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Final Obama Regulatory Agenda Has A Few Surprises By Adele L. Abrams, Esq., CMSP

On December 23, 2016, the U.S. Department of Labor (DOL) issued its Semi-Annual Regulatory Agenda, covering its agencies including the Occupational Safety & Health Administration (OSHA) and the Mine Safety & Health Administration (MSHA). This will be the final agenda issued under the Obama Administration, and the entries will be subject to revision and deletion by the incoming Secretary of Labor and President-Elect Trump's nominees for Assistant Secretaries of OSHA and MSHA. However, because that transition may take a while to effectuate, this should be considered as the non-binding work plan anticipated by the agencies' career staff within their standards offices. Executive Order 12866 requires each agency to publish a listing of all the regulations it expects to have under active consideration for promulgation, proposal, or review during the coming 12-month period.

For its regulatory priorities statement, the Department pledged dedication to its mission of helping people "work in a safe environment with the full protection of our anti-discrimination laws." It noted completion of regulations to limit worker exposure to silica dust, and promulgation of regulations and guidance to implement the "Fair Pay & Safe Workplaces" Executive Order (holding federal contractors accountable when they put worker safety at risk – implementation has been stayed for now).

In the priorities statement narrative on protecting the safety and health of

Workplace Exam Alert

It came down to the wire, but MSHA released its final rule modifying workplace examination requirements for metal/nonmetal mines on January 17, 2017, to be published in the January 23rd Federal Register. See Page 11.

workers, DOL declared: "We reject the false choice between worker safety and economic growth ... Our efforts are to prevent workers from having to choose between their lives and their livelihood." It states that MSHA will build on the knowledge gained through the OSHA silica rulemaking to develop protections for miners from silica exposure in mines. OSHA will develop its Notice of Proposed Rulemaking on infectious diseases, will finalize regulations on occupational exposure to beryllium, and will seek information from health care employers, workers, and experts on workplace violence prevention strategies.

The priorities list included the OSHA general industry walking-working surfaces rule, which was finalized on November 18, 2016, and takes effect in most respects on January 17, 2017 (with some provisions phased in during 2017-2018, and an extended deadline into 2036 for replacement of fixed ladders).

Here are the high points from the regulatory agenda that may govern agency activities during 2017:

OSH Administration

Prerule Stage

- "Section 610 Review" – only one item is on the regulatory agenda for periodic review under Section 610 of the Regulatory Flexibility Act: OSHA's Bloodborne

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Final Obama Regulatory Agenda, cont.

Pathogens standard. OSHA will consider whether the requirements overlap, duplicate or conflict with other federal, state, and local regulations, or whether technology or other factors have changed since the rule was last evaluated.

- Combustible Dust – OSHA initiated rulemaking for a general industry combustible dust standard, and a Small Business Regulatory Enforcement Fairness Act (SBREFA) panel was planned for 11/2016.
- Preventing Backover Injuries & Fatalities – OSHA’s Directorate of Construction conducted a Request for Information (RFI) in 2012 concerning the injuries and fatalities that result from vehicles and equipment backing up. The rule will consider emerging technologies (e.g., cameras and proximity detection systems) as well as the use of spotters and internal traffic control plans to make operations safer. A SBREFA panel is scheduled for April 2017.
- Preventing Workplace Violence in Healthcare – OSHA scheduled an RFI for release in 11/2016, but this deadline has passed. The agency published guidelines on the issue in 1996, which were updated in 2014, and additional tools and strategies have been shared by OSHA. The rulemaking also discusses the Agency’s use of the General Duty Clause (Section 5(a)(1) of the OSH Act) in enforcement cases in healthcare. OSHA says the rate of serious workplace violence incidents requiring days off from work was more than four times greater in healthcare than in private industry, on average. About 80 percent of serious violent incidents involve interactions with patients, and psychiatric aides experience the highest rates of violent injuries (590 per 10,000 Full-time Employees). Other high-risk sectors include emergency departments, geriatrics, and behavioral health.

Proposed Rule Stage

- Infectious Diseases – OSHA has completed its SBREFA panel on this rule, which initially received expedited treatment due to the Ebola scare in U.S. health care facilities. Other infectious diseases of concern include tuberculosis, SARS, MRSA, varicella disease, and pandemic influenza. OSHA is considering regulatory action to address risks to workers exposed to infectious diseases in healthcare and other high risk environments. The draft proposal largely tracked Center for Disease Control (CDC) guidelines, but also contained written program requirements, worker training and medical removal protections. A Notice of

Proposed Rulemaking is scheduled for 10/17.

- Standards Improvement Project IV – This update is intended to remove or revise outdated and duplicative standards and is part of an ongoing project. The proposed changes include updating three standards to align with current medical practice, updates to consensus standards used to protect workers in work zones from automobile traffic, revisions to roll-over protective structure requirements, and a revision to lockout/tagout requirements in response to a court decision. OSHA plans to analyze comments through June 2017.

Final Rule Stage

- Beryllium – OSHA has sent its final rule regulating occupational exposure to Beryllium to the Office of Management & Budget (OMB) for final clearance, and the release is anticipated in January 2017, prior to the change in administration. The rule covers about 35,000 workers in general industry and is expected to prevent 92 deaths from chronic beryllium disease annually.

