

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: April 12, 2019

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 DD 27.00, General or Upper-Tier Contractor (*Stute*) Responsibility, issued November 30, 2016.

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 worksite. In 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).

Most of this Directive was drafted in 2001, and last updated in 2016. Since 2001, Washington courts have issued several rulings that clarify the nature and extent of the duty owed by a general or upper-tier 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. This update further clarifies the changes made to this Directive in 2016. Future updates to this Directive may be needed as courts further clarify the duty owed by general and upper-tier 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 direct *Stute* 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?

Yes. General and upper-tier contractors have a non-delegable duty to all employees on their worksite. Additionally, 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.

VI. Compliance Inspection Protocols

A. How should DOSH staff determine whether a direct *Stute* 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 direct *Stute* citation to an upper-tier contractor must be evaluated.

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-tier 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 direct *Stute* violation is identified, how should it be cited?

The department has determined as a matter of enforcement discretion that direct *Stute* 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 the following language:

As the general or upper-tier contractor, you did not fulfill your non-delegable duty to ensure compliance with all applicable WISHA regulations for every employee on the jobsite by assuring compliance with WAC –[insert same code used with the lower-tier employer]—where subcontractor –[insert name of employer with creating/exposing the hazard]— did not –[insert same AVD language used with the non-general contractor/upper-tier employer also being cited].

The CSHO will also select under “Special Tracking Information” the designation “STUTE”.

Violations should be cited separately as direct violations, and grouped with other similar conditions or hazards. For example: a fall from a roof and a fall from scaffolding would be two direct violations grouped. If there were two sub-contractors being cited for the same direct violation, then this would be cited as one direct violation with two instances.

In other words, the following hazard 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).

Be aware that these are not the only hazard categories that might be present on a construction site. Others may be asbestos and confined spaces.

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 direct *Stute* citation for a general violation?

The department has determined as a matter of enforcement discretion that direct *Stute* citations for general violations will not be issued. Direct *Stute* violations for company-wide program violations will not be issued regardless of classification. Site-specific health and safety plans (such as those involving fall protection and lead) can be considered for a direct *Stute* serious violation.

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

Violations of a previous *Stute* violation are not automatically repeat violations. Repeat violations must not be cited unless previous direct *Stute* 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 direct *Stute* 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 direct *Stute* 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 direct *Stute* citation should be issued to the general contractor if both violations are identified in the course of the inspection.

Approved: _____


 Anne F. Soiza
 L & I Assistant Director
 Division of Occupational Safety and Health