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TO: PLANT MANAGERS AND SUPERINTENDENTS
PLANT SAFETY AND FIRE PROTECTION SUPERVISORS
MANUFACTURING COMMITTEE
ENVIRONMENTAL QUALITY COMMITTEE

CONTRACTOR SAFETY

We thought the attached which will soon be presented by R. A. Harrington, Legal Department, to the American Bar Association would be of interest. It clearly presents the reasons for and legal problems connected with safety of independent contractors on our sites.

SAFETY AND OCCUPATIONAL HEALTH DIVISION

John G. Page, Jr.

John G. Page, Jr., Director

JGP:nlg,14-51

Attachment

DUP 0910789

BETTER THINGS FOR BETTER LIVING . . . *THROUGH CHEMISTRY*

SC-DP-08110

INDEPENDENT CONTRACTORS AND SAFETY

I. INTRODUCTION

Today as American industry is striving to be more competitive in world markets, the focus of attention is on streamlining operations and reducing costs. One strategy frequently considered is increased use of independent contractors to reduce fixed payroll costs, particularly in the areas of construction and maintenance. As is often the case, however, the effort to solve one problem spawns others. One question raised anytime independent contractors are used is the role, if any, that the employer should play in the contractor's safety program.

Responsible employers today place a high priority on the safety of their employees, recognizing that a strong safety effort is both morally right and good business as well. Those same employers are left in a quandry, however, when it comes to the safety practices of contractors on their sites. It runs contrary to the employer's safety efforts to have contractor employees on site -- sometimes side by side with their own employees -- operating under different and typically laxer safety standards. Companies with a genuine humanitarian concern for the safety of their employees find it difficult to understand why they should be less concerned about contractor employees doing similar work. Obviously, employers must warn contractors about latent hazards on their sites and must take steps to be sure that the contractor employees don't pose a hazard to the plant or its own personnel, but should they do more?

Most businessmen have been counseled for years, that they cannot and should not involve themselves in the safety practices of their contractors. There are grave legal risks, they are told. The primary concern is coemployment. They have been told that an employer actively involved in its contractor's safety program risks the possibility that the contractor's employees will be deemed to be its own. The basic test for coemployment is the degree to which the principal controls the day-to-day activities (as opposed to the results) of the contractor and its employees.[1] The greater the degree of control, the greater risk of coemployment. Control over such matters as work methods, working conditions, hiring and firing, wages and benefits, hours, discipline and even safety may be considered.[2]

The impact of a finding that contractor employees are, in law, employees of the principal can be far-reaching. In addition to rendering the principal liable for the actions of those employees under respondent superior,[3] there are potential labor and tax implications. For example, under the National Labor Relations Act, a labor union may be able to treat the principal and contractor as one, picketing the principal's facilities or embroiling it in an organizational effort.[4] The principal could also be obligated to treat them as its own employees under such statutes as the Equal Employment Opportunity Act of 1964,[5] the Fair Labor Standards Act,[6] state minimum wage laws,[7] the Federal Insurance Contributions Act,[8] the Federal Unemployment Tax Act,[9] and the Occupational Safety and Health Act of 1970.[10] Those who are deemed the principal's employees might also be eligible for benefits the principal offers its own employees. Failure to include them in company benefit plans could jeopardize their tax qualified status.[11]

On the other hand, the costs of an unsafe contractor provide strong incentive for involvement in contractor safety. One potential cost is civil liability for work site injuries. In theory the employer is not liable for the contractor's negligence. Although that doctrine of nonliability was once the general rule,[12] today it is riddled with exceptions so numerous that it "can now be said to be 'general' only in the sense that it is applied where no good reason is found for departing from it."[13] Indeed, as one commentator has stated: "it would be proper to say that the rule is now primarily important as a preamble to the catalog of its exceptions."[14]

Liability extends both to employees of the contractor and to third parties, but the primary exposure, especially with construction contractors, is for injuries to the contractor's employees. Because contractor employees are normally barred by workers' compensation statutes from suing their own employer for workplace injuries, they often look to the principal as the most convenient deep pocket.

The theories under which a contractor employee or a third party may hold the principal responsible overlap and blend together.[15] They can, however, be roughly categorized. A few of these major categories are enough to illustrate the potential for principal liability from a contractor's failure to exercise due care.

