



“Joint Employer”

Rule Changes Considered By Adele L. Abrams, Esq., CMSP

On April 1, 2019, the U.S. Department of Labor announced a proposed rule that will revise and clarify the responsibilities of employers and “joint employers” to employees in certain “joint employer” arrangements. The proposal, if adopted, will be the first substantial change to DOL regulations on this topic since 1958.

The changes come in the form of amendments to the Fair Labor Standards Act (FLSA), which governs such issues as minimum wage law, overtime payment and worker classification, and child labor restrictions. While ostensibly addressing responsibilities to pay the minimum wage and overtime, it spills over into definitions of “joint employer” that are also used for OSHA determinations of liability. There is a 60-day comment period on the proposal, but this could be extended if requested, and there may also be public hearings scheduled this year.

From a workplace safety perspective, how employers (and workers) are classified can be significant in terms of which entity has responsibility for employee training, provision of personal protective equipment, worker supervision, and discipline. There are a couple of different vantage points.

In one scenario, two companies are deemed to be joint employers, from the perspective of being affiliates, subsidiaries, or franchiser/franchisees. This can expand the overall company size to affect penalty amounts. A finding that a joint employer relationship exists can result in imputation of violations from one operation to the other, for purposes of triggering “repeat” OSHA violations (where, currently, penalties can reach \$132,598 per affected worker if

the company had a prior violation of the same or similar standard that became a final order within the previous five years). In addition, actions taken by one of the “joint employers” potentially can be imputed to the other employers in the relationship for purposes of finding that a “recognized hazard” exists with a feasible abatement action, and for purposes of OSHA enforcement under its General Duty Clause. Finally, the scope of corporate-wide settlement agreements can be affected in terms of which establishments within a family of related companies must follow the terms of the CSA.

The other variation is where multiple independent companies occupy the same worksite, and are viewed as having liability for violations under one of four theories: (1) Controlling employer (the host employer or “general contractor”); (2) Creating employer (the entity that creates the violative condition, even if they do not have workers exposed to any hazard directly); (3) Exposing employer (the entity whose workers are exposed to a hazardous condition, even if that employer did not create the condition); and (4) Correcting employer (the entity responsible, either by contract or by practice, for correcting any unsafe or unhealthful conditions).

From the DOL/OSHA perspective, the joint employer concept has been evolving in recent years, in part driven by a 2015 decision of the National Labor Relations Board (which has a work-sharing agreement with OSHA for whistleblower protections and prosecutions) in the *Browning-Ferris* case. Obama-era Department of Labor (DOL) policy was developed and released in response to that decision, which made franchising corporations responsible for OSHA and other labor law violations by franchise businesses.

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“Joint Employer,” con’t

The 2015 policy was viewed as providing OSHA with new enforcement powers against companies found to be “joint employers.” Under that policy, the ultimate determination of joint employer status was based on factual information about the relationship between the franchisor and franchisee over the terms and conditions of employment. OSHA said at the time: “A joint employer standard may apply where the corporate entity exercises direct or indirect control over working conditions, has the unexercised potential to control working conditions or based on the economic realities.”

The 2015 OSHA policy is still in effect but would be altered if the pending changes to DOL and NLRB definitions become final later this year. For now, two entities can be found to be joint employers “when they share or codetermine those matters governing the essential terms and conditions of employment and the putative joint employer meaningfully affects the matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction.”

As a practical matter, when determining if a joint employer relationship exists for enforcement purposes, OSHA looks at the following factors:

- Overall Relationship Between Corporate and Franchise;
- Written Documentation of Corporation Direction and Control of Franchise;
- Corporate Control Over the Essential Terms and Conditions of Employment of the Workers at the Franchise; and
- Corporate Control Over Safety and Health Policies & Procedures at Franchise.

Once the initial relationship issues are sorted out, OSHA will critically scrutinize safety and health issues such as:

- Corporate standards for safety training,
- Whether corporate provides a safety and health program,
- PPE instruction and provision by corporate,
- Whether corporate reviews OSHA 300 logs for its franchisees,
- Whether corporate audits the franchisee facilities for safety and health,
- Whether franchisees must inform corporate about safety complaints and issues, and
- Whether the franchisee can independently implement safety and health policies without any involvement of corporate

The first major development on the joint employer front in the Trump Administration came in June 2017, when Labor Secretary Acosta withdrew the 2015 DOL guidance, and removed it from the DOL and OSHA websites, even though it continues to be enforced. In fact, DOL stressed that the removal of the Obama-era guidance did not change legal responsibilities of employers or existing case law.

