

IMPACT OF CONSTRUCTION CONTRACTOR EMPLOYMENT ISSUES ON SURETY BOND CREDIT

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Shareholder

How can Employment Laws Impact Sureties

- Increased delays
- Increased costs

Davis Bacon Issues

Davis Bacon and Related Acts

- Impacts virtually all projects receiving federal funds and projects for federal agencies.

State Davis Bacon

- Also, most states (including Texas) have mini-Davis Bacon Acts for state agency projects.

What is Required?

- Payment of prevailing wages per specific categories of laborers and mechanics.
- Submission of weekly certified payrolls.

What Could go Wrong?

- Failure to submit proper certified payrolls can stop progress payments.
- Problems flow upstream to upper-level contractors!
- Government agency can hold payments for amounts of wages allegedly owed.
- Substantial penalties can be assessed.
- Major time commitment.

Use of Wrong Classifications

- Helpers (crossing the line)
- Apprentices
- Apprentice to journeyman ratios
- No relevant category for work to be performed

Ramifications

- Back pay for misclassified workers.
- Penalties for each error on each certified payroll.
- Payment withholding based on amounts potentially owed to unpaid/underpaid workers and penalties.

Workforce Supply Issues

Immigration/E-Verify

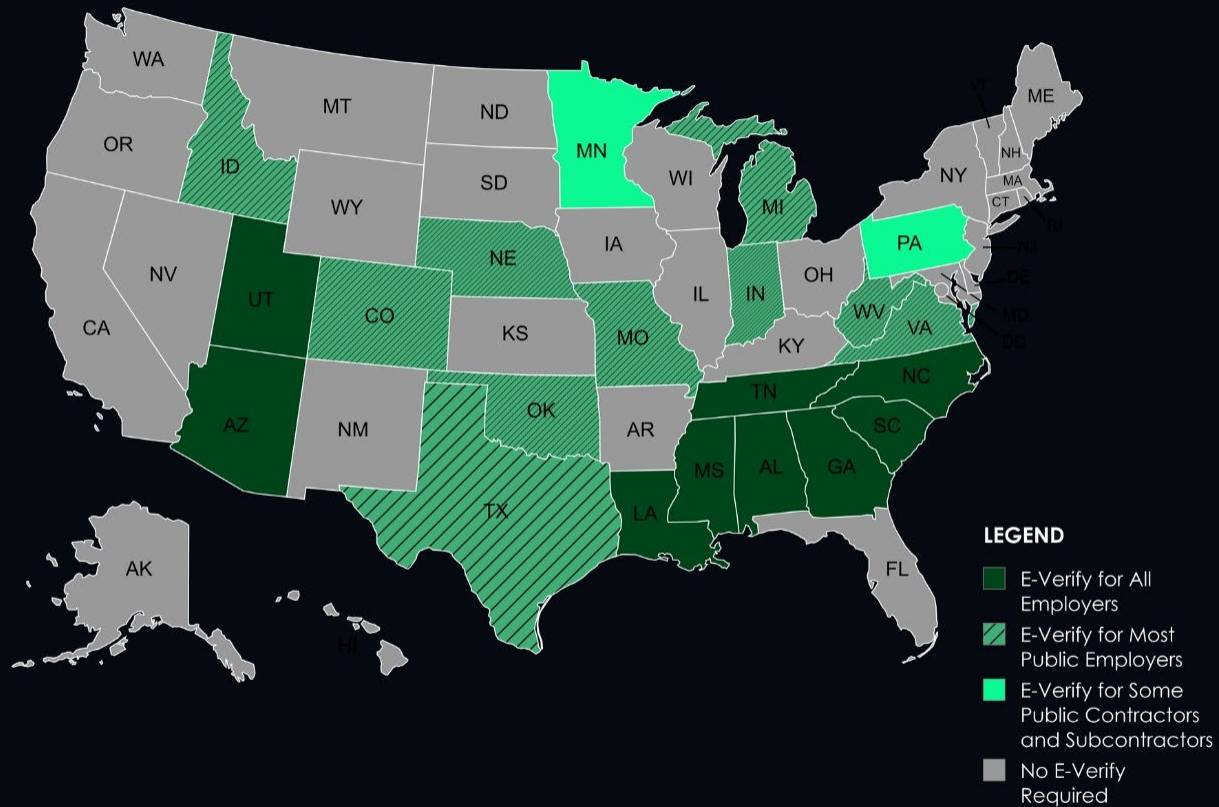
I-9s and No-Match Letters

- I-9s for all employees within first three (3) days of employment.
- No-match letters or DHS auditing could come at anytime.



