Assessing On-Site Risks:
Criminal Liability for Jobsite Construction Accidents

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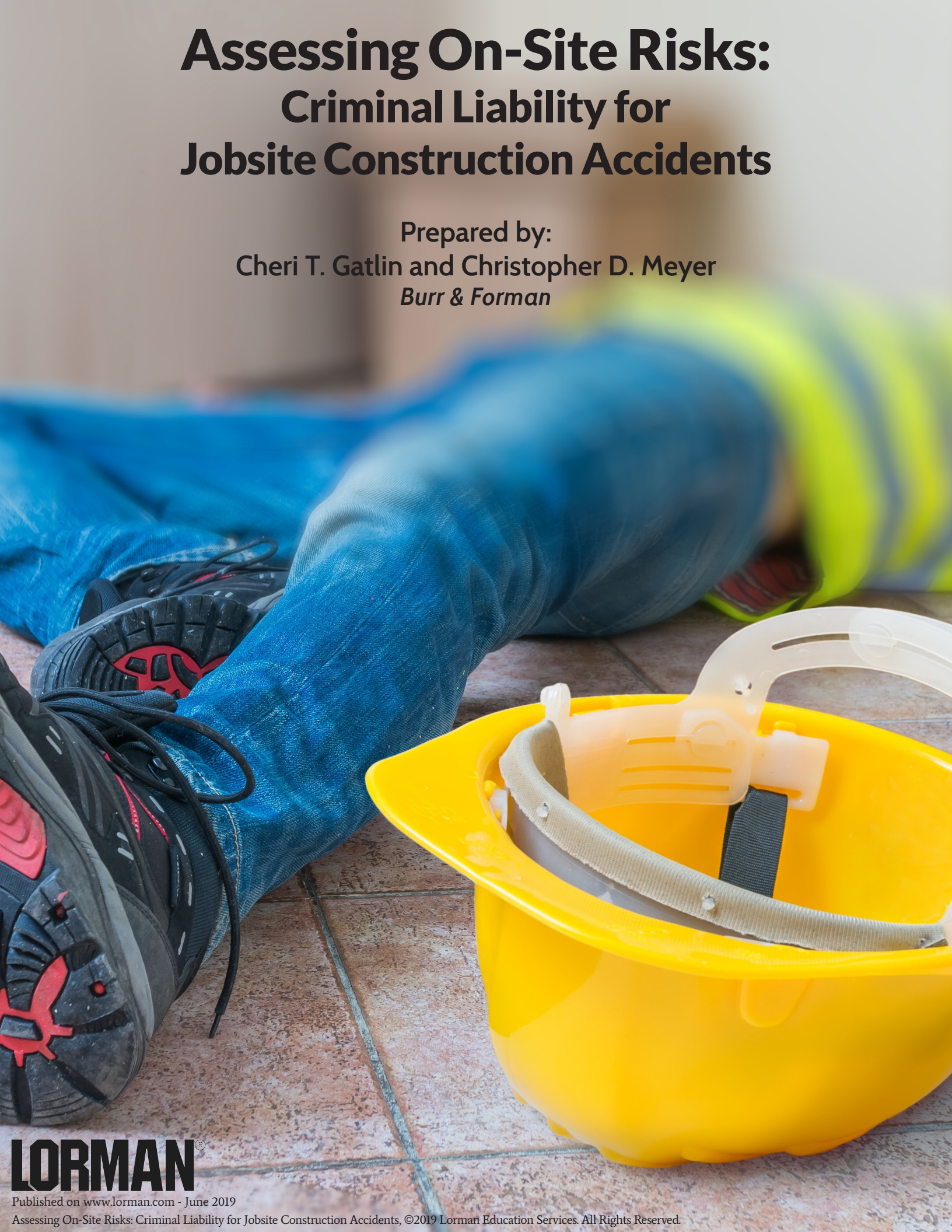

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Assessing On-Site Risks

They say that knowing is half the battle. This old adage applies to the safety arena.

a. Understanding Occupational Safety and Health Act (OSH Act) obligations

OSHA is an agency of the United States Department of Labor. Congress established the agency under the Occupational Safety and Health Act (OSH Act), which President Richard M. Nixon signed into law on December 29, 1970. OSHA's mission is to "assure safe and healthy working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance." Title 29 of the United States Code governs Labor in the United States.