One common theory of liability is the "peculiar risk" or "inherently dangerous" doctrine, embodied in Sections 416 and 427 of the Restatement (Second) of Torts.[16] Under this doctrine, the principal may be liable if:

(1) the contractor is engaged in an activity that is likely to create a peculiar risk of physical harm or involves a special inherent danger;

(2) the danger or risk is foreseeable at the time the contract is entered into;

(3) the contractor fails to guard against the danger or risk; and

(4) this failure on the part of the contractor results in harm to an employee or some other third party.[17]

The duty to guard against the "peculiar risk" is considered nondelegable.[18] No direct negligence on the part of the principal need be shown.[19] Instead, the negligence of the contractor in failing to take the necessary precautions is

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imputed to tne employer.[20] This doctrine applies irrespective of the degree of control exercised by the principal,[21] or any contractual provisions making the contractor responsible for necessary precautions.[22]

Courts have been rather expansive in applying the peculiar risk doctrine. What is a "peculiar risk" is very much in the eye of the beholder. For example, a general contractor was held liable for injuries sustained by a subcontractor's employee during the loading of concrete girders onto barges, where the subcontractor failed to take proper precautions to assure that a crane was not overloaded. The loading of concrete girders by crane was considered an inherently dangerous activity.[23] Similarly, recovery was permitted against the principal where a contractor's employee was killed wnen an unshored trench collapsed. According to the court, trench digging was an activity involving a peculiar risk of harm unless special precautions, such as bracing or shoring, were taken.[24] Damages were also assessed against the employer for injuries sustained by a contractor's employee when, as a result of tne contractor's failure to adequately support a welding buggy, the employee fell while installing an oil tank.[25]

In still another case, a dump truck driver, the employee of a construction contractor, was permitted to recover against the principal -- the State of California -- for injuries incurred when a fellow employee on the construction site backed his vehicle into plaintiff. The contractor had failed to provide for flagmen to direct the trucks, which were required to back down a road for approximately a half block. Visibility was limited, and it was difficult to hear the back-up sirens above the construction noise.[26] In a final example, an employer was held liable for property damage to a third party from a fire caused by the contractor's failure to take proper precautions while using electric cutting torches to remove pipes.[27]

Several states do limit the principal's liability under this doctrine to third parties, refusing to permit suit by the contractor's employees.[28] These courts reason that the primary duty to protect contractor employees from the "peculiar risks" of their own work is with the immediate employer - the contractor - and not with the principal.

Another theory often used to implicate the principal for the negligence of the contractor is the "statutory" or "regulatory" duty doctrine, described in the Restatement (Second) of Torts, Section 424.[29] To break this theory into its most basic components:

(1) tnere must be a statute or an administrative regulation which imposes a duty to take certain precautions for the safety of others when doing specified work;

(2) the contractor must have failed to take the precautions provided for by the statute; and

(3) the failure to take such precautions must result in harm to a party for whose protection the statute or regulation exists.[30]

As with the "peculiar risk" doctrine, the employer is held responsible for the contractor's failure to take the legislatively or administratively mandated precautions because these duties are considered nondelegable.[31]

This principle has been employed, for example, in holding a general contractor liable for injuries sustained when cement blocks, which were stacked by the subcontractor to a height exceeding that permitted by the city building code, fell on a third party;[32] in asserting liability against an employer for the negligence of its contractor in failing to properly illuminate and barricade trenches as required by statute;[33] and, in imposing liability upon an owner where the contractor installed a concrete porch in violation of the city building code, resulting in the collapse of the porch to the injury of third parties.[34] In another case, a court found a trucking company liable for the death of a third party resulting from a fire caused by a gas station attendant's failure to comply with the procedure proscribed by an Interstate Commerce Commission regulation for filling fuel tanks.[35] A few courts refuse to permit employees of the contractor to recover under this theory.[36]

A third situation in which the employer may be held accountable for the torts of its contractor occurs when the employer hires an incompetent agent. The Restatement (Second) of Torts discusses the "unqualified contractor" or "negligent hiring" doctrine, as this theory of liability is sometimes termed, in Section 411.[37] To rely on this theory, a plaintiff must establish that:

> (1) the independent contractor was careless, reckless or incompetent;
>
> (2) the principal knew, or by the exercise of reasonable diligence could have ascertained, that the contractor possessed those traits;
>
> (3) those traits gave rise to plaintiff's injury.[38]

In short, the employer will be held accountable for the tortious conduct of its contractor where the employer was negligent in hiring an incompetent contractor, and where such negligence can be proximately traced to the injury.[39] Problems can occur when the principal hires a contractor of a young age,[40] one with limited experience in or training in the type of work to be performed,[41] or one with a poor performance record or unfavorable reputation.[42]

