

DOSH DIRECTIVE

Department of Labor and Industries
Division of Occupational Safety and Health
Keeping Washington safe and working

27.00

General or Upper-Tier Contractor (Stute) Responsibility

Updated: November 30, 2016

I. Purpose

This Directive establishes guidelines for DOSH compliance and consultation staff when assessing an upper-tier contractor's compliance with the Washington Industrial Safety and Health Act (WISHA) as it applies to a lower-tier contractor or its employees. Property owners, developers, and other employers may also be liable for the safety of non-employees, depending on the degree of control exercised and whether they control or create a hazard. See, *Afoa v. Port of Seattle*, 176 Wn.2d 460, 296 P.3d 800 (2013), and *Martinez Melgoza & Assocs., Inc. v. Dep't of Labor & Indus.*, 125 Wn. App. 843, 847, 106 P.3d 776 (2005).

II. Scope and Application

This document represents DOSH compliance policy, providing interpretation of appropriate application of the WISH Act in such situations. For the purposes of this document, “general contractor” and “upper-tier subcontractor” refer to any entity whose business operations involve the use of any unrelated building trades or crafts whose work the contractor will superintend in whole or in part. “Subcontractor” refers to any contractor that is subordinate to a general or upper-tier contractor.

This Directive updates and replaces WRD 27.00, *Contractor Responsibility Under Stute v. PBMC*, issued August 1, 2001.

III. Background

In 1990, the Washington Supreme Court held in *Stute v. PBMC*¹ that a general contractor could be held liable for an injury to a subcontractor's employee that occurred as a result of a WISHA violation. This decision clarified construction law regarding the liability of a general or prime contractor, which has created a dramatic change in the construction industry.

Since the *Stute* decision, the Washington Courts of Appeals have extended the rule to include an upper-tier subcontractor, *Husfloen v. MTA Construction*²; and owner/developers, *Weinert v. Bronco National Co.*³ In *Weinert*, the Court of Appeals held that the owner/developer held a position so comparable to the general contractor that the owner/developer was also responsible to all employees on the work site. On January 7, 1991, in *Doss v. ITT Rayonier*⁴ the Court of Appeals extended the rule in *Stute* to impose potential liability to a landowner whose independent contractor failed to comply with safety and health regulations. Also see, *Afoa v. Port of Seattle*, 176 Wn.2d 460, 471, 296 P.3d 800 (2013).

This Directive was last updated in 2001. Since that time Washington courts have issued several opinions that further clarify the nature and extent of the duty owed by a contractor to the employees of lower-tier contractors. Because the law in this area has evolved since 2001, the intent of this Directive is to reflect the current state of the law as accurately as possible. Future updates to this Directive may be needed as courts further clarify the duty owed by contractors to employees of subcontractors.

IV. Application Guidance

A. What is the basis for holding general contractors liable for violations by subcontractors?

In addition to the general concepts of creating or correcting employers (on which federal OSHA’s policy guidance on this issue is based), the *Stute* decision and subsequent rulings have established that general contractors may be liable for WISHA violations committed by subcontractors.

B. When does DOSH consider a general or upper-tier subcontractor liable for a subcontractor’s violation?

The Washington Supreme Court has said that the liability of a general contractor to employees on the worksite is “per se” liability. *See Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 122, 52 P.3d 472 (2002). Washington courts have explained that general contractors have a non-delegable, specific duty to ensure compliance with all applicable WISHA regulations for “every employee on the jobsite,” not just its own employees. *Stute*, 114 Wn.2d at 456, 463-64; *accord Kamla*, 147 Wn.2d at 122. Thus, a general contractor’s duty to protect workers on the jobsite extends to “any employee who may be harmed by the employer’s violation of the safety rules.” *Afoa v. Port of Seattle*, 176 Wn.2d 460, 471, 296 P.3d 800 (2013). As our Supreme Court explained, “[t]he *Stute* court imposed the per se liability as a matter of policy: ‘to further the purposes of WISHA to assure safe and healthful working conditions for every person working in Washington.’” *Kamla*, 147 Wn.2d at 122 (quoting *Stute*, 114 Wn.2d at 464).

