National Construction Policy Institute

Rethinking OSHA's Multi-Employer Citation Doctrine: A Comprehensive Policy Analysis and Reform Blueprint

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Abstract:

The Occupational Safety and Health Administration's multi-employer site doctrine, which categorizes employers as *creating, exposing, correcting,* or *controlling,* remains a pivotal but unevenly applied enforcement framework for America's $2 trillion construction sector. OSHA's history of enforcement demonstrates a renewed emphasis on upstream accountability. Prime contractors face heightened citation risk merely for supplying subcontractors with the very training, PPE, and safety technologies that could mitigate the hazard. This unintended consequence can chill proactive collaboration and leave systemic gaps in worker protection.

This policy paper argues that Congress and the Department of Labor must codify clear, bright-line limits on controlling-employer liability to preserve both worker protections and project efficiency. We recommend: (1) establishing a statutory *safe-harbor* that permits general contractors to furnish PPE, training, and on-site safety technologies without automatically assuming controlling-employer status; (2) creating a graduated citation matrix that aligns enforcement severity with the employer's actual ability to abate hazards; and (3) incentivizing data-driven "safety partnership agreements" that reward collaborative compliance across multi-employer worksites. By recalibrating accountability in this way, federal policy can reduce litigation, promote voluntary hazard control, and free resources for innovation, while maintaining OSHA's core mission of safeguarding America's workforce.

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1. Introduction

Multi-tier subcontracting dominates modern construction, often placing two dozen employers on a single site. In this environment, OSHA inspectors must determine who bears responsibility for an unguarded trench, missing guardrail, or improperly assembled scaffolding. The multi-employer doctrine is OSHA's answer: *any* employer that creates, exposes, corrects, or controls a hazard may be cited, even if its own employees face no risk.

Since 1973, the doctrine has oscillated between narrow and expansive readings, producing conflicting obligations for general contractors, specialty subcontractors, staffing agencies, and project owners. Critics decry the rule as "liability without control," while supporters view it as an indispensable bulwark against the fragmentation of construction labor.

This paper proceeds chronologically, grounding each doctrinal milestone in primary sources: statutes, regulations, agency directives, and precedential opinions, and concludes with pragmatic reforms that align liability with actual control and knowledge.

2. Methodology & Source Integrity

All assertions in this paper derive from verifiable authorities: the Occupational Safety and Health Act of 1970; OSHA directives and Field Operations Manuals; U.S. appellate and Supreme Court opinions; OSHRC decisions, state statutes; and peer-reviewed secondary sources. Citations are provided as endnotes for verification.

3. Legislative Genesis of the OSH Act (1968-1970)

3.1 Congressional Hearings and the Robbins Bill

Congressional concern over industrial fatalities peaked in 1968 when the House Education and Labor Committee introduced H.R. 16785, the "Robbins Bill," which formed the template for what became the Occupational Safety and Health Act of 1970 (OSH Act).[i] Testimony highlighted that construction's fatal-injury rate was nearly four times the national average. Although the concern at the time may not have manifested into what we now know as the multi-employer site doctrine, there were discussions of the key employer categories including the "controlling" and "exposing" employer.

3.2 Competing Senate Proposals and Executive Pressure

The Senate's Williams-Steiger proposal, backed by organized labor, called for broad enforcement authority. Meanwhile, the Johnson and later Nixon administrations favored a more cooperative model. The final OSH Act, signed December 29, 1970 (Pub. L. 91-596), reflected a compromise: federal standards with state-plan opt-outs and an independent review commission.

3.3 Statutory Language Relevant to Multi-Employer Liability

Two provisions lie at the heart of the doctrine:

- **§ 5(a)(1)** (General Duty Clause) requires each employer to furnish to *each of its employees* a workplace free of recognized hazards.[ii]
- **§ 5(a)(2)** mandates compliance with promulgated standards, omitting any employee-specific qualifier.[iii]

The dichotomy between an employee-specific general duty and an employee-agnostic specific duty laid the analytical groundwork for courts to extend liability beyond an employer's own workforce. The pivotal distinction between an "employee-specific" *general duty* to keep one's own employees free from recognized hazard, and an "employee-agnostic" *specific duty* to remove or control dangerous conditions regardless of whose workers are exposed, supplied courts with the doctrinal leverage to push liability past the confines of a single payroll.

By treating the general duty clause as inherently tethered to a particular employer's workforce while viewing specific-duty standards as site-wide commands, decisions such as *Brennan v. OSHRC (Underhill Construction Co.)*, reasoned that a "controlling" or "creating" employer could be cited even when the injured party drew wages from another company.[iv] This analytical framework underlies the modern multiemployer doctrine: once a hazard is framed as a violation of an objective, employee-agnostic standard, the question shifts from *whose* employee was harmed to *who had the authority or capacity to prevent the harm*. In effect, the dichotomy reorients liability from a narrow, employment-contract lens to a broader, worksite-stewardship inquiry, empowering OSHA and the courts to hold prime contractors, construction managers, and even upstream designers accountable when their acts or omissions endanger any worker on the site.

4. Early OSHA Enforcement and the First Field Operations Manual (1971-1973)

OSHA's inaugural *Field Operations Manual*, issued on May 20, 1971, instructed compliance officers that, on a multiemployer construction site, they could cite only two categories of employers:

- **Creating employers**, which introduced a hazardous condition even when the danger threatened workers employed by another employer; and
- **Exposing employers**, whose own employees were directly subjected to the hazard.[v]

The manual provided no mechanism to cite a general or prime contractor that retained overall supervisory authority yet neither created the violation nor exposed its own workforce. This narrow, employee-focused reading of the Occupational Safety and Health Act left controlling entities largely immune from enforcement throughout OSHA's early years. Subsequent decisions of the Occupational Safety and Health Review Commission in 1973 and 1974, followed by policy directives issued during the 1980s and 1990s, gradually expanded the doctrine to

recognize controlling employer liability, shaping the four-factor multiemployer framework used today.

4.1 Enforcement Realities on Multi-Prime Sites

During OSHA's formative years, the Field Operations Manual supplied only limited guidance on multiemployer worksites. Compliance officers who arrived on a construction project routinely encountered hazards that endangered employees of several subcontractors at once. Yet the 1971 manual directed them to focus on the employer that either generated the hazard or whose own crew stood in harm's way. When neither of those categories fit neatly, inspectors were left to improvise.

- **Divergent local approaches**
    - Some Area and District Offices cited every subcontractor present, reasoning that broad citations would motivate the entire site to abate the danger.
    - Others cited only the subcontractor whose employees were in immediate peril, even when that employer lacked authority to correct the condition.
    - A third group attempted to reach prime contractors under the general duty clause, producing citations that were frequently vacated for lack of precedent.

5. Doctrinal Foundations in Federal Case Law (1973-1980)

The absence of a unified policy produced a patchwork of penalties that varied from one region to the next and invited accusations of arbitrary enforcement. Beginning in 1973, the Occupational Safety and Health Review Commission began to scrutinize these cases and, in a series of landmark decisions, rebuked the Secretary of Labor for the inconsistency. In *Grossman Steel & Aluminum Corp.,* the Commission observed that effective construction oversight could not rest solely on the "own employees" rule.[vi] Shortly thereafter the federal appellate courts amplified the point. In *Brennan v. OSHRC (Underhill Construction Corp.),* the Second Circuit held that the Secretary could cite an employer that created or controlled a hazard even when only another contractor's workers were exposed.[vii]

The Seventh Circuit adopted similar reasoning in *Anning-Johnson Co. v. OSHRC*.[viii] In *Anning-Johnson Co.*, the Seventh Circuit ruled that a subcontractor who did not create or control a hazard could not be cited for non-serious violations simply because its employees were exposed, thereby limiting multi-employer liability to parties with actual authority and capacity to abate the danger. Collectively these opinions signaled that the agency would need to revise its enforcement playbook, laying the groundwork for the modern four-part multi-employer doctrine that now encompasses creating, exposing, correcting, and controlling employers.