Long-Term Action

- Injury & Illness Prevention Program (I2P2) – This was the priority rulemaking of the Obama Administration, which never moved to the SBREFA panel stage after stakeholder meetings were held in 2010. OSHA instead updated its 1989 Safety & Health Management Program guidelines for general industry and for construction, which are voluntary in nature but are often referenced as conditions in corporate-wide settlement agreements to resolve OSHA citation cases. The current status of the “I2P2” rule is “to be determined” but OSHA indicates that an I2P2 rule “would build on these guidelines as well as lessons learned from successful approaches and best practices under OSHA’s Voluntary Protection Program, SHARP program, and similar initiatives including the ANSI Z10 standard and the OHSAS 18001.

Mine Safety & Health Administration

Proposed Rule Stage

- Respirable Crystalline Silica -- MSHA plans to adopt a rule, paralleling OSHA’s controversial silica standard, which would reduce exposure limits to address miners’ exposure in surface and underground metal/nonmetal mines. MSHA plans adapt OSHA’s work on the health effects and risk

Final Obama Regulatory Agenda, cont. (2)

assessment of silica exposure to a mining-specific silica rule. The target date for a Notice of Proposed Rulemaking is April 2017.

Final Rule Stage

- Proximity Detection Systems for Mobile Machines in Underground Mines – This rule would address hazards when working near mobile equipment in underground mines, which may result in pinning, crushing or struck-by injuries and fatalities. MSHA avers that detection equipment may prevent accidents that cause these injuries and deaths. The proposed rule comment period closed 12/15 but the record will be reopened for comment.
- Workplace Examinations – This rule was omitted from the new regulatory agenda, which is surprising because the final rule is currently undergoing review at OMB and was expected to be released before the end of the current Administration (which could still occur). As proposed, the rule would require all mine operators and contractors at mines to conduct and document a workplace examination of every active working place once each shift, prior to miners or contractors performing work in the area. The documentation required would include all hazards identified and the date and corrective action taken to mitigate each hazard. Records would be maintained for a rolling 12-month period. Industry is actively lobbying against the release of this rule.

To prepare for compliance with these initiatives, contact the Law Office at 301-595-3520.

EEOC Releases Enforcement Guidance on National Origin Discrimination

By: Jordan Posner J.D.

The Equal Employment Opportunity Commission released guidance on national origin discrimination which employers should consider. One of the most common forms of discrimination charges filed is national origin. Title VII of the Civil Rights Act of 1964, protects applicants and employees from employment discrimination based on a number of categories including national origin, race, color, religion, and sex. In a diverse work environment with large percentages of immigrant workers in the United States, employers must be careful to not discriminate based on national origin.

National origin discrimination means discrimination

because an individual is from a certain place or has the physical, cultural, or linguistic characteristics of a particular national origin group. This discrimination can be based on place of origin or association with a national origin group or ethnicity.

Employers should be aware that discrimination can occur in all facets of the employment or application process, including recruitment, hiring, promotion, work assignments, segregation and classification, transfer, wage and benefits, leave, training and apprenticeship programs, discipline, layoff and termination. The EEOC guidance reflects that employment decisions such as the ones mentioned in the prior paragraph that have elements of national origin discrimination and non-discrimination reasons, generally violate Title VII.

One type of harassment that occurs in the workplace is when a hostile work environment is created. Employers should take necessary steps to correct offensive conduct so it does not escalate to the point of violating Title VII. Another issue addressed by the EEOC is language issues. With a rise in the population of non-English speaking workers, it is important to recognize that they can still face discrimination.

Even though employers may have legitimate business reasons for basing employment decisions on linguistic characteristics, because of their closeness to national origin, employment decisions must be scrutinized to ensure that violations do not occur. This can be based on accent, English fluency and restrictive workplace language policies. Additionally, English only rules and policies are considered to be a violation.

Finally, the EEOC addressed citizenship issues. Discrimination occurs whenever citizenship is at issue. For example, requiring a citizenship requirement would be unlawful if it was “pretext” for discrimination, or if it was part of a wider scheme of national origin discrimination. There are many different types of policy, training, and organizational changes that employers should consider implementing to minimize violations based on national origin (as well as all areas covered by Title VII).

For more information on national origin discrimination and how your policies and procedures may be effected, contact our office.

Industrial Sand Mining- Regulated at All Levels

By: Sarah Korwan, Esq.

It is axiomatic that the coal, metal and non-metal mining industries are among the most heavily regulated in the United States. However, industrial sand operations are no different from other forms of mining when it comes to regulations and compliance. In recent years, industrial or frac sand mining has come under fire with harsh allegations that it is an unregulated industry allowed to run uncontrolled over local communities, harming the environment and endangering public health.

This is not the case. Further, this misperception is laid to rest in a policy study entitled, "[Comprehensive Regulatory Control and Oversight of Industrial Sand \(Frac Sand\) Mining](#)". Authored by Mark Krumenacher and Isaac Orr for The Heartland Institute, the study details federal, state, and local regulations applicable to industrial sand operations and offers concrete examples of the complex overlapping regulatory oversight of industrial sand operations.

