

**North Carolina Department of Labor
Occupational Safety and Health Division**

Raleigh, NC

Field Information System

Operational Procedure Notice 146

Subject: Temporary Worker Inspection Activity

A. Purpose.

The purpose of this operational procedure notice (OPN) is to provide the North Carolina Department of Labor (NCDOL), Occupational Safety and Health (OSH) Division guidance on conducting inspections and issuing citations associated with the temporary workforce.

B. Scope.

This OPN applies to all employment placement agencies and temporary help services classified under the North American Industry Classification System (NAICS) 5613 and the corresponding industry group: personnel supply services, Standard Industrial Classification (SIC) 736.

The term “temporary worker” is broadly defined. Per the Bureau of Labor Statistics, temporary workers are those who are paid by a temporary help agency, whether or not their job is temporary. For the purpose of this instruction, temporary workers are those who are working under a host employer-staffing agency employment structure. The temporary worker is hired and paid by a staffing agency and supplied to a host employer to perform work on a temporary basis. It does not include day laborers or seasonal workers who are hired directly by a single employer, nor contractor-subcontractor relationships. Note: “host” and “client” are used interchangeably to indicate the employer that is supplied the temporary worker. Employment placement agencies, temporary help services and personnel supply services are more commonly referred to as “staffing agencies” and “temporary agencies” and these terms will be used interchangeably to indicate the employer who provided the temporary worker.

C. Discussion.

In April 2013, OSHA launched the Temporary Worker Initiative (TWI), an initiative to help prevent work-related injuries and illnesses among temporary workers. NCDOL OSH has not adopted this initiative but will use the information provided by OSHA as guidance. OSHA considers the staffing agency and host employer to be “joint employers” of the temporary worker. Joint employment is a legal concept recognizing that, in some situations, the key attributes of the traditional employer-employee relationship are shared by two or more employers in such a manner that they each bear responsibility for compliance with statutory and regulatory requirements. One example of a joint employer relationship is two corporations with the same owners, same managers, same facilities, using the same equipment, and intermingling of the employees. Another example is businesses that hire crew leaders who in turn hire workers. The business and the crew leader exercise control over the workers.

OSH Division management, NCDOL Legal Affairs and the North Carolina Attorney General’s Office (AG) discussed the use of the term “joint employers” and its implied meaning in context with conducting inspections and issuing citations for the temporary workforce. As a result of these discussions, it was decided additional guidance for Compliance Safety and Health Officers (CSHOs) was needed to properly evaluate temporary worker situations.

D. **Action.**

CSHOs regularly encounter worksites with temporary workers. There are many different types of staffing companies. Traditionally, workers are hired by a temporary/staffing agency and are assigned to work for other employers ('client/host' employer) at the other employers' places of business, and are supervised by the host employer. More recently staffing agencies are offering flexible employment options that include contract, contract-to-hire, and permanent opportunities. The staffing agency may advertise for specialized/highly technical positions and qualify that temporary worker for the position. The staffing agency may provide numerous laborers, including a production supervisor dedicated to the host employers' place of business to solely direct the activities of the temporary employees. Although the relationship between host employers and staffing agencies is evolving, resulting in varying levels of involvement, the elements needed for citation issuance remain the same. The presence of a hazardous condition, employee exposure within the past six months, an applicable standard, and employer knowledge must be established and documented in the case file for any employer cited, whether it is the staffing agency, host employer, or both.

E. **Inspection Guidance.**

The decision to open an inspection with the staffing agency is not dependent upon whether or not a staffing agency management representative is on-site.

When a temporary worker is exposed to a hazardous condition, the CSHO should make inquiries into the staffing agency's actual or constructive knowledge of the worksite's hazards - whether the staffing agency knew, or with the exercise of reasonable diligence, could have known about the hazards. The CSHO should review such factors as the terms of the staffing agency-host employer contract, the interaction and communication between the staffing agency and the host employer, the staffing agency's contact with its temporary workers, whether those workers have had any complaints or concerns and whether they have made those concerns known to the employers (and if not, why not).

If a temporary worker is or could be exposed to a serious hazard or if the staffing agency has not exercised due diligence to learn of the conditions at the host's worksite, then the CSHO should initiate an inspection with the staffing agency. In all other instances, CSHOs and their supervisors should determine, based upon the evidence found during the inspection with the host employer, whether to open an inspection with the staffing agency.

F. **Citation Guidance.**

There must be a hazardous condition, employee exposure, and the CSHO must establish employer knowledge. The CSHO must make inquiries into the staffing agency's actual or constructive knowledge of the worksite's hazards, whether the staffing agency knew, or with the exercise of reasonable diligence, could have known about the hazards.

Staffing agencies have a responsibility to determine what type of work their employees will be performing at the host employer's worksite, and the equipment and hazards that those employees will be exposed to. The staffing agency shares a responsibility with the host employer to ensure that the temporary employee receives appropriate safety and health training. The temporary agency can either conduct the appropriate training themselves or otherwise take reasonable efforts to ensure the host employer conducts the appropriate safety and health training. If it is

determined during an OSH compliance inspection that temporary employees have not been adequately trained, the host employer and temporary agency could both be cited for training related violations.

