



## **Division of Occupational Safety and Health POLICY AND PROCEDURES MANUAL**

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**P & P C-1D**

**DUAL-EMPLOYER INSPECTIONS**

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P&P C-1D

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# DUAL-EMPLOYER INSPECTIONS

**AUTHORITY:** California Labor Code Sec. 6400, 6401, 6401.7, and 6402 through 6404; decisions of the Occupational Safety and Health Appeals Board (OSHAB) and California appellate courts.

**POLICY:** It is the policy of the Division of Occupational Safety and Health to respond appropriately when an inspection reveals that a dual-employer situation exists. This is to be accomplished by gathering sufficient information to determine which employer(s) are to be cited for violations identified at a worksite, in a manner that is fair, consistent with decisions of the Occupational Safety and Health Appeals Board (OSHAB) and the California courts, and protective of employee health and safety. Dual-employer situations should not be confused with multi-employer situations, which is where employees of two or more employers are present at the worksite.

## BACKGROUND

### A. TYPES OF DUAL EMPLOYERS

A “dual-employer” situation is where an employee has two employers at the same time. Both employers are potentially liable for a violative condition to which an employee has been exposed.

#### 1. Traditional primary employers

The traditional, most common dual-employer situation is one involving a **temporary agency, staffing firm, or employee-leasing company** that deploys an employee to work at another employer’s worksite under the supervision and control of that other employer:

- The company supplying the employee (or having the employee on its payroll) is known as the “**primary employer**.” The primary employer is sometimes referred to as the “**payroll**” or “**contractual**” employer of the worker. The primary employer contracts with the employee to perform work in exchange for wages or a salary, issues the employee’s paycheck, secures workers’ compensation insurance for the employee, and usually retains hiring and firing authority.
- The company supervising the employee at the worksite and controlling the employee’s work is known as the “**secondary employer**.” The secondary employer is sometimes referred to as the “**site employer**” or “**host employer**.”
- A mnemonic you might find useful is: “**Primary Processes Payroll; Secondary Supervises Site.**”

#### 2. Professional employer organizations

In recent years, a newer category of employers calling themselves “**professional employer organizations**” (PEOs) has become common in California. A PEO is a company to which client

employers outsource their human resources functions such as payroll, tax withholding, workers' compensation, and employee benefits. Unlike traditional primary employers, PEOs do not typically deploy workers to a client's worksite. Not all companies operating as PEOs call themselves by that name; some call themselves staffing, leasing, outsourcing, or "business solutions" companies.

While the PEO handles a client employer's human resources functions, the client employer remains responsible for managing the other aspects of its business. PEOs sometimes provide services related to injury and illness prevention and other matters concerning workplace safety and health, but day-to-day OSH compliance is usually excluded from their contractual duties.

The laws governing PEOs are complex and continually evolving, and PEOs themselves are continually changing to provide new and varied services for their clients. Under current OSHAB case law, a PEO that has some degree of direction and control over employees (e.g., through hiring, terminating, reassigning, disciplining, and determining the wages of employees) is considered an "employer" subject to Cal/OSHA jurisdiction. (This is regardless of the terms of any contract between the PEO and client employer regarding respective responsibilities, which may differ from actual practice.) A PEO that is an "employer" is the "**primary employer**" of the employees, with the client employer being the employees' "**secondary employer**."

*IMPORTANT: Every inspection involving a PEO must be evaluated carefully on a case-by-case basis. Compliance personnel should contact the Legal Unit as early as possible in any inspection involving a PEO, to obtain assistance in analyzing the facts and developing the case.*

## B. The Secondary Employer's Responsibilities

The secondary employer is fully responsible for the health and safety of the employees who are also employed by the primary employer. The fact that the primary employer may also be responsible for the health and safety of the same employees does not reduce or eliminate the secondary employer's responsibility to those employees, which is the same as the responsibility the secondary employer has to its own internal employees.