According to the study, virtually all aspects of industrial sand mining are regulated by more than 20,000 pages of federal, state, or local government laws and ordinances that combine to form a comprehensive regulatory framework. To illustrate, the authors created a chart which depicts more than 50 federal and state programs and almost 300 individual state regulations. As noted in the study, the industrial sand mining industry is, in fact, highly regulated by a multitude of complicated and comprehensive regulations.

In addition, the study details the type of oversight provided by seven federal agencies, including the Environmental Protection Agency, Fish and Wildlife Service, Mine Safety and Health Administration, Occupational Safety and Health Administration, Department of Transportation, Federal Railroad Administration, and the Bureau of Alcohol, Tobacco, Firearms and Explosives, which have regulatory authority to administer and enforce environmental, and health and safety laws applicable to industrial sand mining operations. Further, each state has independent agencies with regulatory authority to administer and enforce the same types of laws applicable to sand frac mining. Some states, such as Minnesota, have taken additional steps in developing environmental standards which are unique in states which mine industrial sand.

The study also discusses in detail the numerous and complex examples of overlapping regulatory oversight, mostly at the federal level; recent state rule and rule making activities, and local controls; and moratoria and bans on industrial sand mining. The study dispels any notion that industrial sand mining is unregulated. The study acknowledges that properly drafted ordinances can be beneficial to industrial sand operators and neighboring communities. However, too often, the ordinances are overly restrictive in an attempt to prevent industrial sand mining in a given area.

How to Defend Against A General Duty Clause Citation For Heat Stress

By Brian S. Yellin, Esq., MS, CIH

In a recently issued decision, *Secretary of Labor v. Aldridge Electric, Inc.*, OSHRC Docket No. 13-2119 (Aldridge), an administrative law judge (ALJ) ruled that the Occupational Safety and Health Administration (OSHA) had not sustained its burden of proof involving a "Serious" citation alleging a violation of the General Duty Clause (§5(a)(1) of the Occupational Safety and Health Act) for Aldridge allegedly exposing its employees to "excessive heat" during heavy construction activities in June, 2013. The ALJ vacated the General Duty Clause citation holding OSHA had not proven that a heat-related hazard existed, as it was defined in the citation's charging language, or that Aldridge had actual or potential knowledge of the heat-related hazard.

On June 24, 2013, an Aldridge employee suffered heat stroke while supporting the installation of an electrical duct bank system at a worksite in Chicago, Illinois. The employee, who was also obese, died the next day. When the decedent began working with a co-worker to lift and carry two twenty-foot long polyvinyl chloride ("PVC") pipes, each weighing eighty-four pounds, the temperature was 73 degrees Fahrenheit with a relative humidity of 71%.

The decedent and his co-workers reportedly had an ample supply of water that he drank during the course of the morning. He showed no signs of heat illness. After lunch, a co-worker observed the decedent stumble while getting out of a trench; however, the general foreman testified that the decedent did not look like he struggled and did not appear confused, incoherent or disoriented.

Heat Stress Prevention, cont.

Despite not observing any signs or symptoms of heat illness, the general foreman directed the decedent to sit in a nearby trailer to rest and drink water. While exiting the work site the decedent became incoherent and began to lose consciousness. At or about the time the decedent lost consciousness, the weather conditions included a temperature of eighty-four degrees Fahrenheit, fifty-seven percent humidity, with scattered clouds. OSHA's compliance officer calculated the heat index at 86.7 degrees Fahrenheit. The decedent was transported to the hospital and was admitted with a body core temperature of 108.8 degrees. The decedent died the next day and the autopsy report specified the cause of death was heat stroke with a contributing factor of obesity.

OSHA began its investigation of the fatal accident on June 26, 2013, but did not take any temperature or distance measurements or conduct witness interviews at first. The witnesses who were interviewed did not sign their purported statements.

Despite the fact that no temperature measurements were taken during the course of OSHA's fatality investigation, and no signed witness statements were obtained, OSHA issued Aldridge a single "Serious" citation for violation of the General Duty Clause for worker exposure to excessive heat. OSHA relied on weather data from the National Oceanographic and Atmospheric Administration ("NOAA") when it determined that a heat-related hazard existed at the time of the fatal accident. In determining that a heat-related hazard existed, OSHA applied the National Institute for Occupational Safety and Health's ("NIOSH"): "Criteria for a recommended standard. Occupational exposure to hot environments - revised criteria" (NIOSH Publication No. 86-113) and the American Conference of Governmental Industrial Hygienist's ("ACGIH") "Threshold Limit Values and Biological Exposure Indices" (2011).

OSHA's investigative team likely followed the agency's technical guidance regarding the conduct of heat-related inspections, which includes the following elements that should be addressed: workplace description, whether the exposure is typical for the industry, and are there work practices to detect, evaluate, and prevent or reduce heat stress. See *OSHA Technical Manual, Sec. III, Chap. 4*.

Chief among the evidence relied upon by the ALJ

in vacating the General Duty Clause citation were the unsigned witness statements admitted into evidence by OSHA, which were compared and contrasted with the witness' actual testimony. The unsigned statements were admitted into evidence as the CSHO's notes under the "records of a regularly conducted activity" exception.