However, enforcement is in limbo when it comes to how multiple entities will be prosecuted as “joint employers.” DOL previously viewed “joint employment” as existing “when an employee is employed by two (or more) employers, such as that the employers are individually and jointly responsible to the employee for compliance with a statute.” This affected franchise operations where the franchisor maintains significant control over the operations, HR and safety for franchise holders. It also was applied to relationships between host employers and staffing agencies that provide temporary workers.

This becomes a more significant issue as the use of temporary workers, “contractors” and others in flexible or gig-style arrangements grows. A 2016 National Bureau of Economic Research study found the percentage of workers engaged in alternative work arrangements – (temporary or help agency workers, on-call workers, contract workers, and independent contractors or freelancers) – rose to nearly 16% in 2015 from just 10% a decade earlier.

These types of contingent workers are also over-represented in fatal and serious accident cases, when compared with their overall presence in the workforce. Too often, these workers fall through the gaps in safety programs, as each entity assumes the other has provided the requisite training or medical evaluations. From OSHA’s perspective, there can be no second-class citizens when it comes to safety protections.

Under the multi-employer worksite doctrine (recently reaffirmed by the US Court of Appeals, 6th Cir., in the *Hensel Phelps* 2018 decision) OSHA can issue citations to the host employer, the staffing agency, or both, for hazardous exposures to the temporary worker or inadequate training or safety supervision. Moreover, if the worker is injured, there is normally no worker’s compensation shield for the host employer, and OSHA citations may be used as proof of negligence per se in personal injury or wrongful death tort actions.

So what will be the impact of the newly proposed DOL rule on joint employers? The proposal would replace the Obama era test with a new four-factor analysis that considers whether the potential joint employer actually exercises the power to: (1) Hire or fire the employee; (2)

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Supervise and control the employee’s work schedules or conditions of employment; (3) Determine the employee’s rate and method of payment; and (4) Maintain the employee’s employment records. Interested parties can submit comments on the revisions to www.regulations.gov and reference DOL Docket RIN 1235-AAA-26.

Meanwhile, over at the National Labor Relations Board (NLRB), the joint employer issue is also the subject of a proposed rulemaking and this could further complicate OSHA enforcement authority. The NLRB has proposed narrowing the definition of when contractors or franchisees are “joint employers” subject to labor laws including worker safety requirements.

The NLRB plan would reverse the same *Browning-Ferris Industries* decision that was used in 2015 to broaden the definition to apply “even when any joint control is not ‘direct and immediate’” ... based on mere existence of “reserved” joint control, indirect control or control that is “limited and routine.” The NLRB proposed rule was published in September 2018 but the comment period closed in January 2019, after the agency received over 26,000 comments (pro and con) on the proposal.

NLRB’s proposal states that an employer “may be considered a joint employer of a separate employer’s employees only if the two employers share or co-determine the employees’ essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction,” but the big change is that the employer would have to possess and actually exercise substantial direct and immediate control over the terms and conditions of employment in a manner that is not limited and routine.

For employers whose worksites may fall under the changing definitions of joint employer, this issue needs to be monitored closely in terms of DOL activity. Moreover, both union and non-union worksites need to stay tuned to changes under the NLRB joint employer rule, which may carry over to OSHA enforcement, or otherwise influence the ultimate position adopted by the Labor Department in the future. For assistance on safety, employment or labor law matters, contact Adele Abrams at safetylawyer@gmail.com or 301-595-3520.

CalOSHA Standards Board Denies Proposed Changes to Injury and Illness Programs

By Joshua Schultz, Esq., MSP

On December 3, 2018, the California Industrial Hygiene Council (“the Council”) petitioned the California Occupational Safety and Health Standards Board (“the Board”) to amend the Injury and Illness Prevention Program (IIPP) requirements. On May 16, 2019, the Board formally denied the petition.

The California Labor Code specifically permits interested persons to propose new or revise existing safety and health regulations and requires the Board to consider such proposals and render a decision no later than six months following receipt. The California Industrial Hygiene Council proposed revisions to the IIPP requirements under this provision to the Labor Code. The proposed revisions would have added a definition of “effective”, added “qualified person” requirements for inspections and investigations, added a requirement for a “competent person” to administer IIPP’s, and required mandatory labor/management safety meetings for employers with greater than 20 employees.