E-Verify Basics

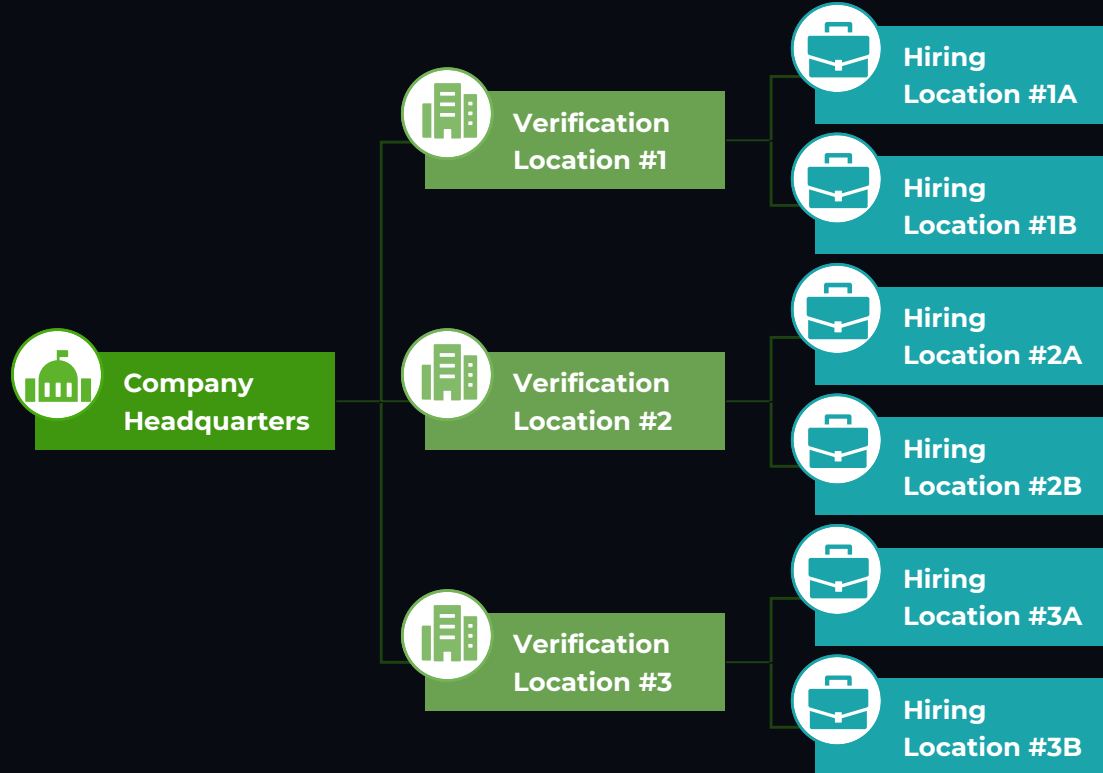
- What is E-Verify
- What E-Verify is Not
- Required or Not Required
- Discrepancies



What Could go Wrong?

- Loss of employees.
- Fines for I-9 errors.

E-Verify Locations



Marijuana Testing

Marijuana Testing

- With the growing national leniency toward legalization of recreational marijuana use, do employers really want to pre-employment random drug test their employees?
- Testing for the presence of marijuana in any circumstance, however, may open a Pandora's Box of unwanted employment issues.

Marijuana Testing

- Positive tests for marijuana in employment drug screening jumped 4.7% in 2023.
- Rate increase of up to 20% in some industries.

The Limitations of Current Marijuana Testing

- Current marijuana tests do not detect impairment.
- Just shows if metabolite is in system from use in last 30 days.



Possible New Test on the Horizon

- Detects use within the last few hours
- Closer to testing for impairment

Marijuana Testing: ADA Issues

- A positive marijuana test result could arise from an employee's proper use of medical marijuana.
- If so, taking an employment action against such an employee may be tantamount to a violation of the ADA.