The NCDOL OSH Division will consider issuing citations to either or both of the employers, depending on the specific facts of the case. This will require a careful assessment of whether both employers have fulfilled their respective occupational safety and health compliance responsibilities in each individual case.

AG consultation will be sought if the CSHO is recommending a host employer and temporary agency be cited for the same violations for the same employees under a joint employer responsibility. AG consultation will be sought if the inspection is the result of an accident investigation, regardless of whether citations are recommended or not. If there is any disagreement between the AG and OSH, the inspection can go through the citation review process and be submitted as a "Director Need to Know".

Employee exposure.

The CSHO must determine within the scope of their inspections whether any employees are temporary workers and whether any of the identified temporary workers are exposed to a violative condition. For questions on determining if the worker is an employee or an independent contractor, refer to the Field Operations Manual (FOM) Chapter IV - Violations.

Employer Knowledge.

The CSHO can determine the degree of knowledge through records review, contract review, interviews, etc. The staffing agency may itself perform an inspection to determine what, if any, safety and health hazards are present at their client's workplaces. Although this is not required of the staffing agency, the CSHO must determine if the staffing agency has inquired and determined what hazards, personal protective equipment, training, safeguards, etc. are present and in place at the client's workplace.

The CSHO must review the contract/service agreement between the staffing agency and the host employer. When reviewing any written contract(s), the CSHO must determine if it addresses responsibilities for employee safety and health. The extent of the obligations each employer has will vary depending on workplace conditions and may be clarified by the agreement or contract. The CSHO must document in the case file as much information as possible about the relationship between the staffing agency and the host employer.

Appendix A provides a list of questions that may be used to evaluate the relationship and delegation of responsibilities between the host employer and the staffing agency. As with any other inspection, the CSHO must follow all NCDOL OSH Division operating procedures in the Field Information System (FIS). Interpretive guidance and compliance directives (CPLs) related to temporary worker issues on recordkeeping, hazard communication, bloodborne pathogens, and other standards already exist. Refer to those specific CPLs and OSHA letters of interpretation for guidance. The guidance documents are referenced in Appendix C.

The CSHO will use the information gathered from Appendix A and the appropriate CPLs to determine whether a citation is appropriate. The CSHO will discuss this with the supervisor, the bureau chief, and the AG's office, if necessary.

G. **Documentation.**

When encountering temporary workers during the scope of an inspection, CSHOs should document/obtain:

- The name of the temporary workers' staffing agency;
- The agency's location;
- The supervising structure under which the temporary workers are reporting (i.e., the extent to which the temporary workers are being supervised on a day-to-day basis either by the host employer or the staffing agency);
- Information about the relationship between the staffing agency and the host employer and the delegation of responsibilities, using the information gathered from Appendix A;
- Copies of contracts between the staffing agency and the host employer.

Hazard Alert Letter.

To notify staffing agencies of the working conditions at client/host employer worksites, copies of host employer citations will be sent to the staffing/temporary agencies that are providing labor if the citations are different than the citations the temporary agency will be receiving. A standard notification letter/ hazard alert letter will be sent with the copies of the citations. A template of the letter to be sent with the citations is attached in Appendix B of this OPN. The letter is also included in OSHA Express (OE).

H. **Effective Date.**

This OPN is effective on the date of signature. It will remain in effect until revised or canceled by the director.

Signed on Original
Fleda Anderson
Compliance Supervisor

Signed on Original
Allen McNeely
Director

9/28/2015
Date of Signature

Appendix A: Host Employer-Staffing Agency Relationship and Delegation of Responsibility Questionnaire

Answering the following questions may be helpful in evaluating the host employer-staffing agency employment structure, determining the obligations each employer has and the delegation of responsibilities between the host employer and the staffing agency. This information may also be useful in establishing employer knowledge.

Host employer-staffing agency employment structure:

1. Who hires the workers, initially? Who does the 'temporary' employee consider to be his employer?
2. How were the temporary employees paid and who paid them? Who decides how much the workers will get paid?
3. Is there a payment rate based on the duties the employees were supposed to be performing? Is the temporary employee paid in intervals?
4. Who screens the workers and decides whether they will work at, or on, a particular job?
5. Does the staffing agency get to approve the temporary employee or specify minimum qualifications?
6. Was there a work order that specified the type of employees the host employer was looking for?
7. Did the staffing agency know where the temporary employees were working or what they were supposed to be doing?
8. What did the contract say about the work to be performed?
9. Where do the workers perform their work?
10. Is the workers' work an integral part of the business where they work?
11. Is the work performed by the workers for an indefinite period of time?
12. Is the work performed by the workers for a specified, finite period of time?
13. Do the workers complete a particular job, or project, and then move on?
14. If the work is for a defined period, or for a particular job, what happens to them after the work is finished? Who will they work for then?
15. Did the staffing agency know what type/sort of work the host employer did?
16. Did a representative of the staffing agency do a site visit before or during the time its workers were at the site?
17. Did the staffing agency have a presence at the site?
18. Does the staffing agency visit the site to verify job assignments? Do they conduct their own hazard analysis?