The proposal sought to define the term “effective” to help employers greater determine compliance with the IIPP regulations. The current language in the regulations requires that “...every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program)...” The term “effective” has not been defined in the regulations, and the proposal suggested defining the term to ensure a clear-cut compliance requirement to eliminate ambiguity for employers.

The Council proposed defining an effective IIPP as one that “has a written program in compliance with the basic Cal/OSHA elements; has a ‘competent person’ as the IIPP administrator; can demonstrate employee awareness and involvement; is providing training to line employees, supervisors, and upper level management which imparts information and skills each of these groups needs so that all health and safety issues are fully addressed; and can document that planned activities are being realized.” This definition would provide employers with a clear roadmap to compliance and leave them less subject to the whims of an inspector’s interpretation.

In denying the petition, the Board rejected the need for more specific guidelines for determining compliance with the “effective” provision for an IIPP, reasoning that “defining ‘effective’ for a performance standard where components of an effective IIPP may vary depending on employer, industry, workplace hazards, environment,

CalOSHA Standards, con't

and other variables would be problematic and may cause unintended consequences." The Board did not provide examples of these unintended consequences in its denial.

The Council's proposal further sought to add a "qualified person" requirement for inspections and investigations. Currently, IPPs are required to "include procedures for identifying and evaluating workplace hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards." The petition proposed requiring that these inspections be performed by a qualified person, as many other California safety and health regulations have similar requirements. The Board denied this provision, noting that prescriptively defined qualifications are not necessary to effectively carry out these inspections.

Finally, the Council recommended amending the requirements regarding labor/management safety and health committees to require that employers with greater than 20 employees be required to have a labor/management safety committee. Currently, these committees are optional, and the Board denied this provision noting that the committees may not be effective for certain businesses, "such as an employer with individual or small number of employees spread out over several locations statewide."

LABOR-HHS Appropriations Update

By Adele L. Abrams, Esq., CMSP

On May 8, 2019, the House Labor-HHS Subcommittee and House Appropriations Committee approved legislation to fund OSHA, MSHA and NIOSH (among other agencies) for FY 2020, which commences on October 1, 2019. The legislation now proceeds to the Senate, which is likely to take a harder line on proposed funding hikes, but which must confer with the House to avoid agency shutdown or a continuing resolution. All funding bills originate in the House of Representatives.

In discussing funding for OSHA, the following report language signals congressional concern: "*The Committee notes that under OSHA's current staffing levels, it would take the agency an average of 165 years to inspect each employer within its jurisdiction just one time.*" The proposed funding levels include:

- \$661 million for the Occupational Safety and Health Administration, an increase of \$103 million above current levels and the President's budget request
- Current funding FY 2019 -- \$557,787,000

- Budget request, FY 2020 -- \$557,533,000
- Committee Recommendation -- \$660,908,000

Proposed program area funding for FY 2020 for OSHA include:

- Safety and Health Standards \$23,100,000
- Federal Enforcement \$246,383,000
- Whistleblower Programs --\$18,809,000
- State Programs --\$123,233,000
- Technical Support --\$30,597,000
- Federal Compliance Assistance --\$86,623,000
- State Consultation Grants -- \$64,687,000

While the proposed administration budget request called for zeroing out the Susan Harwood Training Grants program, which normally has received \$10.5 million, the FY 2020 bill calls for an increase in the grants program, to \$12.7 million.

The OSHA Committee Report called for OSHA to look into strengthening its occupational noise standards, and it urged OSHA not to revoke ancillary provisions from the 2017 final rule limiting exposure to beryllium that protect workers in shipyard and construction industries.

Finally, the Committee took issue with the stagnation of items on OSHA's existing regulatory agenda, particularly workplace violence. It expressed deep concern that OSHA is failing to move forward to develop and issue needed standards on major safety and health problems.

The Committee called workplace violence a "growing problem that has reached epidemic levels." Workplace violence is now the third leading cause of death and is responsible for nearly 30,000 serious injuries every year. Nurses, medical assistants, emergency responders and social workers face some of the greatest threats, suffering more than 70 percent of all workplace assaults. Women workers are at particular risk, suffering two out of every three serious workplace violence injuries.