Therein, Title 29 U.S.C. § 666(e) provides criminal penalties for any employer who willfully violates a safety standard prescribed pursuant to the Occupational Safety and Health Act, where that violation causes the death of any employee. Four elements must be proved in order to establish a criminal violation of 29 U.S.C. § 666(e). The government must prove that: (1) the defendant is an employer engaged in a business affecting commerce; (2) the employer violated a "standard, rule or order" promulgated pursuant to 29 U.S.C. § 665, or any regulation prescribed under the Act; (3) the violation was willful, and (4) the violation caused the death of an employee.

The term "employer" is defined in 29 U.S.C. § 652(5) as "a person engaged in a business affecting commerce who has employees." The term "employer" for civil OSHA purposes generally encompasses only the employing business entity, whether it be a corporation, a partnership or sole proprietorship. *See Skidmore v. Travelers Insurance Co.*, 356 F. Supp, 670, 672 (E.D. La), aff'd, 483 F.2d 67 (5th Cir. 1973).

For purposes of criminal enforcement, however, an individual who is a corporate officer or director, may be an "employer" within the meaning of the Act. *United States v. Doig*, 950 F.2d 411, 415 (7th Cir. 1991) (dicta). This is particularly the case where the officer's role in operating the company is pervasive as in the case of *United States v. Cusack*, 806 F.Supp 47 (D.N.J. 1992), where the company's officer ran the corporation as if it were a sole proprietorship. Although corporate officers or directors may be charged as principals, they cannot be charged as aiders and abettors under 18 U.S.C. § 2(a)(1991). See *Doig*, 950 F.2d at 415; *United States v. Shear*, 962 F.2d 488, 493-96 (5th Cir. 1992).

The employer must be "engaged in business affecting commerce." 29 U.S.C. § 652. OSHA's coverage is as broad as the commerce clause of the Constitution, and includes any employer in a business which generally affects commerce, regardless of whether that employer is actually engaged in interstate commerce. *Usery v. Lacy (Aqua View Apartments)*, 628 F.2d 1226 (9th Cir. 1980); *United States v. Dye Construction Co.*, 510 F.2d 78, 83 (10th Cir. 1975). The use of supplies and equipment from out of state sources is generally sufficient to show the business "affects commerce." See *United States v. Dye Construction Co.*, 510 F.2d at 83, citing, *Katzenbach v. McClung*, 379 U.S. 294 (1964).

In *United States v. Dye Construction*, 510 F.2d 78, the only case to address the issue of what constitutes "willfulness" for the purpose of finding a criminal violation, the court concluded that 29 U.S.C. § 666(e) does not require that the government prove that the employer entertained a specific intent to harm the employee or that the employer's action involved moral turpitude. *Id*. at 82. Instead, the court approved the following jury instruction:

> The failure to comply with a safety standard under the Occupational Safety Health Act is willful if done knowingly and purposely by an employer who, having a free will or choice, either intentionally disregards the standard or is plainly indifferent

> to its requirement. An omission or failure to act is willfully done if done voluntarily and intentionally.

Id. at 81. See also *Consolidation Coal v. United States*, 504 F.2d 1330, 1335 (10th Cir. 1974). This definition of "willfulness" has been widely adopted by the Circuits in the context of OSHA civil enforcement. See *Valdak Corp. v. OSHRC*, 73 F.3d 1466 (8th Cir. 1996); *Ensign Beckford Co., v. OSHRC*, 717 F.2d 1419, 1422 (D.C Cir. 1983), cert. denied, 104 S. Ct 1909 (1984), and cases cited therein.

Ignorance of the applicable standard is not a defense, where intentional disregard or plain indifference to the requirements of the law can be shown. For example, a company may not fail to make its supervisors on the job site aware of OSHA regulations, then plead ignorance when caught in a violation. *Georgia Electric Co. v. Marshall*, 595 F.2d at 320. Such conduct itself shows plain indifference to the requirements of the law.

Indifference to general safety or to a specific hazard can also be evidence of intentional disregard of or plain indifference to the requirements of the law. S*ee Georgia Electric Co. v. Marshall*, 595 F.2d at 319-20 (indifference to employee safety); *United States v. Dye Construction Co.*, 510 F.2d at 82 (gross indifference to the hazard). On the other hand, belief that a practice in violation of OSHA standards is safe is not a defense. *Western Waterproofing Co. v. Marshall*, 576 F.2d at 143; *F.X. Messina Construction Co. v. OSHRC*, 522 F.2d at 780. On the contrary, a defendant's substitution of his own judgment for the requirements of the standard may itself show intentional disregard of or plain indifference to the standard. See *Western Waterproofing Co. v. Marshall*, 576 F.2d at 143.