## C. The Primary Employer's Responsibilities

### 1. Basic Responsibilities

A series of OSHAB and California appellate court decisions have delineated the basic responsibilities of primary employers. The primary employer must:

a. Establish, implement, and maintain an effective IIPP. The IIPP must include:

- (1) A system for communicating effectively with employees about occupational safety and health (8 CCR § 3203(a)(3));
- (2) Procedures for initial and periodic inspections to identify and evaluate workplace hazards at the secondary employer's site (8 CCR § 3203(a)(4));

- (3) A procedure to investigate occupational injuries and illnesses (8 CCR § 3203(a)(5));
  - (4) Procedures for either abating site-specific hazards to which the primary employer's employees are exposed (8 CCR § 3203(a)(6)) or if the primary employer does not have control over the worksite, procedures for working with the secondary employer to timely abate the hazards and, if necessary, for removing its employees from a hazardous or unhealthy worksite until the hazards or unsafe conditions are corrected.
  - (5) Appropriate training for new employees and whenever the primary employer becomes aware of a new or previously unrecognized hazard (8 CCR § 3203(a)(7)). This training may be done by or in cooperation with the secondary employer.
- b. Provide appropriate personal protective equipment (PPE) and training on the use of PPE, or ensure that the secondary employer provides the PPE and the training. In most cases, the secondary employer is in the best position to determine the appropriate PPE. Therefore, the primary employer should coordinate with the secondary employer to fulfill this requirement.
  - c. Inform its employees that its safety rules apply wherever they are working and that if they are asked to perform a task they believe is dangerous and/or in violation of the primary employer's safety rules, they may refuse to do it and may return to the primary employer for reassignment without penalty. (This basic responsibility may not apply to PEOs, which do not usually deploy employees to work at their client employers' worksites.)

The primary and secondary employers may cooperate in fulfilling these basic responsibilities. For example, the secondary employer might agree to provide the necessary job-related training to the primary employer's employees, or the secondary employer might provide appropriate PPE or training on the PPE to the primary employer's employees. Regardless, the primary employer is responsible for ensuring these basic responsibilities are fulfilled.

## **2. Responsibility for Ensuring the Worksite Is Safe**

The extent of the primary employer's responsibility for ensuring the worksite is safe for its employees depends on a number of factors, including (1) whether the primary employer had authority to enter the secondary employer's worksite to *supervise* its employees' work; (2) the amount of influence the primary employer exerted over worksite conditions; and (3) whether the violation arose because the secondary employer relied on the primary employer for advice or consultation about workplace safety and health.

As an example, in a Decision After Reconsideration (DAR) in 2014 called *Staffchex*, the OSHAB held a primary employer liable for a serious accident-related violation because the employer had not prohibited its employees from working on an unguarded machine. The primary employer's on-site supervisor knew about the hazard, but he lacked authority from the primary employer to intervene with the secondary employer to resolve safety issues. The OSHAB held that the primary and the secondary employer are each independently required to protect the safety of the employees, regardless of any contract between the two employers. In other words, an employer cannot defend itself against an occupational safety and health citation by arguing it contracted away or delegated to some other employer its own occupational safety obligations. As the Appeals Board explained: "Each employer in

the state of California owes a duty to its employees to furnish a safe and healthful place of employment.”

The Appeals Board and the courts have also recognized there are limits to what can reasonably be expected of a primary employer when a secondary employer supervises the employees but excludes the primary employer from the worksite. Even in those cases, however, a primary employer must still take all reasonable steps necessary to protect the health and safety of its employees.

The central issue to keep in mind when evaluating situations that may not exactly fit the Appeals Board model is the reasonableness of the steps the primary employer took to ensure the safety of its employees at the secondary site. The reasonableness of the primary employer’s efforts depends on the severity of the hazards and the extent to which the primary employer has influence over conditions at the secondary worksite.

The Appeals Board decisions do not address many of the complexities that compliance personnel are currently encountering and will continue to encounter in this area, such as the applicability of these rules when the primary employer has been excluded from the secondary worksite for a legitimate reason.

## PROCEDURES

*IMPORTANT: Dual-employer cases and especially PEO cases can be complicated. Please seek advice from the Legal Unit as early as possible in any inspection involving a PEO or other complex dual-employer relationship.*

### A. Is There a Dual-Employer Situation?

1. If an inspection might involve a dual-employer situation, compliance personnel must collect evidence in their investigation to determine whether employees were paid by an entity other than the employer that was supervising and controlling the employee’s work.
2. If the answer is NO, then there is no dual-employer issue and no need to continue following the instructions in this P&P section.
3. If the answer is YES, then compliance personnel must evaluate each employer’s responsibility for any violations of health and safety regulations.

