

Managing Contractors: Using Constructor Arrangements to Minimize OHS Liabilities at Multi-Employer Sites



Employers bear primary responsibility for OHS compliance at their work site. But what about sites where workers of more than one employer work? As a safety coordinator, understanding OHS multi-employer site rules is critical to managing your company's liability risks, especially if you have contractors and subcontractors working at your site.

The Rules of Multi-Employer Site OHS Liability

At multi-employer sites, one employer must be the point person for implementing and coordinating the various safety measures, setting up the required JHSC, interfacing with the regulators and, ultimately, taking the hit if an OHS violation occurs.

Historically, that role has fallen to the employer that owns the site ('host employer'). The theory: Since the host owns and controls the site, it's responsible for the safety of all workers that work there—including not just its own payroll employees but also workers of outside contractors hired to work at the site.

Did You Know'

Although now embedded into the OHS legislation of each jurisdiction, the theory of host employer liability for OHS violations at multi-employer sites dates back to a 1992 Ontario case finding a window cleaning company responsible for a subcontract worker's fatal fall from an improperly secured boatswain's chair, even though the subcontractor possessed expertise on window cleaning and supervised the work [R. v. Wyssen, 1992 CanLII 7598 (ON CA), Sept. 17, 1992].

Delegating Liability to a Constructor

But owning the site doesn't always put the host employer in the best position to ensure the safety of work done there. This is especially true when an outside contractor is hired to run a big project involving workers of multiple companies. Accordingly, OHS laws allow host employers to delegate primary responsibility for OHS compliance to an outside contractor in charge and control of the work. We'll refer to this contractor as a 'constructor' even though terms vary by jurisdiction:

Term for Employer Responsible at Multi-Employer Site	Jurisdictions Where Term Is Used
Constructor	Ontario, Nova Scotia, Prince Edward Island
Prime contractor	BC, Alberta, Saskatchewan, Manitoba
Principal contractor	Quebec, Newfoundland, Northwest Territories, Nunavut, Yukon
Contracting employer	New Brunswick

If it doesn't designate a constructor, the host employer itself is deemed the constructor.

Limits on Constructor Arrangements

While allowed in 13 of 14 jurisdictions (federal is the lone exception), use of constructor arrangements is subject to limits.

Construction Projects Only: In Ontario, Quebec, Manitoba, Nova Scotia, Prince Edward Island and Yukon, constructor arrangements are limited to 'construction projects.' However, the term 'construction project' is defined broadly to include construction work done at non-construction sites, e.g., erecting or demolishing a building on a factory site.

Any Multi-Employer Site: In BC, Saskatchewan, New Brunswick, Newfoundland, NW Territories and Nunavut, constructors are required and allowed for any kind of multi-employer site project.

Hybrid: In Alberta, constructors (called 'prime contractors' in that province) are mandatory for multi-employer construction and oil and gas sites and permitted at other multi-employer sites.

Duties that Can't Be Delegated

Designating a constructor doesn't relieve the host employer of all its OHS obligations. Residual OHS duties that the host employer can't delegate include:

- Notifying the constructor of the specific site hazards affecting the health and safety of workers carrying out the project, e.g., the presence of confined spaces;
- Giving the constructor a list of all hazardous substances used, stored or handled at the site;
- Working with the constructor to coordinate safety procedures and measures, e.g., for de-energizing machinery or equipment to be serviced during the project; and
- Providing the constructor the site-related OHS information and materials it needs to meet its reporting and notification duties related to the project.

Takeaway: 3 Steps to Take

Safety coordinators should engage in a 3-prong strategy to

manage these residual liability risks associated with designating a constructor for projects at their site:

Pre-Contract Diligence: Ensure that the contractor designated constructor is selected on the basis of its health and safety record and subjected to a rigorous H&S pre-qualification audit.

Contract Negotiation: Ensure that the contract includes key provisions protecting your company in case the constructor commits an OHS violation, including language requiring the constructor to:

- Comply with all applicable health and safety requirements in carrying out the work;
- Implement an effective, comprehensive and compliant OHS program;
- Immediately notify you of any health and safety incidents;
- Send you weekly OHS progress reports in connection with the work;
- Coordinate and communicate with the site JHSC or health and safety representative; and
- 'Indemnify' or pay you back for any losses you incur as a result of its violations.

You should also have the right to terminate the constructor if it doesn't meet its safety obligations.

Post-Contract Monitoring: Once the contract is signed and work begins, keep a close eye on the project and whether the constructor is meeting its safety duties focusing on, at a minimum:

- Training: Is appropriate instruction and training being provided to all workers'
- Supervision: Are supervisors performing their duties and exercising adequate oversight over the work'
- Hazard notification: Have all workers been notified of

the specific hazards of your worksite, e.g., the hazardous substances stored'

- Safe work procedures: Are workers following applicable safety procedures and policies'
- PPE: Are workers properly using required PPE and safety equipment'
- Accountability: Are workers being held accountable for safety violations including via discipline where necessary'