In one case, the court sustained a cause of action against a manufacturer for injuries allegedly caused by the negligent driving of its distributor, where it was asserted that the distributor had a poor driving record.[43] In another, liability was imposed on a housemoving company for the death of its subcontractor's employee, where the company knew or should have known of the subcontractor's unsuitable method of tree removal, and the use of these improper procedures resulted in the employee's death.[44] Similarly, recovery was permitted for property damage resulting from an agent's negligence in preparing, supervising and setting off a dynamite blast. Although the contractor was an experienced blaster, it had never taken part in the type of blast attempted there.[45] Again, some jurisdictions refuse to extend this theory to provide a remedy for the contractor's employees.[46]

Of course, in all employer-independent contractor relationships, an employer remains responsible for its own negligence, which can be manifested in numerous ways. The principal may negligently order an activity that it knew or should have known involved an unreasonable risk of injury.[47] It may also breach its duty to maintain land or chattels in a reasonably safe condition by failing to inspect the work of the contractor after its completion.[48] Negligent exercise of any control which the principal has retained over work otherwise entrusted to the contractor can lead to liability.[49] Violation of safety regulations or legislation, such as OSHA, can also result in the employer being found negligent under a per se negligence theory,[50] or evidence of negligence theory.[51]

Countless other examples of negligence theories exist,[52] but perhaps the most common theory rests on the principal's duty as a landowner to provide a safe work place free from latent defects.[53] It is an unusual accident on a major industrial or construction site that cannot arguably be attributed to some latent premises defects, e.g., oil or water on the ground, insufficiently protected electrical equipment, insufficient guard rails or other height protection, etc.

As the foregoing discussion illustrates, the threat of liability exposure in the employer-independent contractor context is a real one. An indemnity or hold-harmless clause can provide some protection. It can shift back to the contractor the liability for personal injury or property damage caused by its negligence,[54] and may even provide that the principal is relieved of liability stemming from its own negligent act.[55] There are limitations, however. Most important is the ability to obtain such provisions. Many contractors are unwilling to indemnify the principal against its own negligence. And courts generally will not construe a hold-harmless clause to include indemnification against losses from the indemnitee's own negligence unless that intention is clearly and unequivocably expressed.[56] Some states have declared provisions of this type void against public policy.[57] Without a hold harmless agreement that includes the employer's own negligence, the risk of litigation and eventual liability is still very real.

Whereas indemnity agreements can provide some protection against suits by both third parties and employees, the statutory employer defense may protect only against actions by employees. The phrase "statutory employer" is a term of art under state workers' compensation statutes and case law. In most states, those classified as statutory employers enjoy an immunity from civil suit brought by persons (typically contractor employees) deemed to be its employees.[58] Such employees are relegated to the remedy provided under that state's workers' compensation laws.[59] Unfortunately the price for obtaining this protection may be unacceptably high.

Although the precise criteria for the statutory employer defense vary from state to state, three basic approaches have evolved. The first, and most common test, is the common law "control" test.[60] Under this test, one looks to the degree of control that the principal exercises over the activities of the contractor and its employees, in terms of the manner in which the work is performed and the details of the work. The greater the degree of control, the greater chance the principal will be deemed a statutory employer.[61]

A second test, and one which has been gaining in adherence, is the "nature of the work" test.[62] Under this test, the court examines the nature of the contractor's work in relation to the principal's regular business. Where the type activity contracted is customarily done by employees in the principal's industry, or where the principal itself commonly performs this work using its own employees, the principal is deemed a statutory employer, and the contractor's employees are limited to workers' compensation remedies.[63]

Finally, a few jurisdictions have adopted a third variation, which focuses on whether the principal has provided, or has arranged for the provision of, workers' compensation insurance for the contractor's employees. Where it has, the principal is shielded from common law tort liability.[64]

There are certainly situations where a principal can take refuge behind the statutory employer doctrine, but there may be significant downsides. The employee may find itself with worker's compensation liability for the contractor's employees wnere it would have had no civil liability.[65] More importantly, however, in states where the test is common law "control", the principal cannot take advantage of this defense without being squarely confronted by the coemployment problems because the test for both is the same. Thus the statutory employer defense is an unreliable planning tool for a company witn nationwide operations.