The basis for a general contractor’s expansive duty to all workers on the jobsite arises from “the general contractor’s innate supervisory authority,” which “constitutes sufficient control over the workplace.” *Stute*, 114 Wn.2d at 464. A general contractor has authority to influence work conditions at a construction site. *Kamla*, 147 Wn.2d at 124. As *Stute* explained, general contractors “as a matter of law” have “per se control over the workplace,” which places them “in the best position to ensure compliance with safety regulations.” 114 Wn.2d at 463-64. Because a general contractor is in the best position, financially and structurally, to ensure WISHA compliance “the prime responsibility for the safety of all workers should rest on the general contractor.” *Stute*, 114 Wn.2d at 463.

¹ 114 Wn.2d 454, 788 P.2d 545 (1990)

² 58 Wn. App. 686, 794 P.2d 859 (1990)

³ 58 Wn. App. 692, 795 P.2d 1167 (1990)

⁴ 60 Wn. App. 125, 803 P.2d 4 (1991)

The Department interprets these statements from the Washington Supreme Court to mean that if there is a serious violation by a lower-tier contractor, a parallel violation to an upper-tier contractor may be appropriate.

The issue in each case will be whether there is a serious violation by the lower-tier contractor. If it appears that the lower-tier contractor will be able to successfully assert an affirmative defense such as unpreventable employee misconduct or any other recognized affirmative defense, then no violation should be issued to either contractor.

C. Do general and upper-tier contractors have the same level of responsibility as the actual employer?

It should be noted that this understanding reflects only the general “duty of care” inherent in the role of a general or upper-tier contractor. Where a general or upper-tier contractor is the “creating” or “correcting” employer, it may be subject to citation even if the subcontractor is not (for example, the subcontractor might successfully defend itself using the argument that the hazard was created by the general contractor and could not be controlled by the subcontractor).

V. Responsibilities of a General Contractor

A. What is a general contractor’s general responsibility under WISHA?

Because the general contractor has authority to direct all working conditions on a construction site, the general contractor has ultimate responsibility under WISHA for job safety and health at the job site.

B. What about situations where there is more than one general contractor on a site?

Where there is more than one general contractor on the job site, they must coordinate safety and health activities in a manner consistent with this DOSH Directive.

C. How must a general contractor demonstrate that it is meeting this responsibility by preparing for the job?

A general contractor must demonstrate that it is meeting these responsibilities by fulfilling the following responsibilities:

1. The general contractor must contractually require its subcontractors to provide all safety equipment required to do the job, or furnish the required safety equipment. Additionally, the general contractor may contractually require the subcontractor to reimburse the general contractor for liability incurred as a result of safety violations committed by the subcontractor or its employees. However, these contractual clauses are effective as an enforcement mechanism only to the extent that they are communicated to the subcontractor, and actually enforced.

2. The general contractor must take reasonable steps to ensure that it has established work rules that are designed to prevent violations of the Washington Administrative Code (WAC) rules enacted pursuant to the WISH Act. To accomplish this, the general contractor must:
 - a. Develop and implement an Accident Prevention Program that:
 - Includes its roles and responsibilities pertaining to safety;
 - Includes training and corrective action; **and**
 - Is tailored to the safety and health requirements of particular plants, job sites or operations that may be involved.
 - b. Where appropriate, develop a written site specific Safety Plan that addresses and coordinates the safety issues of all its subcontractors at the site.
 - (1) The general contractor must develop or require its subcontractors to develop, limited to the scope of the subcontract, site specific plans that:
 - Identify anticipated hazards that will most likely be encountered in all phases of the project; **and**
 - Identify the specific means that will be used to address these hazards.

For example, if there are two or more contractors on the job site where guarding is required in common areas to provide adequate fall protection, the general contractor must address how the general contractor and the other contractors will coordinate their efforts to provide protection.
 - (2) It is the general contractor's duty to require that a site specific Safety Plan is developed in a manner consistent with the relevant WAC regulations. It is not the general contractor's duty to select or interfere with the means of appropriate safety protection selected by its subcontractors.
 - c. Require its subcontractors to have Accident Prevention Programs *and* site specific plans consistent with the relevant WAC regulations.
 - d. Develop a management plan that not only confirms existence of subcontractor required programs/plans, but also assures review for compliance with the WAC regulations and conformance with the project.

