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National Aeronautics and Space Administration

Headquarters
Washington, DC 20546-0001

February 15, 2018

Reply to Attn of: Chief Health and Medical Office

TO: Distribution

FROM: Chief Health and Medical Officer

SUBJECT: Successor Employer Rights and Responsibilities

The health and safety of employees is a cornerstone of NASA's Occupational Health Program. A majority of the workforce consists of contractors who support the mission of NASA. It is typical for many of the incumbent employees to transition from one employer to another (different contractors) while continuing to perform the same work or otherwise be potentially exposed to the same occupational risks. NASA has raised questions associated with the right of access to the medical and exposure records by a new contractor in recent discussions with the Occupational Safety and Health Administration (OSHA). The key aspects of OSHA's position regarding successor employer rights are summarized below.

A successor employer is defined as a new employer which continues its predecessor's business in substantially unchanged form and hires employees of the predecessor as a majority workforce. As interpreted by OSHA, the fact that contract changes in NASA do not require one company to purchase the business of another company does not eliminate the rights and responsibilities of the new company as a successor employer.

By law, the new employer has the right to exposure data documented by the previous employer (CFR 29 1910.1020). Providing this data does not appear to be a violation of privacy laws as such requirements of other laws fall within exemptions provided for in 45 CFR 1964.512. The right to employee records does not extend to non-occupationally related information.

The right to have access to employee medical surveillance and exposure records is not negated by virtue of the medical surveillance examinations being performed at an off-campus facility. One example is the expectation that the new employer must retain the audiometric baselines of any employees enrolled in the Hearing Conservation Program.

These requirements are currently established in law and do not necessitate development of new policies. Offices responsible for oversight of occupational safety and health programs should ensure these provisions are implemented at the inception of new contracts and applied throughout the period of performance. Increased awareness of and education on the specific requirements by procurement offices may be beneficial to contractors, contracting officers, and contracting officer representatives.

Additionally, during this conversation with OSHA, it was stated by OSHA that it is NASA's responsibility to verify medical surveillance examinations are being properly completed on all workers performing hazardous tasks inside all NASA facilities. Furthermore, it is in NASA's interest to verify compliance of these medical requirements are being met by all contractors performing hazardous tasks at all NASA Centers, facilities, and sites.

Occupational health clinic and industrial hygiene program managers should ensure their staff understand these requirements.

Please direct questions regarding this memo to Dr. Angel L. Plaza, angel.l.plaza@nasa.gov, 281.483.7305 or Dr. Vincent Michaud, vincent.michaud-1@nasa.gov, 202.358.4719.

James D. Polk, DO, MS, MMM, CPE, FACOEP

Enclosure
OSHA Standard Interpretation Letter_R Smith

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U.S. Department of Labor

Occupational Safety and Health Administration
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Reply to the attention of:

JAN 12 2017

DEP/OHE/27348/AP

Rick Smith, CIH, CSP, CHMM
NASA, Kennedy Space Center
P.O. Box 21025, M/C: ISC-8000,
Kennedy Space Center, Florida 32815-0025

Dear Mr. Smith:

Thank you for your email inquiry to the Occupational Safety and Health Administration's (OSHA) Directorate of Enforcement Programs. You requested clarification of the term "successor employer" as it pertains to OSHA's Occupational Noise Exposure standard, 29 CFR 1910.95, as well as other OSHA standards and regulations that include records transfer requirements. This letter constitutes OSHA's interpretation only of the requirements herein, and may not be applicable to any questions not delineated within your original correspondence. Your paraphrased statement and questions are presented below, followed by our responses.

Background: According to your inquiry, NASA's contracted employees often retain their "work role position" while changing to a new employer after a new contract has been awarded. Although the work environments remain the same, and the employees perform their same duties, some of the new contract employers are of the belief that they should be able to require new baseline audiograms for those employees who had been in a hearing conservation program with the previous employer. The new contractors claim they have not purchased the business, and therefore are not "successor employers."

Successor Employer

The doctrine of successor liability is derived from labor law principles developed in a series of Supreme Court cases decided in the 1960's and 1970's. Although this doctrine was first applied to Labor Management Relations Act cases, it has been extended by the courts to cover most other Federal labor and employment statutes, including the Occupational Safety and Health Act of 1970. See, *Dole v. H.M.S. Direct Mail Service, Inc.*, 752 F. Supp. 573 (W.D.N.Y. 1990), *rev'd and rem'd on different grounds,* 936 F.2d 108 (2nd Cir. 1991).

In this regard, OSHA finds the analogy to the Supreme Court's decision in *Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27 (1987) persuasive. There, the Court held that an employer who had purchased a plant from another firm and hired a majority of the employees from that firm, had a duty to bargain with the union representing the employees at the predecessor if it has a "substantial continuity" with the operations of the predecessor. The Court stated that the determination of whether the purchaser of a business's assets is a successor under

this doctrine is to be made "from the totality of the circumstances of a given situation," and focuses on "whether the new company has acquired substantial assets of the predecessor and continued, without interruption or substantial change, the predecessor's business operations." *Id.* at 43. Based on the facts above, OSHA believes the new contractor performing work for NASA meets this test because the contractor is using the same facilities and equipment, and employs the same workforce performing the same duties. In other words, there is no interruption or substantial change in the work environment, and the new contractor is a "successor employer" for purposes of the OSH Act and its standards and regulations.