The "reliability" of the witnesses' statements was determined by the ALJ's evaluation of words that are considered "terms of art." The ALJ determined that the witness statements included terms of art such as "sunny," "disoriented," "hot," "strenuous," "moderate," and "acclimatization." Although some of the terms deemed to be "terms of art" such as "sunny" appear to be in common use, the ALJ determined that when these words are used by OSHA to establish an aspect of heat illness caused by excessive heat, they become "terms of art" for the particular case.

This is particularly significant in the ALJ's weighing of the reliability of the unsigned witness statements since for example, the general foreman testified that the words "strenuous" and "inclement weather" contained in the CSHO's written statement were not in his vocabulary and therefore, he could not have said them at the time he was interviewed.

As a result, the ALJ did not accord factual weight to any "terms of art" contained within the unsigned witness statements, which were not corroborated by the witness' testimony. The ALJ determined that Aldridge's "Heat Illness Prevention Plan" adequately addressed the heat-stress acclimatization process for new workers and those employees returning from extended illness or leave. More specifically, the ALJ determined that Aldridge's acclimatization process included a work-rest regimen once the ambient temperature reached 91 degrees F. and allowed employees to take as many rest breaks as needed, and that the decedent had been included in Aldridge's acclimatization process.

The ALJ also noted that OSHA's published guidance regarding acclimatization does not prescribe a formal acclimatization program. Rather, OSHA's acclimatization guidance generally states: "Gradually increase the workload or allow more frequent breaks to help new and returning workers to build up a tolerance for hot conditions over time."

Heat Stress Prevention, cont. (2)

Applying the testimony of OSHA's expert witness, an occupational health physician, the ALJ determined that the existence of the alleged hazard, i.e., excessive heat, is best evaluated applying a "heat balance equation," which balances the workers' heat load against his/her ability to dissipate the heat. The "heat balance equation" applied by the ALJ states the following:

Individual's excessive heat = (environmental heat + metabolic heat) – individual's ability to dissipate heat

The ALJ determined that OSHA did not prove any of these four factors by a preponderance of the evidence. First, the ALJ noted that OSHA's calculated unadjusted heat index of 84.9 degrees F. for the day of the fatal accident was within the "caution" zone of OSHA's heat stress guidance, which merely advises "basic heat safety and planning." The ALJ also determined that OSHA was unable to (1) establish the decedent's metabolic rate while he was performing various tasks, or the amount of heat that was dissipated through sweating and evaporative heat loss or that (2) the decedent's individualized heat was excessive, in large part because the decedent was obese, which places a worker at a higher risk of heat illness. It is important to note that the ALJ rejected OSHA's application of the ACGIH threshold limit values (TLV's) for heat stress in order to establish the combined environmental and metabolic heat hazard.

The ALJ reiterated the Occupational Safety and Health Review Commission's ("OSHRC") decision in *Secretary of Labor v. Industrial Glass* where the OSHRC held that an employer's breach of heat stress levels published by a third party organization does not establish a heat stress hazard because "these levels do not have the force and effect of law; failure to comply with it is not, in and of itself, illegal. *Secretary of Labor v. Industrial Glass*, 15 BNA OSHC 1594 (No. 88-0348, 1992). Therefore, OSHA is unable to sustain a violation of the General Duty Clause involving a "heat stress" hazard if it relies on the ACGIH's published limits. The Law Office of Adele L. Abrams, P.C. is a full-service law firm concentrating in occupational safety and health law. Its expert attorneys, and safety and health professionals, are ready to assist you in developing a new, or enhancing an existing, heat stress prevention program.

DOL & EPA Penalties Hiked (Again)

By Adele L. Abrams, Esq., CMSP

Hot on the heels of the August 1, 2016, penalty increases for OSHA and MSHA comes the next wave of hikes for these agencies and others administered by the U.S. Department of Labor (DOL). On January 18, 2017, the DOL published a final rule, retroactively taking effect on January 13, 2017, to adjust federal civil penalties to adjust for inflation. The August 2016 increases came into effect for OSHA as a result of congressional action on debt reduction, and the indexing was included as provided for in the Inflation Adjustment Act.

The new OSHA penalties now have risen to a new maximum of \$126,749 per violation (willful or repeat), and there is a new cap for serious and other-than-serious violations of \$12,675. The previous top penalties were \$124,709 and \$12,471 respectively; however, prior to the August 2016 initial increase, the previous OSHA maximum was \$70,000 – so OSHA penalties are now more than 81 percent higher than they were this time last year. The minimum penalty for repeat/willful violations is now \$9,054. The penalty increases take effect for any violations that have not been assessed prior to January 13, 2017.

On the MSHA side of the fence, penalties have also increased but the results were not as dramatic because MSHA has had intermittent penalty changes as a result of the increases built into the Miner Act of 2006. The new rule will raise the maximum MSHA fine to \$254,530 (from the previous \$250,433) and there are new minimum penalties for "unwarrantable failure" citations/orders as well: \$2,314 for a Section 104(d)(1) citations/orders and \$4,627 for Section 104(d)(2) orders. The new mandatory minimum penalty for failure to report fatalities and injuries with a reasonable potential to result in death is now \$5,785. The penalties for regularly assessed MSHA citations will range from \$129 to \$69,417 (previous high was \$68,300) and penalties for "failure to abate" will be capped at \$7,520 per day.