In January 2017, OSHA committed to developing and issuing a workplace violence standard, but the agency has not yet completed a required small business review, although it may be undertaken shortly. However, the Committee directed that, in order to monitor the agency's progress on this important rule, OSHA must brief Congress, within 90 days of enactment of the Appropriations bill, on a schedule for moving this rule to completion, including the dates on which a proposed rule and final rule will be issued.

On the MSHA side, the Committee approved a recommendation of \$417.3 million, which is \$43.5 million higher than FY 2019 levels, and is also \$41.3 million more than in President Trump's FY 2020 budget request.

LABOR-HHS Appropriations, con't

The Committee Report also sent a strong signal to MSHA concerning pending rulemaking: *"The funding increase will support MSHA's enforcement of the 2014 respirable dust rule and expanded monitoring of operator compliance with its existing silica rule. In addition, the Committee strongly encourages MSHA to develop a more protective silica monitoring standard."*

The Committee also expressed concern about MSHA's proposal to merge the Coal Mine Safety and Health budget activity with the Metal and Nonmetal Mine Safety and Health budget activity. It stated: *"Given the differences in complex safety and health issues between both categories of inspections, the Committee is concerned that a merger could compromise MSHA's mission and make workers less safe. Therefore, the Committee recommendation does not consolidate these two activities as proposed in the fiscal year 2020 budget request."* It is not clear how MSHA will respond to this, as the "blurring" of lines and personnel between coal and metal/nonmetal mines is a key initiative of MSHA Chief Dave Zatezalo.

The National Institute for Occupational Safety and Health (NIOSH) conducts applied research, develops criteria for occupational safety and health standards, and provides technical services to government, labor, and industry, including training for the prevention of work-related diseases and injuries. While it is part of the U.S. Department of Health & Human Services, not the Department of Labor, its funding is included in the same legislation.

The proposed NIOSH appropriation supports surveillance, health hazard evaluations, intramural and extramural research, instrument and methods development, dissemination, and training grants. The Committee recommended the following amounts in key areas:

- National Occupational Research Agenda \$118,000,000
- Agricultural, Forestry, and Fishing \$27,500,000
- Education and Research Centers \$31,000,000
- Personal Protective Technology \$20,000,000
- Mining Research \$59,500,000
- Firefighter Cancer Registry \$1,600,000
- Other Occupational Safety and Health Research \$116,200,000
- National Mesothelioma Registry and Tissue Bank \$1,600,000
- Total Worker Health \$7,000,000

Medical Cannabis Use May Be Protected By NJ Disability Law

By Adele L. Abrams, Esq., CMSP

A March 2019 NJ appellate court ruling in *Wild v. Carriage Funeral Holdings et al.*, has held for a terminated employee who legally used medical marijuana and reversed a lower court holding in favor of the employer. The Plaintiff asserted that his employer's unlawful discrimination arose from his use of medical marijuana, permitted by the New Jersey Compassionate Use Medical Marijuana Act, N.J.S.A. 24:6I-1 to -16, as part of his cancer treatment. The lower court had dismissed his claim, and the Superior Court of NJ reversed.

Critical to the issues presented, the NJ Legislature's declaration that an authorized medical-marijuana user may not be criminally prosecuted included a declaration that "nothing" in the Compassionate Use Act "require[s]" an employer to accommodate a medical marijuana user. Based on that provision, defendants argued – and the lower court held – that plaintiff's related claim – brought under the NJ state Law Against Discrimination (LAD) action could not go forward.

Plaintiff Wild works for Carriage as a licensed funeral director. The job required, among other things, that he direct funerals, engage in visitations, perform embalming, "cosmetize" the deceased, prepare death certifications, conduct religious services at gravesites, and drive the funeral home's hearse and other vehicles. In 2015, Wild was diagnosed with cancer. As part of his treatment, his physician prescribed marijuana as permitted by the Compassionate Use Act.

In May 2016, while working a funeral, a vehicle plaintiff was driving was struck by a vehicle that ran a stop sign. Sustaining injuries, Wild was taken by ambulance to a hospital emergency room.

At the hospital, he advised a treating physician that he had a license to possess medical marijuana. The physician responded that "it was clear [plaintiff] was not under the influence of marijuana, and therefore no blood tests were required."