Circuit Endorsements and Early Skeptics

During the second half of the 1970s a clear judicial trend emerged in favor of OSHA's multi-employer work-site doctrine:

By 1979, three circuits had embraced the Secretary's authority to cite an employer whose own payroll was not directly endangered:

- Eighth Circuit. In *Marshall v. Knutson Construction Co.*, the court ruled that a general contractor with overarching supervisory power could be held liable for a subcontractor's scaffolding violations because § 5(a)(2) "places primary responsibility on those who control the work environment," whether or not their own employees are exposed.[ix]
- Ninth Circuit. One year later, *Beatty Equipment Leasing, Inc. v. Secretary of Labor* upheld a citation against a material-handling subcontractor that erected a defective scaffold used exclusively by another trade. The court stressed that OSHA's specific-duty standards are "employee-agnostic" commands addressed to any employer that creates or fails to correct a hazard.[x]
- Tenth Circuit. In *Clarkson Construction Co. v. OSHRC* the court affirmed a § 5(a)(1) citation against a highway contractor whose traffic-control practices imperiled workers employed by other employers, concluding that the Act was designed to protect "every employee on the site" and that liability properly follows "control and capacity to abate."[xi]

Together, these opinions supplied OSHA and the Review Commission with a three-circuit consensus, strengthening the agency's hand long before the doctrine was codified in the 1999 Multi-Employer Citation Policy.

Counter-current in the Fifth Circuit

The Fifth Circuit declined to join the emerging consensus. In *Melerine v. Avondale Shipyards, Inc.*,[xii] it declared that "OSHA regulations protect only an employer's own employees," casting doubt on controlling-employer citations within that circuit and creating a regional carve-out that persisted until the court reversed course decades later in *Acosta v. Hensel Phelps* (2018).[xiii]

This early split foreshadowed the modern patchwork of multi-employer enforcement with most circuits applying the doctrine broadly while the Fifth Circuit remained an outlier until the twenty-first century.

6. Expansion and Codification in OSHA Policy Documents (1981-1999)

6.1 1981 Field Operations Manual (FOM) Revision

In OSHA Instruction CPL 2.49 (Dec. 23, 1981), the agency formally added the "correcting employer" category to its multi-employer enforcement scheme. The revision responded to recurring construction scenarios; for example, a mechanical subcontractor that was contractually responsible for installing perimeter guardrails on an elevated deck but no longer had employees onsite. Under the new policy a contractor that "had the duty and ability to remedy the hazard,

whether or not its own employees were exposed," could be cited if it failed to act with reasonable diligence. Compliance officers were directed to examine (1) contractual obligations, (2) the employer's actual or constructive knowledge of the hazard, and (3) the feasibility and promptness of abatement measures. This instruction filled a gap left after the 1970s *creating*- and *exposing*-employer caselaw by ensuring that the party best positioned to fix a dangerous condition could not avoid liability merely because another employer's workers were at risk.[xiv]

6.2 1994 Field Inspection Reference Manual (FIRM)
Issued as CPL 2.103 on Sept. 26, 1994, the FIRM replaced most of the earlier FOM text and codified all four categories, creating, exposing, correcting, and controlling, in Chapter III, § 6-C. It also embedded the doctrine into every inspector's core curriculum. The manual prescribed a two-step analysis:

1. Categorize the employer. Determine whether it created the hazard, exposed its own workers, had corrective responsibilities, or exercised general supervisory control.
2. Evaluate liability factors. For each category assess the employer's knowledge, authority to correct, contractual relationships, and reasonable care (e.g., inspection frequency, safety programs, enforcement of subcontractor rules).

By explicitly stating that the policy applied "in all industry sectors," the FIRM ended regional variation and standardized citation practice for construction, manufacturing, and service worksites alike. The 1994 integration also obliged Area Offices to train compliance staff with flow-charts, hypotheticals, and documentation templates that are still referenced in modern FOM updates.[xv]

6.3 CPL 02-00-124 Multi-Employer Citation Policy (Dec. 10, 1999)
Recognizing lingering inconsistency, OSHA issued Directive CPL 02-00-124 (formerly CPL 2-0.124). The 27-page document, still in force today, provides the decision tree that field offices rely on:

- Step 1: Is the employer creating, exposing, correcting, or controlling?
- Step 2: If so, apply five liability factors (hazard control, knowledge, ability to correct, reasonable care, and abatement steps).

Seventeen detailed hypotheticals illustrate how multiple employers can be cited for a single hazard. The directive also clarifies that a controlling employer's duty is one of "reasonable care," not strict liability, with the degree of required oversight tied to the scale of the project and the nature of the hazard.

Procedural controversy. Because CPL 02-00-124 was issued as a sub-regulatory directive rather than through APA notice-and-comment rulemaking, some commentators argue it wields "legislative" force without the requisite safeguards and imposes near-strict liability on general

contractors.[xvi] Courts, however, have generally upheld the policy, finding it a permissible interpretive rule.[xvii]

Together, the 1981 FOM revision, the 1994 FIRM, and CPL 02-00-124 form the backbone of OSHA's modern multi-employer doctrine, guiding inspectors and shaping liability for contractors on complex worksites.

7. Judicial Refinement and Circuit Splits (2000-2010)

7.1 *IBP, Inc. v. Herman*

In *IBP, Inc. v. Herman*, the D.C. Circuit examined whether the Occupational Safety and Health Administration (OSHA) could cite an employer under § 5(a)(2) of the Occupational Safety and Health Act for a violation that did not expose that employer's own employees to a hazard.[xviii] The Secretary of Labor had argued that under the multi-employer worksite doctrine, any employer creating or controlling a hazardous condition could be cite even if the employer's own employees were unaffected.

Although the court ultimately upheld the citation on the specific facts presented, it did so while expressing significant reservations about the Secretary's interpretation of § 5(a)(2). The court noted that this section, which requires employers to comply with safety standards, is framed in relation to their own employees. In the court's words, "nothing in the language of § 5(a)(2) explicitly indicates that Congress intended it to impose a general duty upon employers to protect the employees of other employers."[xix]

The D.C. Circuit's opinion stopped short of overturning the citation but sent a clear signal that the legal basis for OSHA's doctrine was on shaky ground, especially when the cited employer did not employ the exposed workers. This foreshadowed a broader legal debate over whether OSHA had exceeded its statutory mandate.

That skepticism was echoed in *Melerine v. Avondale Shipyards, Inc.*, where the Fifth Circuit held that OSHA regulations "protect only an employer's own employees" and do not extend to employees of other employers on the same worksite.[xx] The *Melerine* court focused on both the statutory text and the legislative history of the OSH Act, concluding that Congress did not intend to create a general duty among all employers to ensure a safe workplace for everyone present. Although later overturned, this decision remains a critical interpretive reference in challenging the legal underpinnings of OSHA's multi-employer enforcement approach.[xxi]

Further doubt was cast in *ComTran Group, Inc. v. U.S. Department of Labor*, where the Eleventh Circuit ruled that a supervisor's misconduct could not be imputed to the employer under § 5(a)(1), the general duty clause, when the supervisor was the sole exposed employee.[xxii] Although not a multi-employer case, *ComTran* reflects a growing judicial insistence that OSHA's enforcement theories must be clearly anchored in the statutory language. The court emphasized

that OSHA may not expand liability based on policy preferences without express congressional authorization.

Taken together, these cases expose the fragility of OSHA's reliance on the multi-employer doctrine, particularly as applied under § 5(a)(2). Courts have consistently reminded the agency that its citation authority must be rooted in the plain text of the statute, not inferred from policy goals or convenience. For multi-employer construction sites where control and exposure may be divided among several entities, the legal foundation of OSHA's enforcement strategy remains vulnerable to challenge.

7.2 Summit Contractors Litigation (2007–2010)

The *Summit Contractors* litigation serves as one of the most pivotal modern tests of OSHA's multi-employer citation policy, particularly the agency's authority to cite controlling employers under 29 C.F.R. § 1910.12(a). This provision incorporates construction industry standards and formed the basis for decades of enforcement activity under the multi-employer doctrine.

In *Secretary of Labor v. Summit Contractors, Inc.*, the Occupational Safety and Health Review Commission (OSHRC) initially vacated OSHA's citation against a general contractor who did not have its own employees exposed to a fall hazard created by a subcontractor.[xxiii] The Commission reasoned that the controlling employer had neither created nor directly exposed employees to the hazardous condition, and that § 1910.12(a), by its plain text, did not expressly authorize citations against employers for violations that affected only other employers' workers. OSHRC questioned the continued validity of OSHA's multi-employer enforcement policy, essentially placing a judicial hold onto the doctrine's reach.

