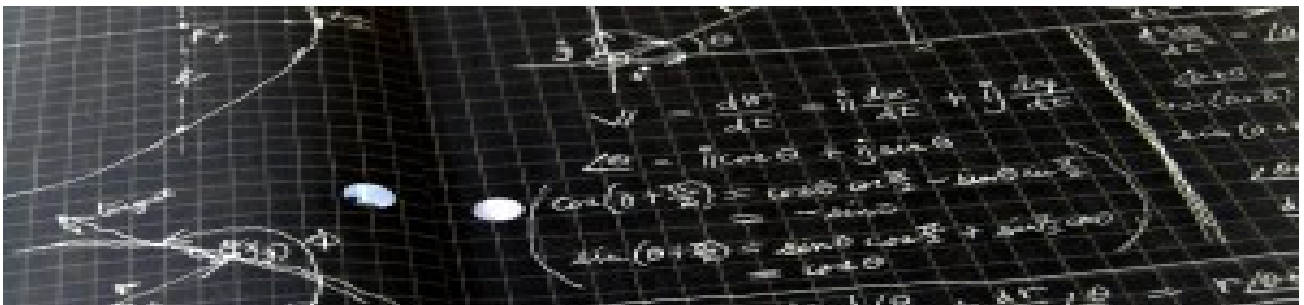


# Safety School: Who is Covered (Or Not) by OSHA

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## Safety School: Courses on Workplace Safety; Regulatory Compliance and Business Best Practices



Jay Acker is a technical writer who creates material for conducting safety meetings, safety training programs, posters and other items. Safety School is a twice monthly exploration into the next level of workplace safety, regulatory compliance and best practices for your business. The curriculum is wide ranging so check back with us on Wednesdays ready to take notes and ask questions.

One of the more common set of questions I get are from small operations wondering if they are covered by the Occupational Safety and Health Administration (OSHA) and all the rules, regulations and standards that go with it:

“I run a small farm with only myself and my family.”

“Everybody that works for me is an independent contractor.”

“We’re all partners here.”

“I am a subcontractor at a worksite; does that mean I am responsible for safety or is the general contractor?”

If you've had a question similar to these, let's try to break down where OSHA coverage begins and clear up the gray areas.

The most basic understanding of OSHA compliance boils down to the General Duty Clause, which says every employer needs to create a safe workplace for its employees by addressing what can reasonably go wrong.

Really, that's it. Even the regulation is understandable and as straight forward as legal code can be. Go ahead and read it.

“29 U.S.C. § 654, 5(a)1: Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”

The caveat is that OSHA does not cover workers who are not employees. The act defines an employer as one who is engaged in a business affecting commerce and has employees. An employee is a person employed by the employer. The act does not give specific guidance on who are employees and who aren't, it is up to legal tests determined by the courts, some of which we will discuss later.

There are volunteers, interns, independent contractors and partnerships to consider.

Further muddying the waters is the fact that OSHA does not cover the self-employed; immediate family members of farm employers without outside employees; or hazards regulated by another Federal agency like the Mine Safety and Health Administration (MSHA), the Federal Aviation Administration (FAA), the Coast Guard, or the Department of Energy.

Who is an employee?

Though straightforward for most situations, when there is a question, in a 1989 decision [Community for Creative Non-Violence v. Reid](#), the U.S. Supreme Court established 13 criteria to consider. They are:

1. Right to control the manner and means by which work is accomplished.
2. The level of skill required to perform effectively.
3. Source of required instruments and tools.
4. Location of work.
5. Duration of relationship between parties.
6. The right of the employer to assign new projects to the worker.
7. The extent of the worker's control over when and how long to work.
8. Method of payment.
9. The worker's role in hiring and paying assistants.
10. Whether the work is the regular business of the employer.
11. Whether the employer is in business
12. The provision of employee benefits.

## 13. The tax treatment of the worker.

All of these factors must be weighed and assessed. No single one of these is decisive.

As an example, if a writer goes to the office (4) every workday for the last two years (5) and does similar tasks (10) in a prescribed way (1) for a weekly paycheck (8) and health insurance (12) then that person is more than likely an employee.

OSHA considers the most important factor in determining an employer and employee as who controls the manner in which the employees perform their assigned work. This makes sense because OSHA's concern is on improving workplace safety, and if the employer gets to tell their employee how to do the work, then they also have the responsibility for ensuring safe work practices.

The logging industry is a great example of the different types of relationships that need to be tested to determine if it is one of an employer/employee or something different like business/independent contractor.

There are thousand acre landowners with a logging operation of foresters, supervisors and cutters, and there are also small landowners with one tract of wooded land contracting with a logging company. OSHA will look at who makes the decisions for what and where to cut, purchasing equipment, hiring and firing to determine if the landowner is an employer.

The roles of workers that would not be considered employees are: independent contractors, partners, interns, and volunteers.