When there has been a prior criminal (or civil) disposition, an employer may seek to defend against a subsequent civil (or criminal) proceeding on the basis that it is barred by the Double Jeopardy Clause as a multiple punishment for the same offense. See, e.g., *United States*

v. Halper, 490 U.S. 435, 442-50 (1989). Applying the *Halper* decision, the Occupational Safety and Health Review Commission recently held that OSHA's civil penalties were not punitive and thus barred by the Double Jeopardy Clause where they bore a rational relationship to the government's costs in investigating and litigating the case. *Secretary of Labor v. S.A. Healy*, 1995 BNA OSHD 30,719 at 642, 642-46.

b. Duty to identify and remedy potential hazards

Employers have the responsibility to provide a safe workplace. To that end, employers must provide their employees with a workplace that does not have serious hazards and must follow all OSHA safety and health standards. Employers must find and correct safety and health problems. OSHA further requires that employers must try to eliminate or reduce hazards first by making feasible changes in working conditions. In the traditional sense, this means switching to safer chemicals, enclosing processes to trap harmful fumes, or using ventilation systems to clean the air are examples of effective ways to get rid of or minimize risks, rather than just relying on personal protective equipment such as masks, gloves, or earplugs.

When viewing this responsibility in the context of keeping a construction site safe and avoiding accidents that could potentially give rise to criminal liability, employers are under a duty to inspect the work site, identify dangerous conditions, and remedy those dangerous conditions in order to keep their employees safe. Under the applicable guidelines and regulations, employers MUST also:

- Train workers in a language and vocabulary they can understand.
- Keep accurate records of work-related injuries and illnesses.
- Perform tests in the workplace, such as air sampling, required by some OSHA standards.
- Post OSHA citations and injury and illness data where workers can see them.
- Notify OSHA within 8 hours of a workplace fatality or within 24 hours of any work-related inpatient hospitalization, amputation or loss of an eye.

As is the case with all the issues discussed in this paper, employer responsibilities with regard to potential hazards is job-specific, and a good, safe employer always considers not only its basic responsibilities, but also reflects on potential issues on its job sites and remains vigilant in guarding against those potential issues.

c. Training with an eye on how to react in case of an emergency

Successful injury prevention programs include common-sense elements that focus on identifying all of the potential hazards in the workplace and developing a plan for preventing and controlling those hazards. Management leadership and active worker participation are essential to ensuring all hazards are identified and addressed. Moreover, workers need to be trained on how the program works, and the program should be periodically evaluated to identify areas for improvement.

According to OSHA, the five basic elements of a successful injury and illness prevention program are:

- Management leadership
- Worker participation
- Hazard identification, assessment, prevention and control
- Education and training
- Program evaluation and improvement

Each element is interdependent and important in ensuring the success of the overall program. The most effective programs are committed to writing, formally adopted, and regularly reviewed and revised by safety personnel.

Employers can help prevent workplace accidents by looking at their workplace operations, establishing proper job procedures and ensuring that all employees are adequately trained.

As the old saying goes, knowledge is power, and one of the best ways to determine and establish appropriate work procedures is to conduct a hazard analysis of all aspects of your work environment. Knowing how to do something right begins with understanding the hazards and risks you are trying to avoid.

Start by asking the following questions about each task, function and workflow in your organization:

- What could conceivably go wrong?
- How could the risk occur or arise?
- Are there contributing or exacerbating factors?
- What is the likelihood the hazard will occur?
- How significant are the consequences?

Once you have the answers to these questions, you should group the tasks, functions and workflows you examined into the following categories:

- High risk of injury – urgent need for response
- Medium risk of injury – accomplish changes within reasonable timeframe
- Low risk of injury – put on a rainy day list

Where something gets placed in the list should also be assessed according to two additional factors: The degree of harm that might result (even if the likelihood of occurrence is low), and the ease with which changes can be implemented.

Hazard analysis should be a formal process that involves a significant investment of time and effort, since what you don't know really can hurt you. Once you've completed the process, it is critical that there be effective and visible follow-through to correct any uncontrolled hazards identified. Otherwise, employees will continue to be at risk, and they may hesitate to notify their supervisors when they encounter dangerous conditions because they do not believe management will take action.