However, that decision was appealed, and the Eighth Circuit Court of Appeals reversed. In *Chao*, the court held that § 1910.12(a) "does not preclude OSHA from issuing citations to controlling employers on multi-employer worksites."[xxiv] The court deferred to OSHA's interpretation of its own regulations under the *Chevron* doctrine, concluding that the agency had reasonably construed the regulation to allow citations even in the absence of direct employee exposure.[xxv] The Eighth Circuit emphasized that the purpose of the OSH Act, to ensure safe and healthful working conditions, supported OSHA's view that holding general contractors accountable for site-wide hazards was consistent with the statutory objectives.

Following the remand, OSHRC reinstated OSHA's multi-employer citation policy, reaffirming its application to controlling employers. In doing so, the Commission formally endorsed OSHA's "Controlling Employer Citation Policy," detailed in CPL 02-00-124 (Dec. 10, 1999), which outlines how a general contractor or construction manager with sufficient control over a worksite can be held liable for hazards created by subcontractors, even if the controlling employer's own employees are not at risk.

The *Summit* case thus represents a significant legal turning point. It resurrected and legitimized OSHA's use of the multi-employer doctrine after years of uncertainty and reinvigorated the

agency's enforcement authority on complex, layered jobsites. However, it also solidified a jurisdictional divide: while the Eighth Circuit endorsed the doctrine, other circuits such as the expressed hesitation or at times, outright disagreement. This fractured landscape created significant compliance burdens for employers operating in multiple jurisdictions, particularly in industries like construction where multi-employer worksites are the norm.

7.3 Ongoing Circuit Disagreements

The legal status of OSHA's multi-employer citation policy remains unsettled because the federal circuit courts still lack firm consensus. Six circuits, the First, Second, Fourth, Sixth, Eighth, and Tenth, had affirmed OSHA's authority to cite an employer that *creates, controls, or corrects* a hazard on a multi-employer site even when that employer's own personnel are not exposed. Those courts largely relied on *Chevron* agency deference, accepting OSHA's view that site-wide accountability is essential to the OSH Act's goal of ensuring safe working conditions for every employee on the project.

The Fifth Circuit formerly rejected that rationale, most notably in the *Melerine case*, but it reversed course in 2018. In *Acosta v. Hensel Phelps Construction Co.*, the court expressly overruled *Melerine* and held that OSHA may cite a controlling contractor whose subcontractor's employees were the only ones exposed.[xxvi] *Hensel Phelps* now binds Texas, Louisiana, and Mississippi, eliminating the earlier "safe harbor" that general contractors in the Fifth Circuit had enjoyed.

The District of Columbia and Eleventh Circuits continue to reserve judgment. In *IBP, Inc. v. Herman*, the D.C. Circuit questioned the Secretary's reading of § 5(a)(2), observing the statutory text does not expressly authorize citations against employers whose own employees are unaffected.[xxvii] Likewise, in *ComTran Grp., Inc. v. U.S. Dep't of Labor*, the Eleventh Circuit sidestepped the broader doctrine; the Court's focus on limits to imputed supervisory knowledge suggests caution about extending liability beyond direct employment relationships.[xxviii]

Accordingly, while most circuits accept OSHA's multi-employer doctrine, a clear national consensus still awaits an opinion from the remaining circuits or the Supreme Court.

8. Contemporary Developments (2011–2025)

From 2011 through 2025, OSHA's multi-employer worksite doctrine remained a central, and often controversial, feature of federal safety enforcement. While the legal foundation of the doctrine continued to rest on decades-old guidance and administrative interpretations, the past decade has seen renewed agency commitment, emerging litigation, and sharpened constitutional and administrative law challenges all within a broader political environment marked by fluctuating enforcement priorities.

In 2019 and again in 2020, OSHA formally reissued and updated its enforcement framework originally issued in 2016 as Instruction CPL 02-00-160, titled *Field Operations Manual (FOM)*, which reaffirmed the agency's multi-employer citation policy for construction worksites.[xxix] This directive explicitly preserved the four-category model citing creating, exposing, correcting, and controlling employers and instructed compliance officers to apply the doctrine wherever appropriate. The FOM cited the Supreme Court's decision in *Chevron*, as justification for deference to OSHA's reasonable interpretations of its own regulations, reinforcing the agency's belief that it retained broad enforcement discretion absent legislative intervention.[xxx]

Following the reissuance, courts remained divided. No significant circuit realignments occurred, leaving the Fifth Circuit's rejection of the doctrine in *Melerine* intact, while the Eighth Circuit's pro-agency position in *Chao v. Summit Contractors, Inc.*, remained authoritative in its jurisdiction. As of 2025, at least eight circuits have either endorsed the doctrine or deferred to OSHA's interpretation under *Chevron*, but the lack of uniformity continues to create uneven enforcement.

From 2020 onward, several new developments have begun to shift the legal landscape:

1. **Chevron Deference Under Fire**
   On June 28, 2024, the Supreme Court issued a consolidated opinion in *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce*, expressly overruling *Chevron U.S.A. Inc. v. NRDC*.[xxxi] Chief Justice Roberts, writing for a six-justice majority, explained that the Administrative Procedure Act requires courts to exercise their own independent judgment when deciding whether an agency has acted within the limits set by Congress. Ambiguity in statutory language is no longer a reason to defer automatically to an agency's interpretation; at most, an agency's reading now carries persuasive weight when it is well-reasoned and consistent.

   The ruling has immediate consequences for OSHA's multi-employer citation policy. Since the mid-1970s, OSHA has relied on an internal theory memorialized in Chapter II of the *Field Operations Manual* to cite controlling contractors who neither create nor expose workers to a hazard. Courts that upheld the practice typically invoked *Chevron* deference, finding the OSH Act ambiguous on the question of third-party liability. After *Loper Bright*, judges must answer that statutory question *de novo*. Without clear language in the Act authorizing citations against non-exposing employers, the multi-employer doctrine is vulnerable to renewed challenges, and outcomes may diverge among circuits until either Congress amends the statute, or the Supreme Court revisits the issue.

   Beyond OSHA, every federal agency now faces a higher hurdle when issuing rules or guidance that stretch the text of its enabling statute. Agencies will need more robust records and tighter textual analysis to survive "hard look" review, and regulated parties have stronger grounds for challenging novel interpretations delivered through letters, memos, or other sub-regulatory means. Contractors and industry associations should

therefore audit compliance strategies that once rested on the predictability of *Chevron* deference, reconsider contract clauses that assume controlling-employer liability, and be prepared for courts to engage more deeply and potentially less uniformly with the plain meaning of statutory language.

2. **Constitutional Challenges to OSHA's Authority**
   Following the Supreme Court's 2022 decision in *National Federation of Independent Business v. OSHA*, which struck down OSHA's COVID-19 vaccination rule as exceeding statutory authority, a wave of constitutional litigation has begun to question the outer boundaries of OSHA's jurisdiction.[xxxii] While that case focused on emergency temporary standards, it signaled that the Court may require a more precise statutory basis for agency action, especially when it affects a broad swath of private employers.

3. **Growing Pushback from the Construction Industry**
   Between 2021 and 2025, several trade associations, including the Associated General Contractors of America (AGC) and regional construction alliances, filed amicus briefs and administrative petitions urging OSHA to limit or clarify the scope of the multi-employer doctrine.[xxxiii] Industry groups argue that holding general contractors liable for subcontractor hazards, absent fault or direct exposure, is inconsistent with the OSH Act's plain language and imposes unfair burdens on controlling entities. These concerns have prompted policy discussions within the Department of Labor and in Congressional oversight committees, though no statutory reforms have yet been enacted.

4. **State Plan Divergences and Increased Federal Oversight**
   Several states operating OSHA-approved State Plans, have taken diverging approaches to multi-employer citations. For example, California's Division of Occupational Safety and Health (Cal/OSHA) generally mirrors federal enforcement but has pursued even broader interpretations of controlling employer liability. In contrast, states like Florida and Texas, under federal jurisdiction have seen enforcement consistent with federal guidelines.[xxxiv]

5. **Contractual Risk-Shift Provisions Under Review**
   Finally, from a private-sector perspective, the legal ambiguity has prompted general contractors to increasingly rely on indemnification, "flow-down" safety clauses, and site control provisions in subcontract agreements. While these provisions are designed to manage OSHA risk, recent case law has questioned their enforceability when used to disclaim nondelegable duties. In *Skanska USA Building Inc. v. MAPP Construction LLC*, a court rejected a general contractor's attempt to contractually shift OSHA liability downstream, citing public policy considerations and the OSH Act's intent.[xxxv]

Taken together, these developments indicate that the multi-employer doctrine, while still in effect, rests on increasingly contested legal ground. OSHA continues to enforce the policy, but its durability will likely depend on the outcomes of high-stakes Supreme Court decisions and the willingness of Congress to revisit statutory language that has remained unchanged since 1970.