Moreover, personal injury or property damage awards are not the only price an employer will pay for an unsafe contractor. Accidents result in a loss of time and money because of the need for investigation and reporting and the training of replacement personnel. It is often necessary to pay the injured and other workers for time not worked. Additional costs are incurred for repair and cleanup, as well as equipment and property damage. Worker's compensation and liability insurance costs -- ultimately borne by the principal -- are a direct reflection of safety performance. Adverse publicity and labor relations effects may also follow any significant accident.[66]

A Business Roundtable task force has estimated that accidents in industrial, utility and commercial construction cost $8.9 billion dollars or 6.5% of the $137 billion spent annually by users of those services.[67] Surprisingly, the bulk of that amount is <u>not</u> for direct costs such as insurance premiums, workers' compensation benefits, litigation costs or liability. It represents such indirect costs as reduced productivity, delays in project schedules, administrative time for investigations and reports, training of replacement personnel, wages paid for non-working time, and damage to equipment and facility. The ratio of indirect to direct costs varies from 4:1 to 17:1 depending on the nature and severity of the accident.[68] The task force concluded that as much as $2.75 billion dollars <u>net</u> -- 8% of direct construction labor payroll - could realistically be saved each year by active safety programs.[69] Few companies aren't interested in saving 8% of contractor labor costs, and neither indemnity agreements nor the statutory employer defense will accomplish that goal.

In sum, for both moral and economic reasons, safe completion of the contractor's task should be a matter of major importance to the employer. What then can a corporation do with potential civil liability and very real cost penalties on one side and the sword of coemployment hanging over its head if it goes too far in controlling contractor activity? There are steps that can be taken if the principal will plan carefully and act with discipline. The key is to keep in perspective the impact of safety activity on the coemployment determination. The principal's control over other facets of the contractor's activities -- activities more central to the employment relationship such as wages and hours, hiring, work methods, etc. -- is far more likely to be determinative. If the principal actively controls other aspects of the contractor's work, it has little to lose by being involed in safety as well. It is already at risk, and a carefully designed safety program will add little to that risk. If, on the other hand, the employer-contractor relationship is otherwise clean, it is unlikely that a coemployment finding will be based solely on an active safety role.

The strategy of a sound, disciplined safety program should be to use the contracting process itself to secure the desired level of safety performance, with appropriate auditing and follow-up through contractor supervision. If these phases are handled properly, it should not be necessary to "comanage" on the job site.

First, the principal should make safety a prime consideration in the contractor selection process. Safety requirements should be a part of bid packages submitted to prospective contractors so that safety-related costs are included in the bids. Otherwise, the contractor selected is not likely to be cooperative when asked to take steps necessary for safe performance during the life of the contract. The contract should set safety performance standards and appropriate health and safety rules. It should include an indemnification provision if possible. It should also include the right to terminate work for failure to comply with safety requirements.

The employer should evaluate the safety records of prospective bidders, considering quality of safety performance just as it would consider the quality of work. There are two objective standards the principal can use to measure a contractor's likely safety performance. One is the experience modification rate, commonly referred to as the EMR. This figure is computed by the contractor's compensation carrier based on the firm's workers' compensation loss record and is used to determine its premium. The more infrequent and less severe the contractor's accidents, the lower the rate will be. The second indicator is the OSHA recordable incidence rate. Under the Occupational Safety and Health Act (1970), employers are required to record and report information regarding injuries on the Occupational Injuries and Illness Annual Survey, Form No. 200. This form reflects figures regarding the numbera of fatalities, injuries and illnesses, with or without lost work days, and can be used to calculate an incidence rate for any of the items listed on the form by the following formula:

$$\frac{\text{\# of incidents X 200,000}}{\text{\# of hours worked}} = \text{Incidence Rate}$$

# of incidents = # of incidents listed on Form No. 200 for a specific category of events

# of hours worked = # of hours a contractor's employees worked over the annual period covered by the Form No. 200 utilized

The principal should obtain the EMR figure and copies (or summaries) of recent OSHA Form 200's from each contractor at the time of bidding and should make a comparison of the various candidate's figures. Both items should be readily available. Employers are <u>required</u> to keep the OSHA forms for 5 years. Information regarding average industry figures for EMRs and OSHA incidence rates are available through the insurance industry and the Bureau of Labor Statistics respectively. There are, however, three different types of EMR, and they are not comparable. Comparisons snould always be made to EMRs of the same type as the bidders.