For example, the general contractor may request its subcontractors to respond to a Safety Questionnaire in a form that is substantially similar to Appendix A (attached to this Directive). In the event such a request is made, it is not required of any general contractor to confirm its subcontractors' WISHA citation history with DOSH under this subsection, and the general contractor may rely on reasonable representations made by its subcontractors.

- e. Make the Accident Prevention Program *and* all site-specific safety plans available *and* accessible in accordance with the WAC regulations. The general contractor must develop a site specific Safety Plan, or require its subcontractors to develop a plan limited to the scope of the contract, that:
 - Identifies all anticipated hazards that will most likely be encountered in all phases of the project; and
 - Identifies the specific means that will be used to address the hazard.

For example, if trenching is identified as a particular phase of the project for a subcontractor, the plan must identify the specific means of protection that will be used (for example, trench boxes, shoring, sloping, etc.) It is not sufficient to state that the excavation codes will be followed, or that the contractor will use either trench boxes, shoring, or sloping.

3. Other considerations: In order to establish work rules that are designed to enhance safety and health and to prevent violations of the WAC regulations, the general contractor may wish to consider:
 - Preparing agendas for job safety meetings;
 - Mandatory attendance of all workers at job site safety meetings;
 - Promote communication between the general contractor and its subcontractors;
 - Common work areas;
 - Safety incentive or recognition programs to reward employees based on actual compliance with safety rules and regulations. However, these programs may not include or be based on the rate of reported injuries;
 - Programs to reward employees for making safety suggestions.
4. The general contractor must develop a plan that will reasonably discover violations of its Accident Prevention Program or Safety Plan. The general contractor may wish to consider the following:
 - Audits
 - Assessments
 - Reviews
 - Training.

D. What must a general contractor do to correct health and safety violations and enforce health and safety rules?

Disciplinary action related to safety violations must be communicated to the appropriate work force.

The general contractor must show it has effectively enforced in practice its Accident Prevention Program and/or Safety Plan when it discovers safety violations through the following methods:

1. The general contractor must provide contractual language that requires its subcontractors to comply with all safety rules.
2. The general contractor must require its subcontractors to have and enforce a disciplinary schedule that will be followed by its subcontractors in the event safety violations are discovered, regardless of who makes the discovery. Appropriate disciplinary action must not be contingent upon the issuance of a WISHA citation.
3. The plan must include a method of documenting safety violations, as well as a method of recording what, if any, appropriate disciplinary action is taken.
NOTE: In this context, disciplinary action includes verbal or written reprimands, demotion, suspensions of work, reduction in pay, or termination. While it does not include corrective counseling, effective disciplinary action must be taken where appropriate.
4. The Contract between the general contractor and its subcontractors should provide for the means and methods to allow the general contractor to effectively promote safety in the work site.

VI. Compliance Inspection Protocols

A. How should DOSH staff determine whether a parallel violation should be issued to a general contractor for a subcontractor's violation of WAC rules?

The Washington Supreme Court has stated that a general or upper-tier contractor's WISHA liability is "per se liability." Therefore, except as noted below, if there is a serious violation by a lower-tier contractor, a parallel citation to an upper-tier contractor may be appropriate.

The issue in each case will be whether there is a serious violation by the lower-tier contractor. If it appears that the lower-tier contractor will be able to successfully assert an affirmative defense such as unpreventable employee misconduct or any other recognized affirmative defense, then no violation should be issued to either the upper- or lower-tier contractor.

In applying the guidance of this Directive, DOSH staff are expected to apply the following checklist and to document their conclusions (failure of an inspector to do so in whole or in part, however, does not represent a contractor defense to an otherwise valid citation):

1. Determine whether there is a contractor to whom this Directive applies, and identify the employers of all employees exposed to hazards;
2. Once it is established that there is a relationship between a general contractor or upper tier subcontractor and the subcontractor(s) being cited, determine whether the subcontractor appears to have a valid affirmative defense.