For national contractors, the lack of uniformity, combined with administrative uncertainty, makes compliance planning more burdensome than ever, which is an outcome that undercuts the very uniformity and predictability that federal workplace safety law was intended to promote.

9. Comparative Analysis: State OSHA Plans and Foreign Analogues

The divergence between federal OSHA enforcement and state-run plans has created a complex legal patchwork for national contractors. State OSHA Plans approved under Section 18 of the OSH Act (29 U.S.C. § 667) are required to be "at least as effective" as the federal program, but they are not required to mirror it, particularly with respect to multi-employer liability. Several states have adopted more expansive, and in some cases nearly strict liability, interpretations of general contractor responsibility on multi-employer worksites.

9.1 Washington State (L&I / DOSH)

Washington's Department of Labor & Industries (L&I), through its Division of Occupational Safety and Health (DOSH), administers the Washington Industrial Safety and Health Act (WISHA). Washington's enforcement reflects one of the most aggressive multi-employer liability regimes in the country. General contractors and controlling employers are regularly cited for hazards created by subcontractors, even when there is no direct exposure to their own employees.

DOSH's enforcement posture assumes that site-wide control carries with it a nondelegable duty to detect and abate hazards, and Washington courts have generally supported this approach. Contractors with general supervisory authority may be cited regardless of the level of knowledge or fault, subject to due diligence defenses.

9.2 California (Cal/OSHA)

California explicitly codifies its multi-employer citation framework in Title 8, Section 336.10 of the California Code of Regulations. The regulation identifies four types of employers, creating, exposing, correcting, and controlling, all of which may be cited for violations, even if their own employees are not endangered.

Cal/OSHA requires controlling employers to engage in proactive monitoring and abatement. The enforcement standard places substantial burdens on general contractors to ensure subcontractor compliance and to intervene whenever unsafe conditions arise. California courts have routinely upheld this framework, reinforcing the premise that controlling employers carry independent safety obligations that cannot be avoided through subcontract language.

9.3 Oregon (OR-OSHA)

Oregon operates its State Plan under the Oregon Safe Employment Act. While Oregon does not have a stand-alone regulation mirroring California's Section 336.10, its enforcement practice

closely follows OSHA's CPL 02-00-160. Oregon OSHA recognizes the same four categories of employers and regularly issues citations based on control and corrective authority.

Unlike federal OSHA's more conservative application in certain circuits, Oregon OSHA does not require direct exposure to the cited employer's workforce. Contractors in Oregon are expected to engage in site-wide hazard detection and implement safety controls, or face citation regardless of fault.

9.4 South Carolina, Arizona, and Other Conservative Plans

Other states operating State Plans, such as South Carolina and Arizona, have generally aligned more closely with federal OSHA enforcement, particularly in jurisdictions where federal courts are hostile to multi-employer liability. In these states, citations are less likely to be issued unless the cited employer's own workers were exposed or there is clear evidence of direct fault.

These more conservative approaches reflect both judicial influence and political resistance to expansive regulatory interpretations. As a result, contractors working in these jurisdictions face less enforcement risk under the multi-employer doctrine, but must still navigate federal OSHA rules where applicable.

9.5 Foreign Analogues

Internationally, several countries impose broad, statutorily defined safety responsibilities on general contractors and site controllers. In Canada, provinces such as Ontario designate the "constructor" as responsible for overall jobsite safety. Under Ontario's Occupational Health and Safety Act, constructors must ensure that every employer and worker comply with the Act, creating a de facto strict liability framework.[xxxvi]

In Germany, the Federal Occupational Safety and Health Act (ArbSchG) mandates cooperation and coordination among all employers at a shared worksite. Responsibility is joint and several, and enforcement authorities have broad discretion to cite multiple parties for the same condition.[xxxvii]

Australia's Work Health and Safety Act 2011 introduces the concept of the Person Conducting a Business or Undertaking (PCBU). PCBUs are obligated to ensure safe conditions "so far as is reasonably practicable," even when workers are not directly employed by them. Australian courts have interpreted these provisions to impose broad and enforceable duties on general contractors and host employers.[xxxviii]

10. Economic Impact Assessment

The multi-employer worksite doctrine has far-reaching economic implications for the construction industry, particularly for general contractors and construction managers operating across multiple jurisdictions. While its intent, to improve safety for all workers on complex, layered jobsites is laudable, the cost of compliance, legal exposure, and enforcement

inconsistency have imposed measurable burdens on employers, especially those with national footprints.

At the core of the economic challenge is the expansion of liability without a corresponding expansion of control. General contractors can now be cited for hazards created by subcontractors over whom they exert only limited oversight, particularly in state plan jurisdictions such as California, Washington, and Oregon. The effect is to impose de facto insurer liability for all jobsite safety conditions, regardless of causation or knowledge. This risk profile significantly increases the cost of doing business in those states, both through enhanced site supervision requirements and elevated insurance premiums.

Moreover, in states that have adopted strict or quasi-strict liability approaches, contractors must absorb the cost of comprehensive safety monitoring systems, including third-party audits, detailed site documentation, and additional layers of project management personnel, to mitigate potential citations. These overhead costs are substantial and recurring, and they are frequently unrecoverable in lump-sum or hard-bid project environments. Contractors may also face higher bonding costs, as sureties reassess risk in jurisdictions with aggressive enforcement histories.

Compounding these direct costs is the legal uncertainty arising from circuit splits and inconsistent regulatory interpretations. A contractor operating in Texas may be insulated from expansive multi-employer liability under federal guidelines, while facing extensive liability for the same conduct in California or Washington. This inconsistency forces national contractors to maintain fragmented compliance protocols tailored to each jurisdiction, increasing administrative complexity and legal fees. Internal safety policies must be adapted state-by-state, legal counsel must be engaged to interpret shifting enforcement boundaries, and training programs must be customized to reflect divergent liability theories.

This jurisdictional fragmentation also undermines the industry's ability to accurately estimate and allocate risk during project bidding. A company pricing a project in Alabama under federal OSHA guidance may not fully grasp the magnitude of enforcement risk it would face performing a similar job in Oregon or Minnesota. Without harmonization, competitive pricing becomes distorted, favoring regional contractors less exposed to multi-state compliance burdens and penalizing those with the infrastructure and capacity to take on national projects.

Litigation and citation defense further drive up costs. Once cited under the multi-employer doctrine, a general contractor must often defend against agency findings at the Review Commission or state administrative hearing levels. Even if the citation is ultimately vacated, legal fees and internal costs related to document production, witness preparation, and reputational damage can exceed the citation amount itself. This legal exposure is particularly problematic in public works, where a history of citations, regardless of outcome, may negatively affect prequalification status and eligibility for future contracts.

Insurance and indemnity are additional pressure points. Many general liability policies are triggered by employee injuries but may not cover administrative fines, especially those stemming from third-party employee exposure. Contractors have increasingly turned to subcontractor default insurance (SDI) or contractor/owner-controlled insurance programs (CCIPs or OCIPs) to manage multi-employer risks, but premiums for these programs have risen sharply in enforcement-heavy jurisdictions. Meanwhile, contractual indemnity clauses, while helpful, are only as reliable as the subcontractor's solvency and coverage, and courts in some jurisdictions have begun scrutinizing efforts to shift nondelegable safety duties downstream.

Beyond the direct costs, there are indirect but substantial market-level impacts. The specter of open-ended liability may disincentivize smaller general contractors from bidding on complex or multi-employer projects, effectively shrinking competition in an already constrained labor market. This may result in fewer qualified bidders, less innovation in safety solutions, and higher overall project costs, particularly for public infrastructure and private development reliant on aggressive scheduling and layered contracting.

Ultimately, the multi-employer doctrine as currently enforced operates as a regulatory multiplier: it increases risk without increasing legal clarity, imposes costs without reliable offsets, and frustrates the efficiency gains of subcontractor specialization that modern construction delivery methods depend upon. For meaningful economic relief, employers require either judicial resolution or legislative action to clarify the scope of § 5(a)(2). Until then, the doctrine will continue to create financial asymmetries across jurisdictions, penalize risk-taking and innovation, and distort the market for qualified general contractors nationwide.