### B. Secondary Employer’s Liability

Compliance personnel must first determine whether employees were exposed to one or more violative conditions. The secondary employer must be cited for each violation at the worksite to which an employee was exposed. This determination must be independent of whether the primary employer is also liable for the violation.

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### C. Primary Employer's Liability

If the primary employer's employees were not exposed to violative conditions at the worksite, do not issue any citations to the primary employer, even if the primary employer failed to fulfill one or more of its basic responsibilities. Instead, compliance personnel may consider issuing an Information Memorandum to direct the primary employer's attention to a workplace condition that has the potential of becoming a hazard to the safety or health of the primary employer's employees in the future. (See [P&P C-5](#).)

If the primary employer's employees were exposed to one or more violative conditions at the worksite:

1. **Failure to Fulfill Basic Responsibilities.** Compliance personnel must determine whether the primary employer fulfilled its basic responsibilities discussed above under "BACKGROUND — C. The Primary Employer's Responsibilities":
  - a. If the primary employer did not fulfill its basic responsibilities to establish, implement, and maintain an effective IIPP, cite the primary employer for the particular violations under section 3203 that contributed to employees being exposed to violative conditions at the worksite.
  - b. If the primary employer did not use reasonable diligence to provide, or ensure the secondary employer provided, appropriate PPE and training on the use of the PPE, cite the primary employer for the particular PPE violations that contributed to employees being exposed to violative conditions at the worksite.
  - c. If the primary employer did not fulfill its basic responsibility to inform its employees that its safety rules apply wherever they are working and that if they are asked to perform a task they believe is dangerous and/or in violation of the primary employer's safety rules, they may refuse to do it and may return to the primary employer for reassignment without penalty, cite the primary employer for violation of IIPP training requirements in section 3203(a)(7), with a reference to section 3203(a)(3).

(This basic responsibility may not apply to PEOs, which do not usually deploy employees to work at their client employers' worksites.)

2. **Liability for Hazardous Conditions at the Worksite.** Compliance personnel must also determine whether the primary employer knew or should have known of hazardous conditions to which its employees were exposed (e.g., lockout/tagout, guardrail, machine guarding, hazard communication, and permissible exposure limit violations):
    - a. If the primary employer did not know and reasonably could not have known of the hazardous conditions, do not cite the primary employer for violations related to the hazardous conditions.
    - b. If the primary employer knew or reasonably should have known of the hazardous conditions, compliance personnel must evaluate the reasonableness of the primary employer's efforts to ensure the safety of its employees. Liability for a hazardous condition is based on the extent to which the primary employer took appropriate, feasible steps to protect its employees. If the primary employer should have but did not take reasonable steps to either remove its employees from exposure to the hazardous condition or work with the secondary employer to abate the violations, cite the primary employer for violations related to the hazardous conditions.
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#### **D. Recordkeeping**

If the secondary employer is not exempt from the Log 300 recording requirements in Title 8, sections 14300 to 14400, gather evidence to show whether the secondary employer entered on its Log 300 all recordable injuries and illnesses of employees it supervised, including employees of the primary employer.

NOTE: The primary employer is not required to log injuries and illnesses occurring at the secondary worksite unless the primary employer provides supervision on a day-to-day basis. Any injury or illness should be recorded on the Log 300 only once, either by the secondary employer or the primary employer, depending on which employer is supervising the employee on a day-to-day basis. (See Title 8, section 14300.31).

#### **E. Reporting Work-Related Deaths and Serious Injuries and Illnesses**

Both primary and secondary employers are required to report work-related deaths and serious injuries and illnesses to the Division.

However, under OSHAB case law there is a narrow exception to this rule. One employer may specifically authorize another employer to report a death or serious injury or illness to the Division, as long as the other employer makes the report and explicitly tells the Division the report is being made on *behalf of both* employers. In such a case, both employers are considered to have fulfilled their duty to report.

#### **Attachments:**

Primary Employer Liability Flowchart (under development)

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