3. For example, determine whether the affirmative defense of “unpreventable employee misconduct” is available to the subcontractor by evaluating the following elements:
 - Did the subcontractor establish safety work rules?
 - If so, did the subcontractor adequately communicate its safety work rules to its employees?
 - If so, did the subcontractor establish a process to discover and control recognized hazards?
 - If so, did the subcontractor enforce safety on the job site in a manner that was effective in practice?

B. If a parallel violation is identified, how should it be cited?

The department has determined as a matter of enforcement discretion that parallel violations will not necessarily be issued to general or upper-tier subcontractors for every violation cited against one or more subcontractors. In order to distinguish upper-tier contractor violations from violations involving the contractor’s own employees, compliance staff should normally use WAC 296-155-100(1)(a). Violations involving generally similar conditions or hazards should not be cited separately but instead should be handled as instances of a single parallel violation by the general contractor or upper-tier subcontractor. Violations not involving such generally similar conditions or hazards would be addressed in a separate violation.

In other words, the following general categories that might be present on a construction site would each be handled as a separate violation if they were cited at all:

- Working at height (including all violations related to scaffolding, fall protection, guardrails, etc.);
- High voltage (including, but not limited to, violations related to overhead lines and violations related to electrical exposures in underground vaults);
- Trenching and excavation;
- Respiratory protection;
- Personal protective equipment (but not if the PPE involved one of the other categories, such as fall protection equipment or respiratory protection).

Any determination that the interests of worker safety would be better served, due to extraordinary circumstances, by citing the general contractor or upper-tier subcontractor separately for each violation, must be approved in advance by the DOSH Statewide Compliance Manager.

C. Should a general contractor or upper-tier subcontractor be issued a parallel citation for a general violation?

The department has determined as a matter of enforcement discretion that parallel citations for general violations will not be issued, nor will parallel violations for program violations be issued regardless of classification (this does not apply to required site-specific plans, such as those involving fall protection or lead).

D. When should repeat violations be issued to a general contractor or upper-tier subcontractor for parallel citations?

Violations of WAC 296-155-100(1)(a) are not automatically repeat violations. Repeat violations must not be cited unless previous parallel violations involve substantially similar hazards (see the list of examples in B above). In addition, a previous violation involving a contractor's direct employees cannot be used as the basis for a repeat parallel violation.

E. How should the exposure of the general contractor or upper-tier subcontractor's own employees to a similar violation be handled?

Violations involving the general contractor's own employees should be cited in accordance with normal agency practice, without regard to the presence of a parallel violation. If a hazardous condition involves employees of both the general contractor and one or more of its subcontractors, both a direct citation and a parallel citation should be issued to the general contractor if both violations are identified in the course of the inspection.

Approved:



Anne F. Soiza, Assistant Director
Division of Occupational Safety and Health
Department of Labor and Industries

[Appendix A is attached below]

APPENDIX A
SUBCONTRACTOR'S SAFETY QUESTIONNAIRE

Name of Subcontractor: _____

Project: _____ Date: _____

1. List your firm's workers' compensation Interstate Experience Modification Rate for the three most recent years.

20_____ 20_____ 20_____

2. Please use your last year's OSHA 300A Summary to fill in:

(a) Number of lost workday cases _____

(b) Number of fatalities _____

3. Employee staff hours worked last year _____

4. Do you conduct project safety inspections?

Yes _____ No _____ If yes, how often? _____

Who conducts this inspection (title)? _____

5. List key personnel planned for this project. Please list safety responsible person and his/her experience:

6. Do you have a written Safety Program? Yes _____ No _____

7. Do you have an orientation program for new hires? Yes _____ No _____

8. Do you have a program for newly hired or promoted foremen? Yes _____ No _____

9. Do you hold craft "toolbox" safety meetings? Yes _____ No _____

How often? Weekly _____ Biweekly _____ Monthly _____

Less often, as needed _____

Signature: _____