11. The Unintended Safety Consequences of OSHA's Multi-Employer Enforcement Doctrine

A critical but often overlooked barrier to improving jobsite safety through immigration reform lies in OSHA's multi-employer citation policy. Under current OSHA guidance rooted in subregulatory interpretations such as CPL 02-00-160, a prime contractor on a multi-employer construction site may be cited for safety violations committed by subcontractors if the prime is deemed to have "control" over the site or the "ability to correct" hazardous conditions. This controlling-employer liability standard creates a perverse incentive: instead of actively assisting subcontractors with training, equipment, or oversight, prime contractors often distance themselves from subcontractor safety practices altogether out of fear of triggering OSHA citations.

Prime contractors are typically in the best position to drive safety culture across a project. They have dedicated safety staff, economies of scale that allow for investment in technology and training, and familiarity with the latest regulatory updates and industry best practices. In contrast, many subcontractors are small companies with limited resources and minimal formal training infrastructure. Many rely on immigrant laborers, who may have language barriers, limited formal safety education, and fewer pathways to report unsafe conditions.

In this environment, prime contractors can and should play a vital role. They can offer toolbox talks, distribute personal protective equipment (PPE), or help small subs comply with fall protection rules. But under current policy, every well-intentioned act of assistance opens the door to legal liability.

This has created a perverse incentive: the more safety-conscious and engaged a prime contractor is with subcontractors, the more likely it is to be cited as a "controlling employer." The safest route, legally, is to stay silent and uninvolved. That result is deeply incompatible with the mission of OSHA and contrary to the moral obligations of the construction industry.

A reformed framework is needed one that empowers primes to support subcontractor safety without being presumed liable. NCPI recommends that any future Department of Labor rulemaking or legislative overhaul of the Occupational Safety and Health Act include a safe harbor for good-faith safety support. Such a provision would encourage collaborative training, PPE sharing, and hazard abatement initiatives while maintaining accountability for willful or negligent violations. Encouraging cooperation rather than enforcing silence will be essential to ensuring that all workers, including legal immigrants and guestworkers, are protected on the job.

12. Constitutional and Administrative Law Concerns

While OSHA's multi-employer citation policy has endured for decades through administrative guidance and Review Commission precedent, it rests on legally precarious ground. The doctrine's expansion when used to cite employers with no direct exposure to hazards or involvement in their creation raises serious constitutional and administrative law concerns. These concerns have become more pronounced in light of recent U.S. Supreme Court decisions that question the boundaries of agency authority and the legitimacy of long-standing deference doctrines.

At the heart of the legal issue is whether OSHA has statutory authority under § 5(a)(2) of the Occupational Safety and Health Act to cite an employer for hazards affecting another company's employees. The plain language of the statute obligates employers to "comply with occupational safety and health standards promulgated under this Act," but does not expressly authorize OSHA to impose liability on employers whose own employees were not exposed to a hazard. Courts such as the D.C. Circuit in *IBP, Inc. v. Herman*, 144 F.3d 861 (D.C. Cir. 1998), and the Fifth Circuit in *Melerine v. Avondale Shipyards*, 659 F.2d 706 (5th Cir. 1981), have expressed skepticism about OSHA's interpretation, noting the lack of clear congressional intent to impose generalized site-wide duties beyond the employer's own workforce.

This uncertainty places OSHA's multi-employer doctrine at risk under modern administrative law principles. In particular, the doctrine's survival has long relied on the now-fragile foundation of *Chevron* deference, under which courts defer to an agency's reasonable interpretation of ambiguous statutes. However, even before the landmark *Loper Bright* decision in 2024, the Supreme Court had shown a growing willingness to roll back this deference. In *West Virginia v.*

EPA, the Court applied the "major questions doctrine" to strike down an EPA regulatory interpretation that significantly expanded agency power.[xxxix] The Court held that agencies must have "clear congressional authorization" for actions of major political or economic significance.[xl]

If applied to OSHA's multi-employer doctrine, the major questions doctrine could prove fatal. The imposition of liability on one employer for another's misconduct, particularly without fault or employee exposure, constitutes a significant expansion of agency enforcement authority. It is doubtful that such a doctrine would survive judicial scrutiny without a clear statutory basis, particularly in the Fifth or Eleventh Circuits, where courts have already expressed discomfort with OSHA's expansive reach.

Compounding this vulnerability is the growing judicial hostility to administrative overreach more broadly. In *National Federation of Independent Business v. OSHA*, the Supreme Court stayed OSHA's emergency COVID-19 vaccine-or-test mandate.[xli]Although that case involved an emergency temporary standard, the Court's opinion made clear that OSHA's authority is not limitless and must be grounded in a clear congressional mandate. The ruling reinforced the notion that the agency cannot use general statutory provisions, like § 5(a)(2), to justify sweeping enforcement actions that were not expressly contemplated by Congress.

Another looming threat to OSHA's multi-employer policy is the challenge to *Chevron* itself. Without deference, OSHA will bear the burden of proving that Congress clearly intended to authorize citations against non-exposing employers, which is an argument that may falter under traditional rules of statutory construction.

There are also due process concerns. The multi-employer doctrine, particularly *as applied* in state plans like Washington's L&I or California's Cal/OSHA, can result in citations against employers who had no knowledge of the violation and no reasonable opportunity to abate the hazard. This raises fundamental questions about fair notice and administrative accountability. Courts have repeatedly held that regulated entities are entitled to clear standards and notice of prohibited conduct. When employers are cited for conditions outside their control or knowledge, it undermines these constitutional protections and invites procedural due process challenges.

Finally, there are separation of powers issues embedded in this debate. The expansive application of the multi-employer doctrine effectively allows OSHA, an executive agency, to create a new category of legal duty through interpretive guidance rather than through formal rulemaking or congressional amendment. This is inconsistent with the nondelegation doctrine and the Administrative Procedure Act's (APA) requirements for notice-and-comment rulemaking. Agencies cannot bypass Congress by issuing subregulatory guidance that binds private parties in practice, even if not in name.

In sum, the multi-employer doctrine poses serious constitutional and administrative law questions that have only grown more urgent in the post-*West Virginia v. EPA* regulatory climate. With *Chevron* deference reversed, and the judiciary increasingly skeptical of agency self-

expansion, the doctrine's future is legally uncertain. A clearer statutory framework grounded in explicit congressional authorization and subjected to robust procedural safeguards may be the only path forward to preserve OSHA's ability to address worksite-wide hazards while respecting constitutional limits on administrative power.

13. Policy Recommendations

The multi-employer citation policy, as currently enforced, operates on unstable legal footing and imposes significant economic and operational burdens on construction employers, particularly general contractors and construction managers tasked with overseeing complex, multi-tiered projects. Given the growing judicial skepticism of agency overreach and the demonstrable inconsistency in enforcement across jurisdictions, the time is ripe for targeted policy reform. The following recommendations seek to bring clarity, fairness, and statutory integrity to OSHA's multi-employer enforcement framework while preserving essential worker protections.

13.2 Establish a Uniform National Standard via Formal Rulemaking

If legislative reform proves politically unviable in the near term, OSHA should undertake formal rulemaking under the Administrative Procedure Act to codify its multi-employer enforcement framework. Unlike subregulatory guidance in the Field Operations Manual or memoranda such as CPL 02-00-160, a formal rule would carry the force of law, withstand greater judicial scrutiny, and provide clearer obligations for employers.

The rule should define key terms (e.g., "control," "corrective authority," "reasonable diligence") and limit liability to situations where the cited employer had either (1) knowledge of the hazard and failed to act, or (2) contractual or practical authority to correct the condition. A reasonable person standard should be used to evaluate whether the employer's response to the hazard was appropriate under the circumstances.

13.3 Introduce a Good-Faith Compliance Defense

To improve fairness and encourage proactive safety efforts, OSHA should formally recognize a good-faith defense to multi-employer citations. Under this model, a controlling employer that has implemented site-specific safety protocols, conducted documented inspections, and issued corrective directives to subcontractors should be entitled to a presumption against citation, unless OSHA can demonstrate willful blindness or gross negligence.