The principal should also obtain information from each prospective contractor regarding its safety practices and attitude in general. Managerial accountability through the first line supervisors, the existence of written safety programs, the frequency of safety inspections and safety meetings, and the practice of regular orientation of new workers and foremen are among the many indicia to be considered.

Once the contractor is on the site the principal should act through contractor supervision to obtain the agreed safety performance. The contractor should designate a responsible supervisor as job safety coordinator. There should be regular safety meetings with the contractor. A permit system for hazardous activities should be required. The principal should monitor contractor activities for safety compliance, require that all accidents be reported immediately and that full investigation be conducted with the principal's participation, require the maintenance of accident statistics, and attend orientation meetings and training sessions regarding plant hazards and safety requirements.

In effect, the principal should treat safety like any other job specification. If the contractor is constructing a building, the principal will certainly watch to see that it is built according to specifications. If not, the principal will advise contractor management that it is not performing consistently with the contract and take more serious steps if necessary. Similarly, the contract should require a level of safety performance. The principal should ascertain that this provision of the contract is being fulfilled as well and should bring it to the attention of the contractor's management if it is not. Except in imminent danger situations, the principal must avoid dealing directly with contractor's employees.

The approach described above has been used for many years by some companies. It was endorsed by the Business Roundtable task force, and the task force report is an excellent source of more detailed information on how to construct a positive contractor safety program.[70] This approach is not, however, without risk. In addition to coemployment concerns, an employer that specifies and monitors the contractor's safety performance must be concerned with the "negligent supervision", "retention of control", or "assumption of duty" doctrine, as it is variously termed. Set forth in the Restatement (Second) of Torts, Section 414, this doctrine provides for the imposition of liability upon the employer, where it is negligent in the exercise of its control retained with respect to work otherwise delegated to an independent contractor.[71] Thus, where an employer controls, or has the authority to control, the contractor's safety practices, it is charged with a duty to use due care in the exercise of that control.[71] Both contractual provisions and the extent of actual control are examined to determine the scope of this duty.[72]

In one case, for example, a general contractor was found liable for injury to its subcontractor's employee, where the general failed to install, or provide for the installation of, safety nets under the construction area. The employee fell twenty-nine feet, sustaining serious injury. Although the subcontractor had responsibility for insuring worksite safety under its agreement with the general, the latter retained coordinating and supervising authority over safety. The general contractor had, in fact, conducted safety meetings on a weekly basis, but it had never taken any action regarding safety nets. The court found that the general contractor had failed to adequately exercise its safety authority by not providing for nets.[73]

If one thing is clear, however, it is that the principal is at risk of incurring significant costs every time it substitutes a contractor for its own employee. A professionally run safety program of the type described above is worth the incremental legal risks it adds if it results in an improved safety record, fewer accidents and, therefore, fewer occasions for lawyers to apply the various theories of liability discussed above.

FOOTNOTES

1. _See generally_, 41 Am. Jur. 2d _Independent Contractors_ Section 5 (1968).

2. For a thorough discussion of factors considered important in determining whether the coemployment concept will be applied, _see_ King v. Southwestern Greyhound Lines, Inc. 169 F.2d 497 (10th Cir.), _cert. denied_, 335 U.S. 891 (1948). _See generally_ 41 Am. Jur. 2d _Independent Contractors_ Sections 5-23 (1968).

3. _See_ Nelson v. Shell Oil Co., 396 So.2d 752 (Fla. Dist. Ct. App.), _petition denied_, 407 So.2d 1104 (Fla. 1981).

4. 29 U.S.C.A. Sections 141 et. seq. (1978 & Am. Supp. 1984). _See_ Lorenz Schneider Co. v. NLRB, 517 F.2d 445 (2nd Cir. 1975) (principal found guilty of an unfair labor practice).

5. 42 U.S.C.A. Sections 2000e et seq. (1981 & Cum. Supp. 1984). _See_ Sprides v. Reinhardt, 613 F.2d 826 (D.C. Cir. 1979) (requisite employer-employee relationship established so as to permit allegations of sexual harassment and discrimination-under EEO Act).

6. 29 U.S.C.A. Sections 201 et seq. (1978 & Cum. Supp. 1984). _See_ Sims v. Parke Davis & Co., 334 F. Supp. 774 (E.D. Mich.), _aff'd_, 453 F.2d 1259 (6th Cir. 1971), _cert. denied_, (where employer-employee relationship not found, payment of wages below federal minimum is permissible).

