is investigating led to injuries, might reveal who claims immunity from suit as an employer. Google is an amazing tool. OSHA should put it to good use.

Finally, when OSHA does investigate large companies who try to delegate out responsibility for safety and health, it should develop a shared database, so one Area Office can benefit from research done by another. It should consult other Department of Labor agencies to see what they know about

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<sup>31</sup> *Worker Protection: Labor's Efforts to Enforce Protections for Day Laborers Could Benefit the Better Data and Guidance*, U.S. Government Accountability Office (Sept. 22, 2002), <http://gao.gov/products/GAO-02-925>.

the company and its relationship with its workers. The control Burger King exercises over a franchise in Boston is likely to be similar to the control its exercises over a franchise in Missouri. And, if Burger King is a joint employer under the Fair Labor Standards Act or the National Labor Relations Act, OSHA has a strong case that it is a joint employer under the OSH Act as well. OSHA does not need to reinvent the wheel every time it visits a Burger King facility. Finally, OSHA should insist that VPP members and applicants ensure safety and health protections are provided to everyone who works at the site.

Increased attention to fissured workplaces, and efforts to ensure they are safe places to work, often means shifting attention away from the establishment and focusing instead on the employing entity that has real control of safety and health issues affecting the employees. In the *Walmart* case, recently decided by OSHRC and now pending in the Fifth Circuit, OSHA seems to be doing the opposite. OSHA needs to send a clear message and it needs to reconcile its approach in the *Walmart* case with possible future efforts to hold franchisors responsible for safety and health hazards. Should corporate headquarters be responsible for safety and health programs or should local establishments? If both have a role, what are those roles?

## V. Conclusion

OSHA has been relying on the multi-employer citation policy or a joint employer theory, in appropriate cases for decades. Washington OSHA has cited a franchisor for the violations found at franchisee locations.<sup>32</sup> Application of either of these theories to fissured workplaces – whether to host employers for hazards faced by leased employee, or franchisors for hazards faced by franchisee employees, or to the top of the supply chain for hazards faced by workers engaged in their delivery system -- is not novel or unprecedented. Instead, it's a fact-specific application of long-standing

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<sup>32</sup> See Appendix A

legal doctrines. The difference is that in today's workplace, more and more workers face conditions created by employers who don't pay their wages but who directly or indirectly control the hazards they face on the job. Because OSHA encounters fissured workplaces more frequently, it has a greater need to adapt its existing policies to the new realities of the workplace.

### **Recommendations to Ensure Worker Safety at Fissured Workplaces**

1. **Use OSHA's existing Multi-Employer Citation Policy in Fissured Workplaces:** OSHA should use its existing policy to maximize worker safety in nontraditional workplaces, like franchises. Apply the policy expansively and include host employers that erect supply chains.
2. **Revise and codify the Multi-Employer Citation Policy to achieve maximum impact:** OSHA should revise the existing policy, clarifying that it applies expansively, and codify the policy in regulation. This maximizes impact and allows OSHA to gain abatement of hazards in multiple sites.
3. **Develop an explanation of the legal and policy basis for broad application of the Multi-Employer Citation Policy:** SOL should develop the broad explanation now, not exclusively in relation to specific citations.
4. **Ask the 5<sup>th</sup> Circuit to reverse itself with regard to the Multi-Employer Citation Policy:** OSHA should ask the court to reverse itself. The 5<sup>th</sup> Circuit is an outlier and reversal would bring conformity amongst the courts on this issue.
5. **Clarify OSHA's current test for joint employment:** OSHA should make its test for joint employment clear through legal and policy analysis. If needed, it should distinguish its test from OSHRC's test.
6. **Clarify OSHA's joint employment test and ensure it is followed:** OSHA should clarify its test for joint employment and ensure that it is expansive enough to fit nontraditional workplaces. OSHA should follow the example set by the NLRB (relying on *Darden* and the Restatement) and/or use

state law definitions of employer to ensure that the test captures today's workplace realities.

Once clarified, OSHA should ensure that it is followed by OSHRC.

**7. Update investigative techniques used for nontraditional workplaces:**

- a. Revise OSHA's Field Operational Manual:** Ensure that OSHA's manual directs investigators to ask management about employment relationships, the structure of the workforce, and other entities that might have control over safety and health policy. The manual should also contain guidance about how investigators should talk to workers and their representatives about the structure of the workforce.
- b. Enhance the sophistication of internet searches to gain information about worksites and employers:** There are many free, web-based tools available to OSHA investigators. They should use them.
- c. Develop a database to share information across the agency:** OSHA should develop a database to share information about various employers between OSHA's regional offices and more broadly within the DOL.