Question 1: Does a new contract employer have the option to establish new audiometric testing baselines for existing employees due to change of ownership?

Response: No. Generally, the successor employer is not permitted to establish new baseline audiograms for employees. In situations where the employees are the same, and they are working in the same work environment, the new employer does not have the option to establish new baseline audiograms. Establishing new baselines when a new employer is awarded a contract constitutes revising the baseline audiograms, which is prohibited by section 1910.95(g)(9). As you are aware, paragraph 1910.95(g)(9)(i), states that a baseline may only be revised if there is a standard threshold shift (STS) of greater than 10 dB, and an audiologist, otolaryngologist or a physician has deemed the STS to be persistent; or, as per section 1910.95(g)(9)(ii), the annual audiogram's threshold indicates significant improvement over the baseline audiogram. Please note that the only time a new employer may revise the baseline is when a business changes ownership, relocates and hires new employees. In those situations, the new business would have to establish new baselines for the new employees within six months in accordance with section 1910.95(g)(5). See, OSHA's December 5, 2008 Letter of Interpretation to Danny Herrera.

Additionally, even in cases where there is no financial relationship between a former and successor employer (i.e., no sale of a business from one employer to another), OSHA's policy regarding the transfer of records to a successor employer is consistent with the requirements in paragraph 1910.95(m)(3). Therefore, NASA's contractors are successor employers, even if the business was not "purchased," and they may not establish new audiometric baselines simply because they replace the previous contractor.

Question 2: Do the requirements for a successor employer under OSHA's noise standard always apply? If so, where is the regulatory language supporting this answer?

Response: Yes. In situations where there is a successor employer, the successor employer requirements in OSHA's noise standard apply. Section 1910.95(m)(5), *Transfer of records*, states: "If the employer ceases to do business, the employer shall transfer to the successor employer all records required to be maintained by this section, and the successor employer shall retain them for the remainder of the period prescribed in paragraph (m)(3) of this section." The successor employer must retain the records for the remainder of the period of time prescribed in paragraph 1910.95(m)(3). This paragraph requires the successor employer to retain audiometric test records for the duration of the affected employee's employment with the successor employer. This requirement also ensures that a successor employer will be aware of the

employees' hearing losses. Again, OSHA's policy is that the transfer requirements in section 1910.95(m)(5) apply when there is a successor employer contractor and a predecessor contractor.

Question 3: Are the same successor employer requirements applicable to all other OSHA standards?

Response: Yes. Successor employer requirements for the transfer of records are the same whenever an OSHA standard or regulation includes such requirements. For example, OSHA's Coke Oven Emissions standard requires that whenever "the employer ceases to do business, the successor employer shall receive and retain all records required to be maintained by the section." See, 29 CFR 1910.1029(m)(4)(i).

Question 4: What is the new employer required to do if the previous employer did not transfer the records subject to Section 1910.1020 and/or Section 1910.95?

Response: If the previous employer did not and/or refused to transfer the records, the new employer should make every attempt to obtain the records and document any correspondence. The new employer also has the option of contacting the local OSHA area office to file a complaint. In addition, please know that the employees themselves can request copies of their audiograms prior to employers ceasing to conduct business. See, section 1910.95(m)(4).

Question 5: NASA provides and maintains OSHA-required exposure monitoring and medical surveillance for its contractors. Are the contractors' requirements under 29 CFR 1910.1020(h)(1) and 1910.95(m)(5) met when NASA takes up the responsibility for transferring, receiving, and maintaining these records?

Response: Yes. If NASA is providing <u>all</u> the required exposure and medical monitoring on behalf of the contractors, and NASA is maintaining <u>all</u> the required records, then there is no need to transfer any records from one contractor to another when a new contract is awarded. On the other hand, if the previous contractor is maintaining some or all of the required records, they must transfer those records to the successor employer contractor.

Question 6: With respect to OSHA's injury and illness recordkeeping regulation, is the successor employer responsible for recording cases that resulted from events or exposures that occurred when the previous employer was performing the contract?

Response: No. OSHA's regulation at 29 CFR 1904.34 addresses the situation when a particular employer ceases operations at an establishment during the calendar year, and the establishment is then operated by a new employer the remainder of the year. The regulation provides that a new employer is only responsible for recording and reporting work-related injuries and illnesses for that period of the year for which the new employer operated the establishment. The previous employer must transfer all the Part 1904 injury and illness records (OSHA Form 300, 301, and 300A) to the new employer. The new employer must save all records of the establishment kept by the previous employer, as required by section 1904.33. However, the new employer need not

update or correct the records of the prior employer, even if new information about old cases becomes available.

Thank you for your interest in occupational safety and health. We hope you find this information helpful. OSHA requirements are set by statute, standards, and regulations. Our letters of interpretation do not create new or additional requirements but rather explain these requirements and how they apply to particular circumstances. This letter constitutes OSHA's interpretation of the requirements discussed. From time to time, letters are affected when the Agency updates a standard, a legal decision impacts a standard, or changes in technology affect the interpretation.

To assure that you are using the correct information and guidance, please consult OSHA's website at http://www.osha.gov. If you have any further questions, please feel free to contact the Office of Health Enforcement at (202) 693-2190.

Sincerely,

Thomas Galassi

Thomas Galassi, Director
Directorate of Enforcement Programs