

WORKER SAFETY ON THE JOBSITE: WHO'S RESPONSIBLE?

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Panelists Kevin Virag, Larry Williams, and Keith Coulter

Experts in the

construction industry met at a luncheon hosted by the American Subcontractors Association Houston Chapter recently to talk about employer responsibility for worker safety on the jobsite. The panel discussion focused largely on safety education and risk assessment, employer liabilities in situations of co-employment, and employer responsibilities when there's a filing with OSHA or a workers' compensation claim.

The discussion was moderated by Lee Hart, owner of Safety by Design , a firm providing safety consulting services like project safety coordinators, safety training, incident investigations, and mock OSHA inspections.

To start things off, Hart asked about the standard training that workers must go through before even stepping foot on a jobsite.

“With Gilbane and every tier of our contractors, we do a kickoff meeting to make sure that they understand all of our safety protocols and what is in the contracts as well. We also look to all of our employees to take on risk assessment of projects,” said Kevin Virag, safety director at Gilbane Building Company .

“We have what we think is a pretty comprehensive and thorough orientation, which has three components,” said Larry Williams, president of Marek Employment Management Company, or MEMCO. Those components are a review of basic safety policy, a safety video, and then an exam.

“It’s a 30-minute to one-hour part of our hiring process, administered in both English and Spanish. It covers personal safety work habits, safety policies, fall protection, ladder safety etc. It’s not deep and probing but it is comprehensive,” Williams said. “The fact that it’s not deep and probing makes it a good first small step in the safety process.”

“We look at all of our employees as well as the contractors, foremen and the superintendents to take on the risk assessments of our projects,” Virag said when asked specifically who is responsible for the assessments.

“I think the contractors are in the best position to perform risk assessment on the job site,” Williams said. “We do have four fulltime safety professionals that are there to help when needed, but I think it’s important for contractors at the job site because the worksite is changing and dynamic.”

“We also have to look to OSHA. If you look at the temporary work conditions that came out in 2013, they tell us that the staffing company is responsible to conduct worker safety orientation. But once at the worksite, they look at the host employer or the customer to provide safety analysis and PPE,” said Williams, referring of course to Personal Protective Equipment.

Keith Coulter , an attorney who’s represented construction companies on a variety of issues, explained the concept of co-employment.

“Co-employment is any situation where an employee has more than one employer,” Coulter said. If you have a solo employee or independent contractor who receive the majority of his income from one company, the Department of Labor is going to view that person as an employee of the company for which they work most of the time, Coulter said.

OSHA has also been shifting toward the “economic realities test,” which asks how long that employee has worked for you, where does that person’s paycheck come from, and who provides benefits if there are any.

“If you are the employer or joint employer you can be responsible for negligence under any of those situations,” Coulter said. “My recommendation for any situation where there’s more than one employer on the jobsite is to put who’s responsible for what in your contracts,” he said. “If there is more than one employer designated for who’s responsible for each part of the project, don’t assume someone else has provided the training, because if that training is not provided, OSHA is going to get you and you’re probably going to be liable for negligence.”

When it comes to personal protective equipment, the answers were straightforward.

“Our basic PPE package is a hard hat, high visibility vest, and gloves and safety glasses for all employees, although we do have some customers who hand out hard hats and vests so they

can put their name and logo on those,” Williams said. “We do expect the host company to provide and enforce job-specific PPE, because the work site is dynamic and different protection may be required at one moment and not the next.”

The discussion also drilled down on the legal meaning of “supervisor” and what that person is responsible for when a project is underway.

“Under the laws resulting from OSHA, if your supervisor, meaning anyone that oversees the work of others, knows of a hazard or makes a decision to violate the regulations, then your company is held accountable for that decision and you can be in violation of the OSHA regulations,” Coulter explained.

“If you do everything you can to prevent the employees from messing up, like having a written safety program that is effectively communicated to employees, inspecting for violations, and disciplining the violators, you’ve done everything you can do and that defense is applicable,” Coulter said. “However, if you have a supervisor that is committing the unsafe practices, then that defense is normally not available. That’s not usually going to be your lead man, your foreman, or superintendent. It’s going to be an officer of the company or a division of the company, which is an important distinction.”

Coulter also talked about the legal importance of providing adequate training to all employees as it pertains to host company liability.

“Make sure you know who is in control. You will be in violation if you don’t make sure that either you or the sub trained those employees. If you’re the host employer, communicate safety issues. Give temporary and leased employees the same training you would give your own employees,” Coulter said. “If the training you provide to your employees trumps that which is provided to temporary employees, push the training through the subcontractor. If you provide training to your employees and not the other ones, that will be the guideline for negligence cases.”

Hart followed up by asking about who’s responsible if there’s an accident or OSHA violation.

“OSHA will always look at the host employer or who provides day-to-day instruction. That’s who they hold most accountable and scrutinize the most closely. They look at what PPE was provided, what training was provided, and what type of preventative measures were put into effect. I have not seen us get cited and the host employer not because they’re the ones that provide day-to-day instruction and supervision,” Williams said.

Coulter agreed.

“Typically, OSHA focuses on the host employer,” Coulter said. “The ultimate responsibility falls on who controls the day-to-day process and means of work. Often times, a host employer will think they’re off the hook because the subcontractor has employees on site. But both employers have the obligation to make sure the reporting gets done and is not duplicated.”

Coulter said a similar procedure should be used when dealing with workers’ comp. While the employee will receive the same benefits regardless of which company files the injury in its

logs, it is highly important that only one of them initiates the claim or fines can be imposed.

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