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19. Once the worker is on the job, who assigns tasks to the worker? Who supervises and/or controls the worker?
20. Supervision/control may include:
 - Training the workers and/or showing or explaining to workers how to do work;
 - Correcting the worker's mistakes;
 - Giving the worker permission to leave the work site;
 - Determining the worker's schedule and work hours;
 - Authority to discipline workers.

Delegation of responsibilities between the host employer and the staffing agency:

1. Whose tools and equipment do the workers use?
2. What training was provided by each employer? How was the training verified?
3. Who provides the general safety and health training?
4. Who provides the site-specific training to the particular hazards at the workplace?
5. Who provides the audiometric testing? Who provides the medical surveillance?
6. Who monitors exposure to noise and toxic substances? Who ensures the machines are adequately guarded?
7. Who provides the personal protective equipment? What personal protective equipment was provided?
8. Have both parties reviewed the task assignments, job safety hazard analyses, hazard assessments?
9. Are the injury and illness reports reviewed initially and periodically? If so, by whom?
10. Have employee safety and health complaints been reviewed? If so, by whom?
11. Have incidents, accidents, and near-misses been investigated and reports of the incidents reviewed? If so, by whom?
12. What are the policies/procedures for responding to a temporary worker injury? Did the host employer communicate with the staffing agency? Are both parties involved to ensure preventative actions are taken?

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Appendix B: Example Hazard Alert Letter

Date Field

Staffing Agency Employer
Attn: Manager's Name Address

RE: OSH Inspection No. #####

Dear [Mr. / Ms. Manager],

On [enter date], the North Carolina Department of Labor, Occupational Safety and Health (OSH) Division conducted an inspection at [Name of Company], located at [Site Address]. This inspection was conducted as a result of a/an [NEP, SEP, fatality, accident, complaint, etc. (enter description)].

OSH understands that your agency employs temporary workers who perform work for [Name of Company] at this job site.

While the extent of responsibility under the law for staffing agencies and host employers is dependent on the specific facts of each case, staffing agencies and host employers are both responsible for maintaining a safe work environment for temporary workers. Temporary staffing agencies and host employers share control over the worker, and OSH may hold both the host employer and the staffing agency responsible for violative condition(s) in the appropriate case.

Enclosed you will find copies of the [citations] issued to [Name of Company] for violations of the Occupational Safety and Health Act of North Carolina ("OSHANC"). We are forwarding you these copies to ensure that you are fully aware of the hazards at that job site. Please review these documents and ensure that appropriate steps are taken to protect your employees at that job site. Please note that Section 95-241(a)(1) of the Retaliatory Employment Discrimination Act (REDA) provides protection for employees against retaliation due to their involvement in protected safety and health related activity.

If you have any questions concerning this matter, please do not hesitate to contact this office. We appreciate your support and interest in the safety and health of your employees.

Sincerely,

District Supervisor

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Appendix C: OSHA Reference Documents on Temporary Workers

Many of the following documents were used as references to develop this OPN. With the exception of the compliance directives, which are adopted for use in North Carolina, the remaining documents should be used for **reference only and do not constitute NCDOL OSH Division enforcement policy**.

Compliance Directives: (The following CPLs are located in the FIS on the One Stop Shop.)

CPL 02-00-135: Recordkeeping Policies and Procedures Manual

CPL 02-02-079: Inspection Procedures for the Hazard Communication Standard (HCS 2012)

CPL 02-02-069 (2-2.69): Enforcement Procedures for the Occupational Exposure to Bloodborne Pathogens

Publications:

[OSHA 3735 Publication, *Recommended Practices for Protecting Temporary Workers*](#)

[Temporary Worker Initiative \(TWI\) Bulletin No. 1 – Injury and Illness Recordkeeping Requirements](#)

[Temporary Worker Initiative \(TWI\) Bulletin No. 2 – Personal Protective Equipment](#)

OSHA Letters of Interpretation related to employer responsibilities for temporary worker safety:

[Staffmark – November 21, 2012](#)

[National Employment Service Corporation – February 3, 1994](#)

OSHA Memos:

April 29, 2013 - OSHA Memorandum from Thomas Galassi, Directorate of Enforcement Programs:
“[Protecting the Safety and Health of Temporary Workers](#)”

September 5, 2013 - OSHA Memorandum from Thomas Galassi, Directorate of Enforcement Programs:
“[Updated OIS Coding Instructions Regarding Temporary Workers](#)”

July 15, 2014 - OSHA Memorandum from Thomas Galassi, Directorate of Enforcement Programs:
“[Policy Background on the Temporary Worker Initiative](#)”

October 29, 2014 - OSHA Memorandum from Thomas Galassi, Directorate of Enforcement Programs:
“[Temporary Worker Initiative: Staffing Agency Citation Cover Letter](#)” (This document is on the OSHA extranet.)