



VOSH PROGRAM DIRECTIVE: 06-003 (e-version)

ISSUED: May 13, 1986

SUBJECT: Definition of “Employee” for Purposes of VOSH Enforcement Program

A. Purpose.

This directive provides guidelines for determining which people on a jobsite are “employees” for the purposes of the Occupational Safety and Health Act of 1970 and the VOSH Program.

B. Scope.

This directive applies VOSH-wide.

C. Action.

The Assistant commissioner, Enforcement Directors and Regional Supervisors shall assure that the determination of who is an “employee” for the purposes of the OSH Act of 1970 and the VOSH Program shall adhere to section “E. Guidelines” of this directive and to other relevant OSHA Review Commission Decisions. The issue of who is an “employee” should be dealt with on a case by case basis and where necessary a legal opinion based on the individual facts of the inspection should be sought from the legal section.

D. Background.

VOSH Enforcement Divisions have recently been confronted with a number of cases where the decision to issue a citation was dependent on whether or not the individual exposed to the hazard (i.e. family member of business owner; sole owner of business; President, Vice-President or Stockholder in Corporation; Partner in a Partnership, etc.) Was considered an “employee” for the purposes of the OSH Act of 1970 and the VOSH Program. This directive summarizes OSHA Review Commission decisions on the issue of who is an employee for purposes of the OSH Act and adopts the general guidelines of the Review Commission in this area as VOSH policy.

E. Guidelines.

Section 3(6) of the OSH Act of 1970 defines the term “employee” as “an employee of an employer who is employed in a business of his employer which affects commerce.” (Virginia Code Section 40.1-49.3 defines “employee” in essentially the same manner). OSHA regulation 29 C.F.R. § 1975.4(a) provides that:

Any employer employing one or more employees would be an “employer engaged in a business affecting commerce who has employees” and, therefore, he is covered by the Act as such. (Emphasis added).

Therefore, the employer need only have one "employee" exposed to a hazard, for a citation to be issued. The OSHA review Commission has issued decisions on the following fact situations:

1. The Act does not apply to a self-employed person or sole owner of a business who is the only one exposed to the hazard cited.

Gene L. Willison, Contractor, 1974-75 OSHD ¶ 19,757 (1975) ("Only the sole proprietor drove the vehicle, and the Judge ruled the Act does not apply to an employer who is a worker and the only one endangered.")

2. A company's President, Vice President and Plant Manager are "employees" for the purposes of the Act when they are performing work on the site for the employer and are exposed to the hazard cited.

Hydraform Products Corp., 7 OSHC 1995, 1979 OSHD ¶ 23,825 (1979) ("The employer also argued unsuccessfully that since only the company president was exposed to the hazard because only he worked near it and then only after all other employees had left the premises, the citation should be vacated. The argument is rejected because the employer's president, as a workingman, is as much entitled to protection under the Occupational Safety and Health Act as any other employee.")

D & H Pump Service, Inc., 5 OSHC 1485, 1976-77 OSHD ¶ 20,950 (1976) ("Employer's vice-president, who regularly spends 40 hours per week working with shovel in excavation, is employee within meaning of Occupational Safety and Health Act, and is entitled to safe and healthful working conditions.")

Dri-Mix Products Corp., 3 OSHC 1191, 1974-75 OSHD ¶ 19,404 (1975) (The plant manager was an employee within the meaning of the act, as was the president).

Kensington Electric Products Co., Inc., 1 OSHC 3095, 1971-73 OSHD ¶ 16,255 (1973) (The president of a corporation and the plant superintendent, two major stockholders in the corporation, were held to be employees because they regularly contributed substantial services by directing and supervising plant operations).

3. A partner in a partnership is an "employee" for the purposes of the Act when he/she is performing work on the site for the employer and is exposed to the hazard cited.

Magnus Firearms, 3 OSHC 1214, 1974-75 OSHD 19,381 (1975) ("The store was managed by its principal owner, a Mr. Merck. The only other person who worked in the store was a 'silent partner,' a Mrs. Vaughn, who had invested money in the business and received half the profits. Mrs. Vaughn tended the store an average of six or seven hours per week when Merck was absent, but did not participate in ordering merchandise, paying bills, or day-to-day decisions regarding the business. She did not consider herself an employee of Merck, but regarded her work in the store as looking after her investment.... In this case, Mrs. Vaughn was performing the duties of a salesperson, which are commonly performed by employees.... The fact that Merck did not exercise control over Mrs. Vaughn is not controlling, since the ability to control was always present. In light of all the circumstances, it is concluded that Mrs. Vaughn was an employee within the meaning of the Act...")

4. Stockholders in a corporation are "employees" for the purposes of the Act when they are

performing work on the site for the employer/corporation and are exposed to the hazard cited.

Maverick Campers, Inc., 2 OSHC 3133, 1974-75 OSHD ¶ 18,364 (1974) (The company had lost money for two straight years and the three stockholding members worked as production employees for weekly salaries with one additional temporary employee on the payroll. The court ruled that the stockholders were employees for purposes of the Act).

Dri-Mix products Corp., 3 OSHC 1191, 1974-75 ¶ 19,404 (1975) (“The company president and his two sons, along with the plant manager, were the individuals using the stairs. As stockholders in a “Subchapter S” corporation, the president and his sons claimed that they were not “employees” within the meaning of the Act. The Judge rejected this contention on the ground that they performed functions on behalf of the corporation during their daily work completely apart from their services as shareholders. The plant manager was also an employee within the meaning of the Act.”)

5. An employer’s family members are “employees” for the purposes of the Act when they are performing work on the site for the employer and are exposed to the hazard cited.

Howard M. Clauson Plastering Co., 5 OSHC 1760, 1977-78 OSHD ¶ 21,759 (1977).
(Employer’s family members who are engaged in construction activities on employer’s behalf are covered by provisions of the OSH Act).

[Note: There is a specific exemption in the OSH Act which provides that members of the immediate family of a farm employer are not regarded as employees for purposes of the Act.]

As evidenced by the preceding cases, a citation can be issued to an employer whenever any of the following persons is the only worker/employee exposed to the identified hazard and they are not self-employed or the sole owner of the business or corporation:

1. President, Vice President, Plant Manager or any other member of the management of the company;
2. A partner in a partnership;
3. Stockholder in a corporation
[Note: if all the corporation’s stock is owned by one person, that person would be considered a sole owner of the corporation.];
4. A member of the owner’s family (unless the business is a farming operation, as noted earlier).

Review Commission decisions are reliable legal authority for VOSH to take into court; however, Virginia courts are not bound by these federal decisions and they can and have in the past completely ignored Federal OSHA case law. Nonetheless, the cases summarized in this memorandum do provide us a sound legal basis to issue citations to Virginia employers in similar situations.

DISTRIBUTION: Commissioner of Labor and Industry
Assistant Commissioner for VOSH
Directors and Supervisors
Compliance Safety and Health Staff
Voluntary Compliance and Training Staff
OSHA Regional Administrator, Region III