Types of Tests

- Pre-employment
- Random
- Fitness for duty
- Reason suspicion/observed impairment
- Post-accident



Pre-Employment Testing

- O.K. if post offer/pre-employment.
- May limit applicant pool.



Random Testing

- Must be truly random.
- You may be surprised by the results.

And are you prepared to react to all employees in the same way?

- The infamous Monday morning phone call.



Reasonable Suspicion Testing

- An employee acting strangely
- Smell of marijuana
- Observed behavior

OSHA Post-Injury/Accident Drug Testing

OSHA issued rule that states:

OSHA believes the evidence in the rulemaking record shows that blanket post-injury drug testing policies deter proper reporting.



OSHA Post-Injury/Accident Drug Testing

OSHA clarified their position on post-accident drug testing:

- Does not ban drug testing of employees.
- Prohibits using drug testing (or the threat of drug testing) against employees who report injury or illnesses.

OSHA Post-Injury/Accident Drug Testing

OSHA post accident drug testing:

- To strike the appropriate balance here, drug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use.

FLSA Issues

The Basics: The FLSA

What

Fair Labor Standards Act

When

1938

Where

Nationwide

Why

Protect Employees

Wage and Hour Issues

Who

Enforcement is Department of Labor

Subjects are Businesses >\$500k per year /
Employees involved in interstate commerce

The Purse: 2023 FLSA Recovery

DOL Recovery in 2023

\$274M

Construction Industry

\$35M

**Liquidated Damages Equal to
the Amount of Wages Owed**

- Also, if an FLSA defendant loses it needs to pay for other sides attorney's fees and administration penalties.



Exempt v. Non-Exempt



Executives



Administrators



Professionals



Outside
Salespersons



Everyone Else



Salary Increase 2024 Update

2023

\$35,568

2024

\$43,888  19%

2025

\$58,656  40%

3%



Percentage of Employees Affected

4.3M



Gross Number of Employees Affected

Independent Contractor or Employee Misclassification

- Big issue in recent years.
- If you see a worker everyday and they do not have their own business, they are almost certainly employees.

OSHA

Scrambling: Responding to OSHA When Incidents Occur



Gather Information / No Conclusions



Contact Key Persons



Secure the Scene



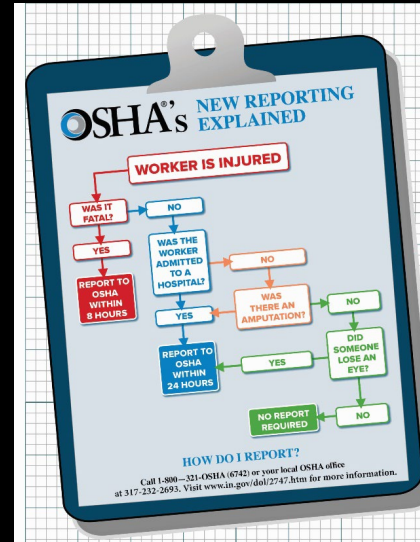
Preserve Evidence



Report Incidents if Required

What Injuries Need to be Reported?

- As of January 1, 2015, all employers must report:
 - All work-related fatalities within 8 hours.
 - All work-related inpatient hospitalizations, all amputations and all losses of an eye within 24 hours.



What is In-patient Hospitalization?

OSHA defines in-patient hospitalization as a formal admission to the in-patient service of a hospital or clinic for care or treatment



What if the Fatality/Hospitalization Does Not Occur Right After the Incident?

If a fatality occurs within 30 days of work-related incident, or if in-patient hospitalization, amputation, or loss of an eye occurs within 24 hours of work-related incident, ***you must report the event to OSHA.***



OSHA's Recording Requirements

Those with 20 to 249 must file electronically each year.