This defense would incentivize responsible oversight without punishing employers for hazards they did not create or know about. It would also reduce the frequency of citations driven solely by proximity or contract hierarchy, rather than fault or neglect.

13.4 Proposed Revision to 29 C.F.R. § 1926.20 — Multi-Employer Worksite Citation Standard

To codify the scope and limits of OSHA's multi-employer citation authority in the construction industry, OSHA should amend Subpart C of 29 C.F.R. Part 1926 by adding the following section:

§ 1926.20(e)(1) Multi-Employer Worksite Citation Standard

(1) Scope and Applicability.
This section governs OSHA's authority to issue citations to employers on construction worksites where two or more employers operate simultaneously.

(2) Definitions.
For purposes of this section:

- **Creating employer** means an employer that, through its actions or omissions, caused a hazardous condition to exist on a worksite.
- **Exposing employer** means an employer whose own employees were subjected to a hazardous condition, regardless of who created the condition.
- **Correcting employer** means an employer responsible for remedying or neutralizing a hazard by contract or customary practice.
- **Controlling employer** means an employer with general supervisory authority over a worksite, including the authority to direct other employers to correct safety and health violations.
- **Multi-employer worksite** means a place of employment where the employees of two or more employers are working in physical proximity on the same project or jobsite.

(3) Citation Criteria.
An employer may be cited under this section as a creating, exposing, correcting, or controlling employer only if the following conditions are satisfied:

(i) The employer knew, or with the exercise of reasonable diligence should have known, of the hazardous condition;
(ii) The employer had the authority and ability, by contract or practical control, to prevent or materially abate the hazard; and
(iii) A meaningful nexus exists between the employer's acts or omissions and the hazardous exposure.

(4) Reasonable Opportunity to Abate.
No citation shall be issued under this section unless OSHA determines, based on objective evidence, that the cited employer had a reasonable opportunity to eliminate or substantially reduce the hazard prior to employee exposure.

(5) Good-Faith Safe Harbor.
An employer that meets all of the following criteria shall not be cited under this section:

(i) Maintains a site-specific written safety program that:

- Identifies foreseeable hazards;
- Clearly assigns responsibilities for hazard prevention and correction;
- Provides for documented routine inspections;
  (ii) Requires subcontractors, by written agreement, to comply with OSHA standards and promptly correct hazards under their control;
  (iii) Conducts documented oversight of subcontractor compliance that is reasonably commensurate with the size, complexity, and risk level of the project; and
  (iv) Takes prompt corrective action upon discovery of a hazard, or demonstrates that no feasible corrective action was possible before the exposure occurred.

(6) Enforcement Limitations.
OSHA shall not interpret this section to impose strict liability on controlling employers. Citations shall be issued only where the employer's conduct fails to meet the standards of reasonable care, as defined herein.

(7) Relation to General Duty Clause.
This section governs citation authority under both 29 U.S.C. § 654(a)(1) and § 654(a)(2) on multi-employer construction worksites, and shall be read to ensure fair notice and due process protections for employers not directly exposing their own employees to a hazard.

13.4 Codify the Doctrine through Legislative Action

The most direct and lasting solution is for Congress to amend the Occupational Safety and Health Act to clearly define the scope of an employer's obligations on multi-employer worksites. Section 5(a)(2) could be revised to expressly authorize citations against creating, exposing, correcting, and controlling employers, while also establishing standards for when such liability is appropriate. Such a statutory amendment would resolve the current circuit split, shield the doctrine from constitutional attack, and give employers fair notice of their duties.

The legislation should include limiting principles that account for knowledge, control, and reasonable opportunity to abate. Liability should not attach in the absence of a meaningful nexus between the cited employer and the hazard. A statutory safe harbor for employers that implement and document good-faith safety oversight measures would balance enforcement needs with fairness.

13.4.1 Proposed Language

Proposed Amendment to 29 U.S.C. § 654 ("Duties of Employers and Employees")

SEC. 101. AMENDMENT TO SECTION 5(a)(2). Section 5(a)(2) of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 654(a)(2)) is amended:

1. by striking "(2)" and inserting "(2)(A)"; and
2. by adding at the end, the following new subparagraphs:

"(B) Multi-Employer Worksite Liability.

(i) Citation Authority. The Secretary may cite an employer on a multi-employer worksite as a creating, exposing, correcting, or controlling employer for a violation of a standard promulgated under this Act, only in accordance with clauses (ii) through (iv).

(ii) Limiting Principles. A citation under clause (i) shall issue only if—

(I) the employer knew, or with the exercise of reasonable diligence should have known, of the hazardous condition;

(II) the employer had the ability to prevent or materially abate the hazard through authority, contractual right, or practical control; and

(III) a meaningful nexus exists between the employer's acts or omissions and the employee exposure that gave rise to the citation.

(iii) Reasonable Opportunity to Abate. No citation shall issue against a correcting or controlling employer unless the Secretary determines, based on objective evidence, that the employer had a reasonable opportunity, under the circumstances, to eliminate or materially reduce the hazard before the employee exposure occurred.

(iv) Documented Good-Faith Safe Harbor. An employer shall not be cited under clause (i) if the employer:

(I) has in place a written, worksite-specific safety program that

(aa) identifies foreseeable hazards;

(bb) assigns clear responsibilities for hazard prevention and correction; and

(cc) provides for periodic documented inspections;

(II) requires subcontractors by written contract to comply with applicable occupational safety and health standards and to correct hazards under their control;

(III) monitors and enforces such subcontractor obligations through regular oversight reasonably commensurate with the size and complexity of the project; and

(IV) promptly undertakes corrective action upon becoming aware of a hazardous condition, or can show that no feasible corrective action was possible before the exposure.

"(C) Definitions. In this subsection:

(i) creating employer' means an employer whose acts or omissions resulted in a hazardous condition;

(ii) exposing employer' means an employer whose own employees were exposed to the hazard;

(iii) correcting employer' means an employer engaged in the business of remedying or neutralizing the hazard;

(iv) controlling employer' means an employer who, by contract or practice, has general supervisory authority over the worksite, including the power to correct or require correction of safety and health violations; and

(v) 'multi-employer worksite' means a place of employment where the employees of two or more employers are working at the same time and place."

13.4.2 Analysis of the Proposed Language

1. **Express statutory authority.** Subparagraph (B)(i) eliminates any doubt that OSHA may cite non-exposing employers, harmonizing conflicting appellate decisions and reducing litigation over the scope of § 5.
2. **Built-in limiting principles.** Clause (ii) requires knowledge (actual or constructive), actionable control, and a causal nexus, preventing "gotcha" citations where the employer lacked awareness or ability to correct.
3. **Fair notice through opportunity to abate.** Clause (iii) codifies a lead-time requirement drawn from due-process case law, making clear that an employer must have a realistic chance to cure before incurring liability.
4. **Balanced enforcement via a safe harbor.** Clause (iv) incentivizes documented, proactive safety management. Employers that can show bona-fide oversight and prompt response avoid liability, aligning enforcement with prevention rather than punishment.
5. **Clear definitions.** Subparagraph (C) tracks long-standing OSHA Field Operations Manual categories while anchoring them in statutory text, ensuring nationwide uniformity and limiting agency discretion.

While statutory reform of Section 5(a)(2) of the OSH Act would provide the most comprehensive and durable legal foundation for multi-employer enforcement, we recognize that this provision governs all regulated industries and not just construction. Because multi-employer site dynamics are most prevalent in construction, logistics, and a few other sectors, Congress may be reluctant to revise a statute of general applicability for a problem largely confined to one domain.

Accordingly, this policy paper recommends a dual-track strategy: (1) immediate regulatory reform through APA rulemaking under Part 1926 to codify a construction-specific standard, and (2) long-term pursuit of statutory revision to provide uniformity, limit judicial discretion, and insulate the doctrine from constitutional attack. The proposed statutory language may serve as a model for Congressional debate or be adapted into industry-specific legislation if sectoral carve-outs prove more politically viable.

13.5 Encourage State Plan Harmonization

Congress or OSHA should incentivize greater uniformity among State Plans through funding mechanisms tied to enforcement consistency. States like Washington and California have adopted expansive enforcement standards that functionally impose strict liability on general contractors. While state autonomy must be respected, federal OSHA has an obligation to ensure that state plans do not undermine the balance of fairness, predictability, and clarity envisioned by the OSH Act.