Other agencies within DOL whose penalties were adjusted upward for inflation include: the Office of Workers' Compensation Programs, Wage and Hour Division (covering child labor law and wage/hour and overtime violations under the Fair Labor Standards Act), and the Employee Benefits Security Administration (handling ERISA actions).

Starting in January 2017 the Environmental Protection Agency, along with many other federal agencies. Starting will now be responsible for annual reviews of statutory civil penalties. Agencies must now make adjustments to account for inflation. The inflation adjustment multiplier for 2017 is 1.01636. This means that a current penalty amount will be multiplied by this number to find the raw adjusted penalty value.

Actions Around Workplace Violence

By: Gary Visscher, Esq.

Workplace violence, once considered to be the province of criminal law, has in more recent years been treated as a preventable workplace hazard. Although the number of such cases is still relatively small, OSHA has cited employers, primarily in the health care and social services sectors, after violent incidents against employees occur, under the “general duty clause” in section 5 (a)(1) of the OSH Act.

In 1996 OSHA published its first “non-regulatory” guidelines for preventing workplace violence. The initial guidelines addressed healthcare and social service workers; subsequent guidelines were issued for late night retail establishments, and taxi / for-hire drivers. The guidelines for healthcare and social services have been revised several times, most recently in 2015. In 2011 OSHA published CPL 02-01-052, a compliance directive for inspectors conducting workplace violence inspections.

In December 2016, OSHA published a Request for Information (RFI) stating that “OSHA is considering whether to commence rulemaking proceedings on a standard aimed at preventing workplace violence in healthcare and social assistance workplaces perpetrated by patients or clients.” The RFI poses a series of questions that OSHA is seeking responses to, including questions regarding experience with incidents of workplace violence and the effectiveness of employer programs and state laws. The questions and format of the RFI track the measures included in the agency’s published guidelines on preventing workplace violence in the healthcare and social service sectors.

Responses to the RFI are due to OSHA by April 6, 2017, and may be filed electronically or by mail or fax. Please let us know if you would like any further information about the RFI, or would like assistance in drafting comments and responses to the questions that OSHA posed in the RFI.

A number of states have also enacted laws requiring employers, particularly in health care and social services, to have programs to address workplace violence. Last year, pursuant to a law passed by the legislature, California OSHA (CalOSHA) adopted a workplace violence standard, which is scheduled to take effect on April 1, 2017. The California standard applies to health facilities, home health care programs, drug treatment programs, emergency medical services, and outpatient medical services for correctional and

detention services, and requires employers to implement specific measures intended to prevent incidents of workplace violence.

A case pending before the Occupational Safety and Health Review Commission, *Secretary of Labor v. Integra Health Management*, may also clarify employers’ obligations regarding threats and acts of violence by patients and clients. The case was brought after a newly hired case worker employed by Integra was murdered by a client who suffered from serious mental illness. The case worker had traveled to the client’s residence to conduct an initial assessment of the client; the case worker’s supervisors were aware of the client’s history of violence, but did not require that the case worker be accompanied by a second person when visiting him. OSHA cited Integra under the general duty clause, and the company defended, in part, by showing that it provided employees with training and had procedures in place to protect employees from potentially violent clients. The administrative law judge nonetheless upheld the violation, and Integra appealed to the Commission where it is pending.

OSHA Issues Interim Guidance on Enforcing Anti-Retaliation Provisions

By: Joshua Schultz, Esq., MSP

Following a federal district court's decision to allow OSHA to enforce the anti-retaliation provisions of the Agency's Electronic Recordkeeping rule while a law suit is pending, the prohibition on retaliation for reporting a work-related injury or illness took effect on December 1, 2016. OSHA recently issued a memorandum outlining how inspectors should enforce the provisions.

OSHA's memorandum specifically addresses how inspectors will enforce the regulations governing reporting procedures noted in Section 1904.35(b)(1)(i). This provision requires employers to establish a "reasonable procedure for employees to report work-related injuries or illnesses promptly and accurately." The regulation deems any procedure for reporting injuries unreasonable, and therefore in violation of the standard, if it deters or discourages a reasonable employee from accurately reporting a workplace injury or illness. This has raised questions about how far OSHA will go in deeming a reporting procedure “unreasonable.”

The Agency instructs inspectors to only issue

OSHA Issues Interim Guidance, cont.

citations under this standard if the procedure regarding the "time" and "means" for filing an injury report is unreasonable. The memorandum clarifies that the time for filing an injury report is unreasonable if the company disciplines employees for late reporting when the employee could not have realized that he or she has a work-related injury or illness. The memorandum further notes that the means for filing an injury report is unreasonable if the procedure requires the employee to report an injury or illness at a remote location or if the procedure adds unnecessarily cumbersome steps to report an injury or illness. Thus, in accordance with this guidance, employers must ensure that employees have adequate time to discover and report injuries or illnesses and a means to report that is not unduly burdensome.