OSHA Recordable:

- Death
- Days away from work
- Restricted work or transfer to another job
- Medical treatment beyond first aid
- Loss of consciousness
- Significant injury or illness diagnosed by physician or other licensed health care professional

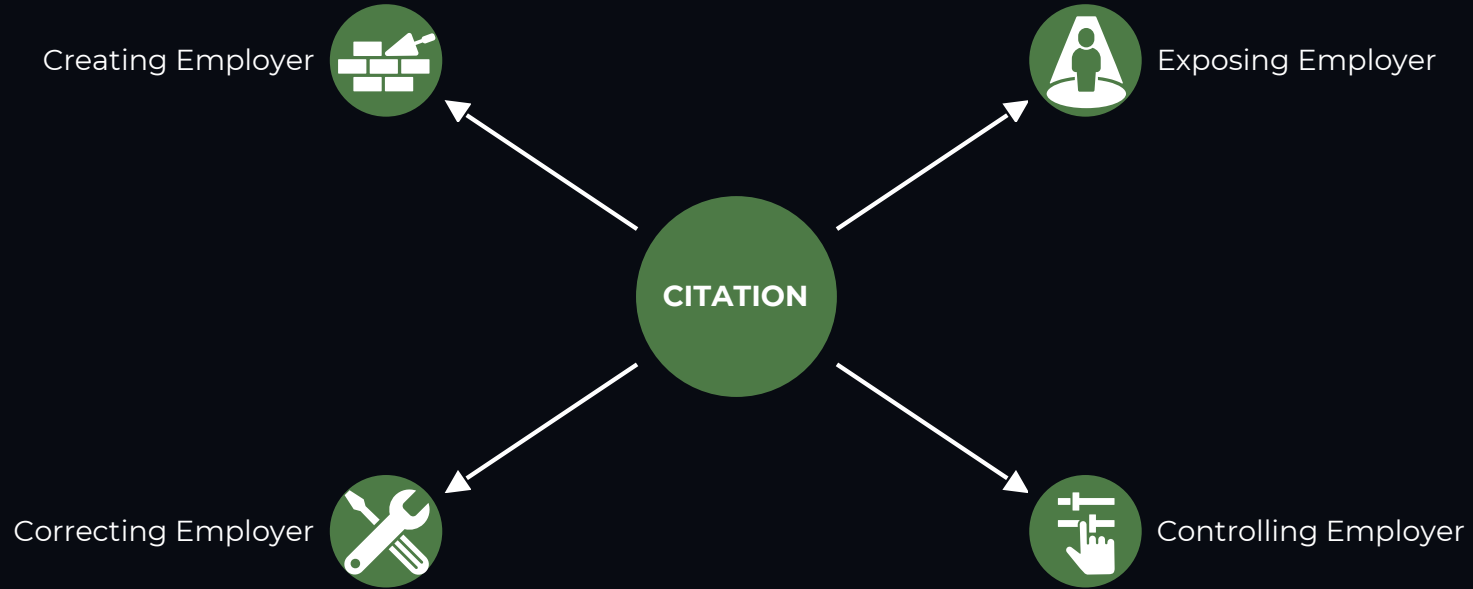


NEW ELECTRONIC REPORTING REQUIREMENTS

- For employers of 250 or more employees or employers of 20 – 249 in high incidence industries (such as construction)
- 2016 300 log information must be submitted by December 1, 2017



Multi-Employer Citations



It's in the Grip: Determining Controlling Employers

Supervisory Authority

Supervision of worksite, including power to correct health and safety

Contract or Conduct

Contractual terms for control or actions demonstrating control



Standard of Care for Controlling Employers

Standard

- Reasonable care
- Prevent and Detect Violations
- Less than Exposing Employer standard

Factors to Determine Standard

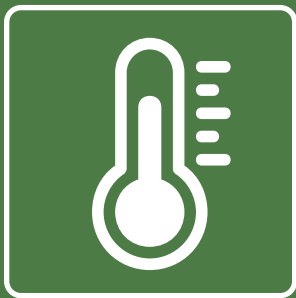
- Scale of Project
- Nature / Pace of Work
- Frequency in Change of Hazards
- Level of Compliance by Others

OSHA Evaluating Standard

- inspections
- Implementation of Safety System
- Enforcement of Compliance

OSHA's Newly Proposed Heat Rule

Heat Thresholds



Monitoring and Control Measures



Heat Injury Prevention Programs



**How Could the Election
Change Things?**

DISCUSSION

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