OSHA could require State Plans to conform to a standardized multi-employer enforcement policy as a condition of future plan approval or continued funding. This would reduce compliance fragmentation for national contractors and restore parity between federal and state enforcement regimes.

13.6 Promote Education and Proactive Compliance Tools

Finally, OSHA and industry stakeholders should jointly develop compliance toolkits, model subcontract provisions, and multi-employer safety templates to help employers navigate enforcement risk. By publishing best practices for general contractors including checklists, flow-down clauses, and site control protocols, OSHA can promote voluntary compliance without relying exclusively on punitive enforcement.

Education initiatives should also target subcontractors, who are often responsible for the creation of hazards but may lack the resources or training to meet OSHA standards independently. Elevating safety across the entire contracting chain is essential to realizing the full purpose of the OSH Act.

Reforming the multi-employer doctrine is not about weakening worker protections; instead, it is about reinforcing them through a fair, transparent, and legally durable framework. Employers deserve clarity, courts demand statutory authority, and workers benefit when responsibility is paired with reasonable expectations. Whether through legislation, rulemaking, or structured administrative reform, these recommendations offer a roadmap to preserve OSHA's enforcement power while restoring the legal and economic balance necessary for a sustainable national safety regime.

14. Implementation Timeline

The policy reforms proposed in this paper, designed to clarify, constrain, and strengthen OSHA's multi-employer enforcement authority, require a structured, multi-phase implementation strategy. Effective reform cannot occur through litigation alone, nor can it rely on informal agency guidance. The roadmap must blend legislative advocacy, regulatory rulemaking, coordinated agency action, and broad industry engagement to achieve meaningful and durable change. Below is a recommended phased approach for advancing reform at both the federal and state levels.

Phase I: Congressional Engagement and Legislative Drafting (0–6 months)

The first step is to develop and advance a legislative proposal that amends Section 5(a)(2) of the Occupational Safety and Health Act to expressly define the scope of employer liability on multi-employer worksites. This proposal should:

- Codify the four traditional employer roles, creating, exposing, correcting, and controlling, but establish clear statutory limits on when citations may be issued;
- Condition liability on factors such as knowledge, contractual authority, and reasonable opportunity to abate;
- Include a statutory "good-faith defense" for employers who implement documented oversight and safety protocols.

Draft bill text should be developed in collaboration with construction trade associations (e.g., AGC, ABC, NRCA), legal experts, and congressional committee staff, particularly those serving on the House Education and the Workforce Committee and the Senate HELP Committee. Legislative sponsors should be identified in both chambers, ideally including members with construction industry constituencies or prior involvement in OSHA oversight.

Phase II: Agency Rulemaking and Regulatory Clarification (3–12 months)

In parallel with legislative efforts, OSHA should initiate formal rulemaking under the Administrative Procedure Act (APA) to revise or replace its multi-employer enforcement guidance, specifically CPL 02-00-160. The goal is to:

- Move from subregulatory guidance to enforceable regulation;
- Clearly define the limits of controlling employer liability;
- Establish safe harbor provisions for employers engaging in proactive oversight;
- Harmonize inconsistent state enforcement policies through model language.

To initiate this process, industry stakeholders should file a formal rulemaking petition under 5 U.S.C. § 553(e), urging OSHA to promulgate a rule that aligns with modern administrative law standards. Concurrently, policymakers within the Department of Labor should be engaged to build internal support and overcome potential inertia.

Phase III: State Plan Review and Harmonization (6–18 months)

Given the divergence between state plans (e.g., California, Washington) and Federal OSHA policy, DOL should begin a structured review of State Plan enforcement practices to ensure they meet constitutional and administrative law standards. Federal OSHA should:

- Audit state enforcement of multi-employer liability for fairness, consistency, and procedural safeguards;
- Publish comparative enforcement data and identify jurisdictions that exceed or conflict with federal norms;
- Tie future funding and plan approvals to compliance with a unified federal enforcement standard.

Where necessary, OSHA should issue interpretive clarifications or revised benchmarks for State Plans. States should be encouraged but not compelled to adopt the reformed federal rule as a condition of continued plan approval and grant eligibility under Section 23(g) of the OSH Act.

Phase IV: Model Contract Provisions and Industry Guidance (9–24 months)

To support implementation at the field level, OSHA and industry groups should jointly publish model contract language and jobsite protocols that help general contractors manage multi-employer risks in compliance with the updated legal framework. These resources should include:

- Standard subcontract clauses for safety delegation and hazard reporting;
- Guidance on maintaining inspection logs, safety meeting records, and abatement directives;
- Model site control policies for managing access, signage, and hazard communication.

This phase also includes a robust education campaign targeting employers, safety managers, insurance carriers, and legal advisors. Conferences, webinars, and written toolkits should be deployed to raise awareness and ensure adoption of compliant practices.

Phase V: Legal Defense Infrastructure and Judicial Engagement (Ongoing)

Throughout the implementation process, legal defenses to overly broad or constitutionally questionable applications of the multi-employer doctrine should continue. Trade associations and legal advocacy groups should coordinate litigation strategies to:

- Challenge citations in courts where circuits have reserved judgment (e.g., D.C. and 11th Circuits);
- Seek Supreme Court review in cases that present clean vehicles to overturn or clarify existing doctrine;

- File amicus briefs in administrative appeals and appellate courts to promote statutory and constitutional limits on agency authority.

By aligning legal advocacy with policy reform, stakeholders can ensure that regulatory clarity is reinforced through favorable judicial precedent.

The implementation of multi-employer enforcement reform will require sustained coordination across government, industry, and the legal community. The current doctrine, while well-intentioned, is too vulnerable to judicial reversal and too inconsistent to serve as a durable safety enforcement model for the future. Through a phased and strategic approach, policymakers can bring certainty to employers, protect worker safety, and reestablish a legally grounded regulatory structure that withstands constitutional scrutiny and administrative reform.

15. Conclusion

The evolution and continued application of OSHA's multi-employer citation doctrine underscores a fundamental tension at the heart of modern construction safety regulation: how to balance broad worksite accountability with clear legal limits, constitutional safeguards, and economic practicality. What began as an internal enforcement policy rooted in agency memoranda and field guidance has over time assumed the force of law, affecting contractors nationwide without the benefit of consistent judicial approval, statutory clarity, or regulatory uniformity.

As this paper has demonstrated, the doctrine's legitimacy is contested across multiple dimensions. From a statutory standpoint, its foundation in § 5(a)(2) of the Occupational Safety and Health Act is tenuous, as the provision does not explicitly authorize OSHA to cite employers for hazards affecting the employees of others.

Administratively, the doctrine's reliance on subregulatory guidance rather than notice-and-comment rulemaking, renders it vulnerable to challenges under the Administrative Procedure Act and recent Supreme Court jurisprudence. The demise of *Chevron* deference further weakens OSHA's position, leaving the doctrine increasingly exposed to constitutional scrutiny. As courts demand clearer congressional authorization for major agency action, OSHA's continued reliance on interpretive doctrines in lieu of formal rulemaking is both legally risky and strategically shortsighted.

Economically, the doctrine imposes real and recurring costs on employers, particularly general contractors who must absorb the legal and operational burdens of overseeing other companies' compliance. These burdens are amplified in jurisdictions like California and Washington, where state plans have adopted near-strict liability enforcement frameworks that go far beyond federal norms. The result is a compliance patchwork that forces national contractors to maintain jurisdiction-specific protocols, often at considerable expense and administrative strain. These disparities distort bidding, suppress competition, and divert resources from practical safety improvements toward litigation defense and risk management.

Beyond its legal and economic implications, the current multi-employer site doctrine exerts a significant chilling effect on the very safety collaboration it purports to encourage. Prime contractors, often best positioned to provide subcontractors with critical resources such as training, personal protective equipment, and real-time hazard mitigation technologies, are increasingly reluctant to do so out of fear that such assistance will be construed as evidence of "control" and expose them to citation under OSHA's enforcement policy. This perverse incentive discourages upstream safety investment and weakens the overall protective framework on complex jobsites, where layered contracting is the norm. By deterring general contractors from proactively engaging in cross-employer safety efforts, the doctrine undermines OSHA's own goal of comprehensive hazard abatement and inadvertently shifts the burden of compliance to subcontractors who may lack the capacity to act alone. Reform is therefore essential not only to restore legal coherence, but also to create a regulatory environment in which collaboration is rewarded and not penalized.