OSHA's memorandum instructs inspectors that they may issue citations for a failure to establish reasonable procedures for employees to report work-related injuries and illnesses even if the Agency cannot identify any employees who did not report injuries due to the provision, if the inspector can show that employees would be deterred or discouraged from reporting future injuries or illnesses. OSHA indicated that these citations would normally be classified as other-than-serious.

The anti-retaliation provisions of the Electronic Recordkeeping rule additionally require employers to inform employees that they have the right to report work-related injuries and illnesses and prohibit employers from discharging or discriminating against any employee for reporting work-related injuries and illnesses. This can be accomplished simply by posting the OSHA worker rights poster (this must be a version of poster created from 2015 or later). OSHA's memorandum instructs that if an inspector finds that an employer has not posted a worker's rights poster and has not otherwise informed employees of the information required by the provision, the inspector will provide the employer a copy of the poster. If the employer posts the poster, no citation will be issued.

OSHA Issues Final Rule on Continuing Violations of Recordkeeping Rules, Court Rejects Same Approach To PSM Standard

By: Gary Visscher, Esq.

Section 9 (c) of the Occupational Safety and Health Act provides that "no citation may be issued ...after the expiration of six months following the occurrence of any

violation."

Despite this provision in the statute, a long-standing interpretation by the Occupational Safety and Health Review Commission, dating back to the 1980's, allowed OSHA to issue citations for recordkeeping violations (such as a failure to record an injury or illness) within five years of when the injury or illness should have been recorded, under the premise that such a failure was a "continuing violation" as long as the employer was required to maintain the records.

This interpretation was challenged in a 2012 case in the U.S. Court of Appeals for the D.C. Circuit, AKM LLC ("Volks Construction"). The Court of Appeals held that the "continuing violations" interpretation was inconsistent with the statute. In the words of the Court of Appeals, "'occurrence' refers to a discrete antecedent event – something that 'happened' or 'came to pass' 'in the past.'"

As described in the November 2016 newsletter, in the aftermath of the Court of Appeals decision, OSHA undertook rulemaking to "undo" the Court of Appeals decision in Volks Construction. OSHA issued its final rule on injury and illness records subject to "continuing violation" enforcement on December 19, 2016. The final rule amends OSHA's recordkeeping regulation (29 C.F.R. Part 1904) by stating that an employer's obligation to "make and maintain" accurate records "continues throughout the entire record retention period."

The final rule takes effect on January 18, 2017 (30 days after promulgation). As one of the "midnight" rules issued by the Obama Administration, a motion of disapproval may be voted on by the new Congress, under the Congressional Review Act. If it does go into effect, the rule is likely to be challenged in a future enforcement case. Meanwhile, a second court of appeals, the Court of Appeals for the Fifth Circuit, rejected a similar "continuing violations" interpretation under the Process Safety Management(PSM) standard. In *Delek Refining*, (Dec. 29, 2016) the Court of Appeals held that the six month statute of limitations in the OSH Act meant that OSHA could not cite a refinery for failing to make or maintain written responses to PSM audit findings, where the audits had been conducted several years earlier. OSHA argued that the requirement to document the responses were "continuing violations" and could be cited as long as the refinery was required to keep the

OSHA Issues Final Rule, cont.

records. The Court of Appeals, citing the D.C. Circuit's decision in *Volks Construction*, said that the statute's language is "at best, in tension" with the Secretary's enforcement, and held that "we cannot agree with the Secretary that the continuing violations theory applies."

The Fifth Circuit noted that neither its decision in *Delek Refining* nor the D.C. Circuit's decision in *Volks Construction* addressed situations involving "continuing unlawful risks to employee health and safety," suggesting that treatment of a "continuing violation" in such cases might be different than the "paperwork" violations in *Delek* and *Volks*. Ironically, the "continuing violation" theory grew out of a "continuing unlawful risk to employee safety and health," *Central of Georgia R.R.*, 5 BNA OSHC 1209 (1977), where the Commission rejected the employer's argument that the "occurrence" of a violation of OSHA's housekeeping standard was when the violative condition was first created, and therefore could not be cited if the condition existed unabated for more than six months.

Democrats Hold Unofficial Hearing into Secretary of Labor Nominee Puzder's Business Practices

By: Jordan Posner, J.D.

On January 10, 2017, the Democratic Senators of the Health, Education, Labor and Pensions Committee ("HELP") conducted a forum with witness testimony to provide information regarding Department of Labor nominee Andrew Puzder (Puzder) and his businesses/employment practices. Puzder, President-Elect Donald Trump's pick for Secretary of Labor, is also the Chief Executive Officer of CKE, the parent company to fast food restaurants Hardee's and Carl's Jr.

The chairman of the committee, Republican Senator Lamar Alexander, rejected a written request by Senators Elizabeth Warren (Massachusetts) and Patty Murray (Washington) to hold a hearing with witnesses who could provide the Committee with information on Puzder's business practices and treatment of workers. Specifically, he has been quoted by the media as being against wage increases for workers.

HELP invited three former employees; one former manager of a Hardee's location, in addition to two non-managerial employees, and Christine L. Owens, the Executive Director of the National Employment Law Project, a group who works for wage equality. Each of the three workers who testified, spoke out against the

nominee, based on their personal experiences as employees of Hardee's and Carl's Jr. Christine Owens applauded the Department of Labor for its efforts in passing groundbreaking Silica legislation and the work that has been done to facilitate worker safety, but also shared concerns of the direction of the Department of Labor.

