# OSHA REPEAT VIOLATIONS AND AFFILIATED OR SUBSIDIARY COMPANIES: THE 'SINGLE EMPLOYER' TEST

*OSHA Alert*
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Most employers think of OSHA exposure as being limited to violations that arise in a particular facility or work location. But businesses that operate on a larger scale, through subsidiaries or affiliates, may have broader exposure to OSHA repeat violations than they realize. The Occupational Safety and Health Act defines an employer as "*one or more* individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons" (emphasis added). This broad language has taken on renewed importance in recent years as OSHA enforcement practice has placed greater emphasis on corporate- or business-wide compliance and is more actively issuing repeat violations.

For years, OSHA has issued repeat violations against large corporations that operate multiple business locations. For example, Walmart seems to be a regular target of OSHA activity and also a repeat contester of OSHA citations, no doubt both due to the company's size and presence throughout the country. A few years ago, Walmart challenged OSHA's ability to ground a repeat violation in an Alabama store on a similar violation that had occurred previously in a store in Georgia. Unfortunately for Walmart and other companies similarly situated, Walmart lost that battle, and the repeat citation was upheld. *Walmart Stores, Inc. v. Secretary of Labor*, 406 F.3d 731 (D.C. Cir. 2005). It has now become an almost common expectation that OSHA will pursue and issue repeat violations to employers with similar multi-location business models. And with OSHA in 2010 having also expanded its look-back period for issuing repeat violations from three years to five years, and having likewise modified the penalty structure to increase the financial consequences of all violations, the potential exposure to employers operating multiple business locations has grown substantially. But the exposure is moving even further beyond this enforcement model.

As far back as 1976, the Occupational Safety and Health Review Commission ruled that the separateness of individual corporate entities could be disregarded for purposes of holding one entity responsible for safety violations of another entity where the two entities operated as a single employer. *Advance Specialty Co., Inc.*, 3 OSHC 2072 (March 5, 1976). The Review Commission articulated a three-pronged test: (1) sharing a common worksite where employees of both companies faced the

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same hazards, (2) interrelated and integrated operations of the entities, and (3) sharing a common president, management, supervision, or ownership. That test was subsequently applied in a small collection of Review Commission cases over the next three decades with seemingly mixed and inconsistent outcomes. And as recently as 2007, the Review Commission flatly refused to apply the doctrine to two separately incorporated entities. *Secretary v. St. Lawrence Food Corp.*, 22 OSHC 1145 (Sept. 7, 2007).

In the interim, a large body of case law continued to develop under the National Labor Relations Act (NLRA), Title VII, and other federal labor statutes that adopted and employed the so-called "single employer" doctrine for determining when to hold one entity responsible for another entity's conduct relative to obligations under those statutory schemes. The single employer doctrine is comprised of a four-part test: (1) interrelated operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership. Though these factors are similar to some of the considerations in the three-part OSHA test, one significant difference is the absence of the "common worksite" prong. While the four-part test was discussed in several Review Commission cases over the years, it was never clearly adopted. And neither standard had ever been appealed to the federal circuit court level in the OSHA context. That changed very recently.

In 2012 two different circuit courts grappled with efforts by the secretary to apply the four-factor test in the OSHA context. The first case arose from of an inspection of a residential health care facility in New York State that was conducted in 2002. See *Solis v. Loretto-Oswego Residential Health Care Facility*, 692 F.3d 65 (2d Cir. 2012). At the administrative law judge and Review Commission levels, the case was argued solely under the traditional three-pronged OSHA test, with the administrative law judge sustaining the repeat citation and the Review Commission reversing it. On appeal, however, the secretary attempted to argue for application of the four-factor test, presumably because it seemed to better fit the case facts. The Second Circuit rejected this approach, but not on substantive merit. Rather, the court concluded that the secretary had argued the three-prong test at the Review Commission level and had not previously proffered the NLRA four-factor test for consideration. The court also conclude that the four-part test had never been clearly adopted by the Review Commission. The Second Circuit further noted that the secretary had ample avenues to challenge the three-part test or advocate for the four-part test, including arguing the proper standard in other cases or engaging in formal regulatory rulemaking. So while the Second Circuit ultimately affirmed the elimination of the repeat classification, it also provided guidance for OSHA and the secretary to advocate implementation of the four-part test in the future.

The second case—decided a mere two weeks later—was borne out of the Third Circuit following a 1998 inspection of related, family-operated construction companies in New Jersey. *Altor, Inc. v. Secretary of Labor*, 498 Fed. Appx. 145 (3rd Cir. 2012). The Third Circuit analyzed the case under the four-factor test, noting that the Review Commission had "essentially adopted" that standard in the 2003 decision *Secretary v. Trinity Industries, Inc.*, 9 BNA OSHC 1515. In a cursory application of the four factors, the Third Circuit upheld the Review Commission's finding that the evidence supported treating the two corporations collectively as a single employer for purposes of the Occupational Safety and Health Act, and it sustained the repeat violations. It is also important to note, however, that the Third Circuit's decision is both unreported and deemed non-precedential by its own rule, and it seems to conflict with the Second Circuit's statements that the four-factor test had not previously been adopted by the Review Commission.

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The two cases illustrate several things. First, the single employer standard and how it is applied in OSHA cases are far from settled. But the cases foreshadow possible policy changes in OSHA's approach to enforcement and efforts to redefine the doctrine. Second, companies and business owners should be wary that traditional corporate separateness does not necessarily insulate them against OSHA repeat liability. And they need to appreciate that every case turns upon its own facts. Third, affiliate repeat liability is an issue about which safety professionals and owners need to be mindful on a "corporate family" level when dealing with OSHA citations because there can be carry over implications to other affiliated entities. And with OSHA's heightened emphasis on issuing repeat violations, it is important to consult with an OSHA lawyer on strategies for mitigating risk before, during, and after an OSHA inspection. Finally, and perhaps most importantly, OSHA appears to be playing fast and loose with the standard, inconsistently advocating whatever approach best fits the case facts and prosecutorial agenda. Indeed, in *Trinity Industries*, the secretary actually reversed course on appeal to argue to the Review Commission that the two employers at issue *did not* qualify for treatment under the sole employer doctrine. Why? To preserve double willful violations and penalties issued separately to each related company, thereby doubling the punishment. For employers and practitioners facing alleged single employer liability, there remains ample room to draw out these discrepancies and prosecutorial inconsistencies as part of the overall defense strategy.