7. See, e.g., Mich. Comp. Laws Ann. Sections 408.381 et seq. (1967 & Cum. Supp. 1984-85) See Sims v. Parke Davis & Co., 334 F. Supp. 774 (E.D. Mich.), aff'd., 453 F.2d 1259 (6th Cir. 1971), cert. denied, 405 U.S. 978 (1972) (payment of wages below those required by state law permissible where no employer-employee relationship exists).

8. 26 U.S.C.A. Sections 3101 et seq. (1979 & Cum. Supp. 1984). See Pack v. United States, 434 F. Supp. 232 (E.D. Tenn. 1977) (employer found owing in employment taxes where relationship found to be employer-employee, not employer-independent contractor).

9. 26 U.S.C.A. Sections 3301 et seq. (1979 & Cum. Supp. 1984). See Chase Mfg., Inc. v. United States, 446 F. Supp. 698 (E.D. Mo. 1978) (employer found owing in employment and withholding taxes where relationship found to be employee, not employer-independent contractor).

10. 29 U.S.C.A. Sections 651 et. seq. (1975 & Cum. Supp. 1984). See Cocnran v. International Harvester Co., 408 F. Supp. 598 (W.D. Ky. 1975).

11. See, e.g., Burnella vs. Commissioner, 68 T.C. 387 (1977).

12. W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on The Law of Torts Section 71 at 509-510 (1984) [hereinafter cited as Prosser & Keeton].

13. Restatement (Second) of Torts Section 409 comment b (1965).

14. Pacific Fire Ins. Co. v. Kenny Boiler & Mfg. Co., 201 Minn. 500, 503, 277 N.W. 226, 228 (1937).

15. Prosser & Keeton, supra at 510.

16. Restatement (Second) of Torts Sections 416, 427 (1965).

Section 416 provides:

Work Dangerous in Absence of Special Precautions

> One who employes an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions even though the employer has provided for such precautions in the contract or otherwise.

Id. at Section 416. Section 427 states:

Negligence as to Danger Inherent in the Work

> One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contact, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

Id. at Section 427.

17. Id. at Sections 416, 427.

18. Southwestern Bell Tel. Co. v. Rawlings Mfg. Co., 359 S.W.2d 393, 398 (Mo. Ct. App. 1962)

19. Moss v. Swann Oil, Inc., 423 F. Supp. 1280, 1283 (E.D. Pa. 1976), aff'd without opinion, De Moss v. Swann Oil, Inc. 566 F.2d 1160 (3d Cir. 1977).

20. Sevit, Inc. v. Western Stock Center, Inc. 38 Colo. App. 401, 404, 559 P.2d 1118, 1120 (1976), aff'd, Western Stock Center, Inc. v. Sevit, Inc., 195 Colo. 372, 578 P.2d 1045 (1978).

21. Castro v. State, 114 Cal. App. 3d 503, 517-518, 170 Cal. Rptr. 734, 742-43 (Cal. Ct. App. 1981); Heath v. Huth Engineers, Inc., 279 Pa. Super. 90, 93, 420 A.2d 758, 760 (1980).

22. Giarratano v. Weitz Co., 259 Iowa 1292, 1307-08, 147 N.W.2d 824, 833-34 (1967); Restatement (Second) of Torts Section 416 and comment C (1965).

23. La Count v. Hensel Phelps Constr. Co., 79 Cal. App. 3d 754, 145 Cal. Rptr. 244 (Cal. Ct. App. 1978).

24. Heath v. Huth Engineers, Inc., 279 Pa. Super. 90, 420 A.2d 758 (1980).

25. Moss v. Swann Oil, Inc., 423 F. Supp. 1280 (E.D. Pa. 1976), aff'd without opinion, De Moss v. Swann Oil, Inc., 566 F.2d 1160 (3d Cir. 1977).

26. Castro v. State, 114 Cal. App. 3d 503, 170 Cal. Rptr. 734 (Cal. Ct. App. 1981).

27. Sèvit, Inc. v. Western Stock Center, Inc., 38 Colo. App. 401, 559 P.2d 1118 (1976), aff'd, Western Stock Center, Inc. v. Sevit, Inc. 195 Colo. 372, 578 P.2d 1045 (1978).

28. Conover v. Northern States Power Co., 313 N.W. 2d 397, 404 (Minn. 1981); Donch v. Delta Inspection Services Inc., 165 N.J. Super. 567, 575, 398 A.2d 925, 929 (1979).