### Independent Contractors

An independent contractor provides a service to another business based on an agreement or contract. They are free to decide who to work for and can be their own boss, but many work agreements are so intertwined that it can be hard to determine whether a person is an independent contractor or an employee. Misclassifying an employee as an independent contractor means the employee misses out on the benefit of monetary incentives like workers' compensation and unemployment insurance and regulation like OSHA's safety requirements.

Look at the above list of 13 criteria to see if we can use it to identify an independent contractor.

A roofer at a construction site who decides which jobs to take on (6) and how he wants to complete the task to specifications (1) and submits a bill (8) to the contractor, then these aspects all point to the roofer being an independent contractor and not an employee.

This doesn't mean a business with all independent contractors and no employees isn't free from keeping a safe workplace. OSHA has a Multi-Employer Citation Policy that holds more than one employer citable for a violation of an OSHA standard.

OSHA first determines whether the employer fits the description for a correcting, controlling, creating or exposing employer, each with its own OSHA obligations, and then determines if the employer has met those obligations. An employer can fit into multiple employer roles. You can read the [OSHA Instruction](#) for more details, but make sure you understand the following:

~~The~~reating employer caused the hazardous condition and can be cited if anybody else on the

worksite is exposed to the hazard.

**The exposing employer** is the one whose employees are exposed to the hazard and knew of the condition or didn't exercise reasonable diligence to discover the hazard and failed to take steps within its authority to protect its employees. If it does not have the authority, the exposing employer must ask the creating/controlling employer to correct it and take reasonable protective measures.

**The correcting employer** is responsible for correcting a hazard and must take reasonable care to prevent and discover violations and meet its obligations. This usually occurs when someone is responsible for installing or maintaining safety and health equipment.

**The controlling employer** is the worksite's general supervisor and has the power to correct safety violations or have others do it. A controlling employer exercises reasonable care to prevent and detect violations.

## Partners

Obviously, owners aren't subject to OSHA regulation, and as long as everybody is part owner, like in a cooperative corporation where everyone is a partner, then there are no employees. And, like determining an employee, the U.S. Supreme Court has established criteria to determine if a master-servant relationship exists.

1. Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.
2. Whether and, if so, to what extent the organization supervises the individual's work.
3. Whether the individual reports to someone higher in the organization.
4. Whether and, if so, to what extent the individual is able to influence the organization.
5. Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
6. Whether the individual shares in the profits, losses, and liabilities of the organization.

And this is only one of several tests that can be applied, although a lot of the criteria is similar.

To be sure that all the members of your business are partners, try to fulfill this criteria: all partners serve on a Board of Directors; decisions are made by supermajority voting; ensure each partner has control over his own work; make it difficult to get fired (by a voting process); limit supervisory positions.

## Interns

Under the [OSH Act Section 3 \(6\)](#), the term "employee" covers those who are "employed in a business of his employer which affects commerce." An uncompensated intern or volunteer is NOT considered to be an employee under the OSH Act.

But in order to ensure that the person is an intern and not actually considered an employee, check that they follow this criteria.

1. The training is similar to a vocational school.
2. The training is for the intern's benefit.
3. The intern does not displace regular employees.
4. The employer doesn't benefit from the intern's activities.
5. The intern isn't entitled to a job at the end of their internship.
6. The intern is not paid.

These are strict standards to meet when the line between an intern and a paid employee is not clear. In fact, it helps if the intern's efforts hinder the employer's work; they work under the close supervision of an employee; the intern works in several different departments and doesn't spend too much time doing menial work.

### Volunteers

A for-profit business will have a hard time proving a person is a volunteer and not an employee. Volunteers work for nonprofit charitable, religious, or humanitarian organizations. Nonprofit cooperatives need to be tax exempt under 501(c)(3), or 501(c)(4).

A nonprofit operating commercially to serve the general public cannot have volunteers.

Another difficulty is promising to pay volunteers with food or with something else that has value. According to the Department of Labor (DOL) and Fair Labor Standards Act (FLSA), volunteers need to do their work without promise, expectation, or receipt of compensation. A volunteer can be paid expenses, reasonable benefits or a very small (nominal) fee.

### Farm Employees

Also not covered by OSHA are immediate family members of farm employers that do not employ outside employees. Furthermore a small farm is exempt from the enforcement of all rules if it employs 10 or fewer employees at all times in the last year (family members are not counted).

One thing that OSHA makes clear is that having a temporary labor camp in the preceding 12 months makes the farm eligible for enforcement.

This is interesting because small farms with employees are covered by OSHA regulations, but because of an appropriations law, OSHA has not been allowed to spend any funds to enforce their standards to small farmers.

### Covered by other Federal Agencies

To complete our discussion, the last area exempt from OSHA regulations, although not receiving a completely free ride, are workplace hazards regulated by another federal agency like the Mine Safety and Health Administration (MSHA) the Federal Aviation Administration (FAA), the Coast Guard, and the Department of Energy.

### Your Questions