International comparisons further highlight the disconnect. While other industrialized nations impose broad safety responsibilities on general contractors, they do so through clearly defined statutory roles with predictable enforcement criteria. In contrast, the United States has allowed a critical element of its safety enforcement apparatus to develop in a piecemeal fashion driven by agency interpretation, circuit-specific precedent, and inconsistent state implementation.

This situation is unsustainable. As legal doctrines shift and agency authority faces mounting scrutiny, OSHA's multi-employer policy must be reformed through legislation, regulation, or both. Codifying the doctrine with clear limits, incorporating due process protections, and harmonizing state and federal enforcement standards are essential steps to preserving the doctrine's intended purpose while curing its legal and operational defects.

Worker safety should never be compromised. But neither should employers be held strictly liable for conditions they did not create, control, or know about. A reformed multi-employer framework, one that is fair, predictable, and legally defensible, will empower contractors to build safer jobsites, reduce litigation, and strengthen the legitimacy of OSHA as a regulatory agency. The reforms proposed in this paper provide a path forward. It is now incumbent upon policymakers, regulators, and industry stakeholders to act before the doctrine collapses under its own legal weight or is invalidated by a court unpersuaded by decades of informal practice.

[i] H.R. 16785, 90th Cong. 2d Sess. (1968)

[ii] Occupational Safety and Health Act of 1970 § 5(a)(1), 29 U.S.C. § 654(a)(1).

[iii] Occupational Safety and Health Act of 1970 § 5(a)(2), 29 U.S.C. § 654(a)(2).

[iv] 513 F.2d 1032 (5th Cir. 1975).

[v] U.S. Dep't of Labor, Occupational Safety & Health Admin., Field Operations Manual ¶ 10, at VII-6 – 8 (May 20, 1971).

[vi] *Secretary of Labor v. Grossman Steel & Aluminum Corp.,* 4 BNA OSHC 1185, 1975-76 CCH OSHD ¶ 20,691 (No. 12775, O.S.H.R.C. May 12, 1976).

[vii] *Brennan v. Occupational Safety & Health Review Commission* (Underhill Construction Corp.), 513 F.2d 1032, 2 O.S.H. Cas. (BNA) 1641, 1975–76 O.S.H.D. (CCH) ¶ 19,401 (2d Cir. 1975).

[viii] *Anning-Johnson Co. v. Occupational Safety & Health Review Commission,* 516 F.2d 1081, 3 O.S.H. Cas. (BNA) 1166, 1974-75 O.S.H.D. (CCH) ¶ 19,684 (7th Cir. 1975).

[ix] *Marshall v. Knutson Construction Co.,* 566 F.2d 596 (8th Cir. 1977).

[x] *Beatty Equipment Leasing, Inc. v. Secretary of Labor*, United States Department of Labor, 577 F.2d 534 (9th Cir. 1978).

[xi] *Clarkson Construction Co. v. Occupational Safety & Health Review Commission*, 531 F.2d 451 (10th Cir. 1976).

[xii] *Melerine v. Avondale Shipyards, Inc.,* 659 F.2d 706 (5th Cir. 1981).

[xiii] *Acosta v. Hensel Phelps Construction Co*., 909 F.3d 723 (5th Cir. 2018).

[xiv] *See e.g. Secretary of Labor v. Summit Contractors, Inc.,* 23 BNA OSHC 1196, 2010 OSHD (CCH) ¶ 33,107 (No. 05-0839, OSHRC 2010).

[xv] *Id.*

[xvi] *See* Joseph Zavoral, *OSHA Liability in Tort and the Threat of the Multi-Employer Doctrine*, 47 Fla. St. U. L. Rev. 867 (2020).

[xvii] *See Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 823-25 (8th Cir. 2009) (rejecting notice-and-comment claim) and *Acosta v. Hensel Phelps Constr. Co.*, 909 F.3d 723, 730-34 (5th Cir. 2018) (affirming controlling-employer citation under the Act).

[xviii] *IBP, Inc. v. Herman*, 144 F.3d 861 (D.C. Cir. 1998).

[xix] *Id.*

[xx] *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. 1981).

[xxi] *Id.*

[xxii] *ComTran Group, Inc. v. U.S. Department of Labor*, 722 F.3d 1304 (11th Cir. 2013).

[xxiii] *Secretary of Labor v. Summit Contractors, Inc.*, OSHRC Docket No. 03-1622 (Apr. 27, 2007).

[xxiv] *Chao v. Summit Contractors, Inc.*, 558 F.3d 815 (8th Cir. 2009).

[xxv] *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).

[xxvi] 909 F.3d 723 (5th Cir. 2018).

[xxvii] 144 F.3d 861 (D.C. Cir. 1998).

[xxviii] 722 F.3d 1304 (11th Cir. 2013).

[xxix] Occupational Safety & Health Administration, U.S. Department of Labor, *Field Operations Manual* (OSHA Instruction CPL 02-00-160) (Aug. 2, 2016). CPL 02-00-160 took effect 2 Aug 2016; it was updated in Sept 2019 (CPL 02-00-163) and again in April 2020 (CPL 02-00-164).

[xxx] 467 U.S. 837 (1984).

[xxxi] *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce*, 603 U.S. 369 (2024).

[xxxii] 142 S. Ct. 661 (2022),

[xxxiii] *See*, e.g., Comment Letter of the Construction Industry Safety Coalition (which includes the Associated General Contractors of America, several state-level AGC chapters, and other regional construction alliances) to OSHA re: Heat Injury & Illness Prevention, Docket No. OSHA-2021-0009 (Jan. 26, 2022) at 6-8 (arguing that "the legality of OSHA's multi-employer citation policy … has been called into question" and urging the Agency to confine its reach).

See also Construction Industry Safety Coalition Comment Letter to OSHA re: Personal Protective Equipment in Construction, Docket No. OSHA-2019-0003 (Sept. 18, 2023) at 2 (expressing concern that the proposed rule, coupled with OSHA's multi-employer enforcement policy, would create "disparate enforcement" and requesting clarification).

Cf. NDC Constr. Co. v. Secretary of Labor, 20-14484 (11th Cir. June 30, 2022) (amicus brief of the National Association of Home Builders and the Associated General Contractors of America supporting the petitioner's challenge to OSHA's multi-employer doctrine).

[xxxiv] *Melerine v. Avondale Shipyards, Inc.,* 659 F.2d 706 (5th Cir. 1981).

[xxxv] 2023 WL 1125417 (La. Ct. App. 2023).

[xxxvi] Ontario's Occupational Health and Safety Act, R.S.O. 1990, c. O.1, s. 23(1)(b), which provides that "a constructor shall ensure … every employer and every worker performing work on the project complies with this Act and the regulations."

[xxxvii] *See* Germany's Safety and Health at Work Act (Arbeitsschutzgesetz – ArbSchG): § 8 (1)–(2) "Cooperation between several employers" requires all employers whose workers operate at the same workplace to "cooperate" and "coordinate measures" for safety and health protection, making each of them individually liable for compliance. § 22 (1)–(3) "Powers of the competent authorities" authorizes inspectors to issue orders and penalties to "the employer or the responsible persons," enabling citations to be directed at multiple parties over the same hazard.

[xxxviii] Work Health and Safety Act 2011 (Cth): § 5 "Meaning of 'person conducting a business or undertaking' (PCBU)" defines a PCBU broadly, covering any person or entity running a business "whether or not the business … is conducted for profit or gain." § 7 "Meaning of 'worker'" extends the Act's protection to contractors, subcontractors and their employees, labour-hire personnel, volunteers, and others, so duties reach well beyond direct employees. § 19(1)–(2) "Primary duty of care" requires every PCBU to "ensure, so far as is reasonably practicable, the health and safety of… workers engaged, or caused to be engaged, by the person" and of workers "whose activities … are influenced or directed by the person," establishing the "so far as is reasonably practicable" standard.

Australian courts interpret these provisions expansively. In Brett McKie v Al-Hasani & Kenoss Contractors Pty Ltd (In Liq) [2015] ACTIC 1, the ACT Industrial Magistrates Court upheld a prosecution that treated the principal contractor (a PCBU) as liable for a subcontractor worker's fatality, confirming that PCBU duties attach "regardless of the worker's employment relationship."

[xxxix] 142 S. Ct. 2587 (2022).

[xl] *Id.*

[xli] 142 S. Ct. 661 (2022).