Puzder, whose confirmation hearing was already set to occur, has been rescheduled for February 2, 2017. For more information on Andrew Puzder or this hearing, please contact our office.

OSHA Releases Fall Protection Revisions for General Industry

By Adele L. Abrams, Esq., CMSP

On November 18, 2016, the Occupational Safety & Health Administration (OSHA) published a final rule on Walking-Working Surfaces and Personal Fall Protection Systems (29 CFR 1910 Subpart D&I) that took effect on January 17, 2017, just days before the next administration assumes control of the agency. While it is possible that Congress could seek to rescind the rule, using its powers under the Congressional Review Act (which happened to kill the OSHA ergonomics standard released at the very end of the Clinton administration), employers should be aware that they will be fully responsible for compliance in the interim.

The final rule includes revised and new information that addresses everything from stairways and ladders to scaffolds to fall protection systems to training and design requirements. It covers all employers engaged in general industry activities, so any hazardous fall exposures arising from poorly maintained or constructed walking and working surfaces will need to be addressed.

OSHA anticipates that the rule will cost about \$300 million per year for general industry employers and contractors to implement, with the majority of the costs attributed to training (\$74.2 million), scaffolds and rope descent systems (\$71.6 million), and the revised duties associated with fall protection and falling object protection (\$55.9 million). The rule is expected to save 29 lives per year and prevent nearly 6,000 non-fatal injuries annually. Falls rank number two among causes of death in general industry, second only to motor vehicle accidents, and about 20 percent of all disabling workplace injuries are due to falls.

OSHA Releases Fall Protection, cont.

In the rule, OSHA addresses scaffold use in general industry by simply incorporating by reference the construction scaffold rules in 29 CFR Part 1926, Subpart L. The rule also contains specifications for the design of stairways, step bolts and manhole steps. Dockboards, both fixed and portable, must be used in a specified manner and measures such as wheel chocks are now required to prevent transport vehicles from moving while workers are on the dockboards.

One of the contentious issues was whether OSHA would rescind its existing enforcement policy to exempt “rolling stock” and other motor vehicles from the scope of the general industry fall protection standard. That exemption had its roots in a 1986 interpretative memorandum from OSHA, and was largely based on the infeasibility of tying off in non-fixed locations given the lack of rated anchorage points on many types of rail cars, bulk trucks and similar mobile equipment. While OSHA says it is now feasible to use fall protection even when the equipment is not contiguous to a structure, it decided to continue its current enforcement exemption for this category of equipment (at least for now).

The revised standard is intended to be “performance oriented” and it does give employers enhanced flexibility to now use personal fall arrest systems, travel restraints, safety net systems, or “designated areas” in lieu of installing guardrail systems or other fixed or portable barricades. This will be particularly helpful to contractors who perform mechanical, HVAC or electrical work at heights within general industry facilities or who are doing maintenance to systems that fall outside the construction regulations. While OSHA sought to bring the general industry and construction rules largely into alignment, general industry retains the “4-foot” fall distance trigger while construction remains at 6 feet. In addition, personal fall protection or railing may still be required at lower heights if a worker could fall into moving equipment or onto dangerous surfaces such as uncapped rebar.

Some employers will have to have a written fall protection program under the new rules, particularly if they will perform non-construction work on residential roofs where use of personal fall prevention systems are infeasible. Those employers would have to have a site-specific plan with detail on what methods will be used to protect workers as an alternative.

Non-roofing employers have a duty to inspect walking-working surfaces regularly to watch for hazards such as greasy or icy surfaces, areas with

spills, protruding objects that could cause trips, holes in floors and walls, uncovered skylights and railing systems that might have defects affecting safety. In addition, all ladders must be inspected before use and during the shift, and fixed ladders will have to be modified to meet the specifications, but certain types can delay modification for up to 20 years unless they are replaced or new components added earlier.

There are also unique requirements for use of rope descent systems (such as those used by window washers) and for outdoor billboard work. The standard also makes some minor adjustments to the aerial lift rule, and communication towers standards (among others) to bring them in harmony with the changes.

Not only employers have obligations under the new rule. If rope descent systems will be used on buildings, the building owner must inspect and certify the rating of anchorage points that the RDS will utilize, and fall protection system components must also be inspected before use. All inspections should be documented, because otherwise it will be difficult to demonstrate compliance with the inspection requirements to OSHA. In addition, a written PPE hazard assessment is also required under a separate standard, 1910.132. All workers must also be trained on fall protection, and retrained as necessary, and all training should be documented as well.

As a minimum, OSHA expects employers to:

- Inspect and provide working conditions that are free of known fall dangers.
 - Keep floors in work areas in a clean and, so far as possible, a dry condition.
 - Select and provide needed personal protective equipment at no cost to workers.
- Utilize guardrail or other permissible systems to engineer out fall hazards where possible, but otherwise effectively use personal fall arrest systems, train workers on use of PPE, and maintain and inspect equipment used as part of fall prevention systems.
- Provide appropriate ladders or other manlifts to allow workers to safely access work areas, use them in accordance with the manufacturer’s specifications and weight ratings, and train workers on the proper use of this equipment.
- Train workers generally about fall hazards and

OSHA Releases Fall Protection, cont.