29. Restatement (Second) of Torts Section 424 (1965). This provision states:

Precautions Required By Statute or Regulation

> One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.

Id.

30. Id.

31. Mastrandrea v. J. Mann, Inc. 128 So.2d 146, 148 (Fla. App.), cert. denied, J. Mann, Inc. v. Mastrandrea, 133 So.2d 320 (Fla. 1961); Jack Cooper Transport Co. v. Griffin, 356 P.2d 748, 754 (Okla. 1959)

32. Mastrandrea v. J. Mann, Inc., 128 So.2d 146 (Fla. App.), cert. denied, J. Mann, Inc. v. Mastrandrea, 133 So.2d 320 (Fla. 1961).

33. Dixon v. Simpson, 74 Nev. 358, 332 P.2d 656 (1958).

34. Gardenvillage Realty Corp. v. Russo, 34 Md. App. 25, 366 A.2d 101 (1976).

35. Jack Cooper Transport Co. v. Griffin, 356 P.2d 748 (Okla. 1959).

36. Conover v. Northern States Power Co., 313 N.W.2d 397, 407 (Minn. 1981).

37. Restatement (Second) of Torts Section 411 (1965). Section 411 provides:

Negligence in Selection of Contractor

> An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor
>
> (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or
>
> (b) to perform any duty which tne employer owes to third persons.

Id.

38. See id.; Annot., 78 A.L.R.3d 910, 915-919 (1977).

39. Id.

40. Ellis & Lewis v. Warner, 180 Ark. 53, 20 S.W.2d 320 (1929).

41. Watsontown Brick Co. v. Hercules Powder Co., 265 F. Supp. 268 (M.D. Pa.), aff'd., 387 F.2d 99 (3rd Cir. 1967).

42. Gettemy v. Star House Movers, Inc., 225 Cal, App. 2d 636, 37 Cal. Rptr. 441 (Cal. Ct. App. 1964).

43. Gomien v. Wear-Ever Aluminum, Inc., 50 Ill.2d 19, 276 N.E.2d 336 (1971).

44. Gettemy v. Star House Movers, Inc., 225 Cal. App. 2d 636, 37 Cal. Rptr 441 (Cal. Ct. App. 1964).

45. Watsontown Brick Co. v. Hercules Powder Co., 265 F. Supp. 268 (M.D. Pa.), aff'd., 387 F.2d 99 (3rd Cir. 1967),

46. Hess v. Upper Mississippi Towing Corp., 559 F.2d 1030, 1033 (5th Cir.), reh'g denied, Hess v. Upper Mississippi Towing Corp., (5th Cir. 1977), cert. denied, Hess v. Upper Mississippi Towing Corp., 435 U.S. 924 (1978).

47. See, e.g., Moloso v. State, 644 P.2d 205 (Alaska 1982). See also, Restatement (Second) of Torts Section 410 (1965), which provides:

Contractor's Conduct in Obedience to Employer's Directions

The employer of an independent contractor is subject to the same liability for physical harm caused by an act or omission committed by the contractor pursuant to orders or directions negligently given by the employer, as though the act or omission were that of the employer himself.

48. See, e.g., Schwartz v. Zulka, 70 N.J. Super. 256, 175 A.2d 465 (1961), modified, Schwartz v. North Jersey Bldg. Contractors Corp., 38 N.J. 9, 182 A.2d 865 (1962). See also, Restatement (Second) of Torts Section 412 (1965), which states:

Failure to Inspect Work of Contractor After Completion

One who is under a duty to exercise reasonable care to maintain land or chattels in sucn condition as not to involve unreasonable risk of bodily harm to others and who entrusts the work of repair and maintenance to an independent contractor, is subject to liability for bodily harm caused to them by his failure to exercise such care as the circumstances may reasonably require him to exercise to ascertain whether the land or chattel is in reasonable safe condition after the contractor's work is completed.

49. See, e.g., Kelley v. Howard S. Wright Construction Co. 90 Wash.2d 323, 582 P.2d 500 (1978). See also, Restatement (Second) of Torts Section 414 (1965), which provides:

Negligence in Exercising Control Retained by Employer

One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

50. See, e.g., Teal v. E. I. du Pont de Nemours & Co., 728 F.2d 799 (6th Cir. 1984).

51. See, e.g., Knight v. Burns, Kirkley & Williams Constr. Co., 331, So.2d 651 (Ala. 1976).

52. See, e.g, Restatement (Second) of Torts Section 414A (1965) ("Duty of Possessor of Land to Prevent Activities and Conditions Dangerous To Those Outside of Land"); id.; ("Duty to Supervise Equipment and Methods of Contractors or Concessionaires on Land Held Open to Public").