PPE use in a language and vocabulary that they can understand.

Employers can expect OSHA to focus on walking and working surfaces and the use of scaffolds and ladders particularly during upcoming inspections, because the new rule will impose significant new requirements and provide more than a few “gotcha” scenarios resulting in citations against those companies that remain oblivious to the new mandates.

MSHA Issues Workplace Exam Revisions As “Midnight Rule”

By Adele L. Abrams, Esq., CMSP

It came down to the wire, but the Mine Safety & Health Administration (MSHA) released its final rule modifying workplace examination requirements for metal/nonmetal mines on January 17, 2017, to be published in the January 23rd Federal Register. The rule, which takes effect on May 23, 2017, modifies existing standards 56/57.18002 to require each mine operator to (1) have a “competent person” conduct working place examinations to identify hazards before work begins in an area; (2) notify affected miners of hazardous conditions that are not corrected immediately, and promptly initiate corrective action; and (3) record the locations examined, the adverse conditions found, and the date of the corrective action. The records must be retained for 12 months and made available for MSHA review upon demand. The person conducting the examination must be named on the record, but it does not have to include a signature of the examiner. MSHA deleted a proposed requirement that would have mandated inclusion of each corrective action and the name of the person reporting the correction. The original definitions of “working place” and “competent person” were not altered in the revised rule. If the examiner identifies any conditions that present an “imminent danger,” they must bring them to the attention of the mine operator.

Under the old rule, while each active working area needed to be examined each shift, it could occur any time during the shift and did not need to include a list of the hazards identified nor any information on corrective actions taken (or when). The new requirement will make it easier for MSHA to prove that examinations were “inadequate” if the agency finds hazards that were not identified on the inspection form or checklist.

Hazards that have been listed, but not corrected in a timely manner, could also trigger citations with elevated action. The examiner (if found to be an “agent of management” due to the authority to initiate corrective actions or otherwise direct the workforce) may also be held personally liable and fined up to \$70,000 under Section 110(c) of the Mine Act for conducting examinations in a highly negligent manner. In its information on the rule, MSHA notes that in 16 recent fatality cases, mine operators were issued “unwarrantable failure” Section 104(d) citations or orders and MSHA claims these accidents would not have occurred if hazardous conditions had been recorded during the exam.

The new rule requires all working places to be examined if miners will work in the extraction or milling processes in those areas, including roads traveled to and from working places. However, roads not directly involved in the mining process, and it also excludes from the inspection requirements all administrative office buildings, parking lots, lunchrooms, toilet facilities, and inactive storage areas. Mine operators would have to examine isolated, abandoned or idle areas of mines or mills only when miners will have to perform work in those areas during a shift.

MSHA estimates the economic impact of the rule to be \$34.5 million per year for the metal/nonmetal sector, but it has not quantified a benefit for the rule because “the prior examinations rule had already anticipated all the benefits of effective examinations.” But MSHA says that the anticipated previous benefits were not realized and this rule will do so by improving the effectiveness of examinations.

Because the standard was issued so late in the Obama administration’s term (actually coming out post-Inauguration), it could be subject to rescission under the Congressional Review Act, if it is included in the “hit list” now being prepared by Congress and the White House. Legislation has already passed the US House of Representatives to eliminate “midnight rules” en masse rather than requiring Congress to act separately on each rule under scrutiny.

For more information on the practical impact of the new rule, and how to effectively conduct workplace examinations, contact the Law Office at 301-595-3520.

SPEAKING SCHEDULE**ADELE ABRAMS**

1/24/17 PA Electrical Contractors, State College, PA

1/25/17 Mechanical Contractors Assn of America Safety Conference, Clearwater Beach, FL

2/8/17 BLR Webinar on OSHA inspection management, www.blr.com

2/13/17 Progressive Business Executive Education, webinar on OSHA's General Duty Clause

2/14/17 Chesapeake Region Safety Council & Associated Builders and Contractors, full day workshop on OSHA's New Silica Rule, Richmond VA (Adele Abrams and Michael Peelish)

2/23/17 ASSE Region IV PDC, speak on Crystalline Silica rule, Baton Rouge, LA

3/1/17 Indiana Safety Conference, speak on OSHA's e-Recordkeeping rule, Indianapolis, IN

3/9/17 NWPCA Annual Leadership Conference, present OSHA update, Tucson, AZ

3/15/17 National Business Institute, Employment Law Seminar, Baltimore MD

3/21/17 MCA conference, speak on Silica rule, Chicago, IL

4/4/17 BLR Safety Summit, present on OSHA's Walking-Working Surfaces rule, Austin, TX

JOSHUA SCHULTZ

1/24/17 Webinar: OSHA Regulations Update, Colorado Sand Stone and Gravel Association

TINA STANCZEWSKI

3/1/17 OSHA's Silica Rule and Its Impact to Your Operation, PACA, Concrete Forum, Harrisburg, PA

4/25/17 Mid-Atlantic Safety Construction Conference, OSHA Update, Greenbelt, MD