53. See, e.g., Jackson v. Tennessee Valley Authority, 413 F.Supp. 1050 (M.D. Tenn. 1976).

54. See, e.g., United States v. Seckinger, 397 U.S. 203, reh'g denied, 397 U.S. 1031 (1970); De Tienne v. S. N. Nielson Co., 45 Ill. App. 2d 231, 195 N.E.2d 240 (1963).

55. See, e.g., Oregon Transfer Co. v. Tyee Construction Co., 188 F. Supp. 647 (D. Or. 1960); Sellers v. Owens-Illinois Glass Co., 156 W. Va. 87, 191 S.E.2d 166 (W. Va. 1972).

56. See, e.g., Paul Hardeman, Inc. v. J. I. Hass Co., 246 Ark. 559, 439 S.W.2d 281 (1969); Wrobel v. Trapani, 129 Ill. App. 2d 306, 264 N.E.2d 240 (1970).

57. See, e.g., Champagne v. W. E. O'Neill Constr. Co., 77 Ill. App. 3d 136, 32 Ill. Dec. 609, 395 N.E.2d 990 (1979).

58. See, e.g., Pearman v. United States, 528 F. Supp. 598, 600 (W.D. Va. 1981).

59. Id.

60. See lc, A. Larson, The Law of Workmen's Compensation Section 43.30, at 8-8 (1982) ("the right to control tne details of the work is the primary test").

61. _See, e.g._, Livingston v. Citizen's Utility, Inc. 107 Ariz. 62, 481 P.2d 855 (1971); Weaver v. Shell Oil Co., 91 Nev. 324, 535 P.2d 787 (1975); Brooks v. Chemical Leaman Tank Lines, Inc., 71 A.D.2d 405, 422 N.Y.S.2d 695 (1979).

62. See 1C, A. Larson, _The Law of Workmen's Compensation_ Section 43.54 (discussing the "[t]rend toward nature-of-work test").

63. _See, e.g._, Darville v. Texaco, Inc., 674 F.2d 443 (5th Cir.), _cert. denied_, 459 U.S. 969 (1982), _later proceeding_, 442 So.2d 1246 (La. Ct. App. 1983), _rev'd_, 447 So.2d 473 (La.), _reconsideration denied_, 448 So.2d 1302 (La. 1984); Pearman v. United States, 528 F. Supp. 598 (W.D. Va. 1981); Begnaud v. Pedestal Crane, Inc., 408 So.2d 24 (La. Ct. App. 1981).

64. _See_ Musick v. Puerto Rico Telephone Co., 357 F.2d 603 (1st Cir. 1966). _Cf_. Powell v. Independent Constr. Co., 396 So.2d 725 (Fla. Dist. Ct. App.). _petition denied_, 402 So.2d 612 (Fla. 1981); Haygood v. Home Transportation Company, Inc., 149 Ga. App. 229, 253 S.E.2d 805, _aff'd._, 244 Ga. 165, 229 S.E. 2d 429 (1979).

65. _See, e.g._, Alexander v. Industrial Comm'n, 72 Ill. 2d 444, 21 Ill. Dec. 342, 381 N.E.2d 669 (1978).

66. _See generally_, The Business Roundtable, _Improving Safety Performance - A Construction Industry Cost Effectiveness Project Report_ (Report A-3, January 1982).

(available from The Business Roundtable, 200 Park Avenue, New York, New York 10166, phone: (215) 682-6370) [hereinafter cited as _Safety Report_]

67. _Id._ at 3.

68. _Id._ at 11.

69. _Id._ at 3.

70. _Id._

71. _Restatement (Second) of Torts_ Section 414 (1965). Section 414 provides:

Negligence in Exercising Control Retained by Employer

> One who entrusts work to an independent contractor, but who retains the control of any part of the work is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

_Id._

71. _See, e.g._, Moloso v. State, 644 P.2d, 205 (Alaska 1982); Kelley v. Howard S. Wright Constr. Co., 90 Wash. 2d 323, 582 P.2d 500 (1978).

72. Moloso v. State, 644 P.2d 205, 211 (Alaska 1982).

73. Kelley v. Howard S. Wright Constr. Co., 90 Wash. 2d 323, 582 P.2d 500 (1978).