After being examined, the plaintiff was given pain medication and sent home. Once home, he took his prescribed pain medication and used medical marijuana. Later that day, the employer's representatives called and spoke to the plaintiff's father to advise that a blood test was required before the plaintiff could return to work. His father protested that "[plaintiff] was not under the influence at the time of [the] accident," that "the hospital determined he was not under the influence," and that "the [hospital]

Medical Cannabis Use, con't

doctor . . . would not participate in any type of blood testing." It also was noted that Wild's drug test would test positive because the marijuana stays in one's system for 45 days and he had used medical cannabis after the accident.

The employer still required the plaintiff to take a blood test at an urgent care facility. There, the physician opined that "testing [the plaintiff] was illegal, and he warned that the results would be positive due to the marijuana and the prescription pain killers taken after the accident. In lieu of blood testing, the physician had the plaintiff take a urine and breathalyzer test. The Plaintiff was never given the results of those tests, and the results were not in the court record. The employee did return to work, on a reduced schedule due to pain and his injuries, but then was told that "corporate" was unable to "handle" his marijuana use and that his employment was "being terminated because they found drugs in [his] system."

The appellate court held that because the NJ Compassionate Use Act declared it should not be construed to "require" an accommodation, this did not mean such a requirement might not be imposed by other legislation, including the LAD. The three-panel court wrote:

"In short, like the first law of thermodynamics, that provision – beyond its own limited criminal and regulatory context – neither creates nor destroys rights and obligations. So, we reject the essential holding that brings this matter here and conclude that the Compassionate Use Act's refusal to require an employment accommodation for a user does not mean that the Compassionate Use Act has immunized employers from obligations already imposed elsewhere. It would be ironic indeed if the Compassionate Use Act limited the Law Against Discrimination to permit an employer's termination of a cancer patient's employment by discriminating without compassion."

OSHA and MSHA Announce Regulatory Agenda By Gary Visscher, Esq.

Just before the Memorial Day holiday, the Trump Administration released its Spring 2019 Regulatory Agenda. The Regulatory Agenda lists regulatory actions which each agency anticipates taking during the next 12 months.

Agencies may also publish a separate list of "Long

Term Actions," which lists regulations which the agency is working on but no specific step in the regulatory process is anticipated next year.

OSHA

OSHA identified two new regulations that it is working on, both listed as Long Term Actions. One is a rule regarding Drug Testing and Safety Incentives – according to OSHA, the rule would codify OSHA's 2018 memorandum which in turn was an attempt to clarify the preamble to OSHA's injury and illness electronic reporting rule's discussion on post-accident drug testing and safety incentive programs. The second new item, also listed as "Long Term Action," is a rule to "clarify requirements for the fit of personal protective equipment in construction."

Other items on OSHA's "Long Term Actions" list are previously worked on rulemakings on infectious disease, Process Safety Management standard amendments, a separate column (on injury and illness records) regarding MSDs, and fall protection in shipyards. No specific action or timetable is given for any of these items. Most of the most significant issues on OSHA's "active" Agenda, as in previous agendas, are at the "pre-rule" stage. Items that the Regulatory Agenda includes in the pre-rule stage are:

- a new standard on Communication Tower construction and maintenance,
- a comprehensive standard on Emergency Response,
- updates to the Mechanical Power Press, Powered Industrial Truck and Lock Out Tag Out standards (the anticipated action in each of these is a Request for Information (RFI). OSHA issued the RFI on Powered Industrial Trucks on 3/11/2019, and the RFI on LOTO on 5/20/2019).
- a new standard on Tree Care operations,
- a new standard on Prevention of Workplace Violence in Health Care and Social Assistance,
- revising (by reducing the blood lead levels for Medical Removal) the general industry and construction lead standards, and
- revisions to the Construction Silica standard's Table 1.

OSHA plans to issue five proposed rules. They include

- amendments and corrections to the 2010 Construction Crane standard,
- updates to the 2012 Hazard Communication Standard
- implementation of 2014 court settlement on exemption of railroad roadway work from the Construction Crane standard
- final approval for the Puerto Rico state plan, and
- amendment to the 2015 Construction Confined Space standard regarding welding in confined spaces.

Regulatory Agenda, con't

OSHA lists six final rules which it plans to issue during the relevant time period. OSHA has already issued the first of those, the Standard Improvement Project IV rule, which was published in the Federal Register on May 14, 2019.

In addition, final rules are planned to amend Fit Testing protocols under the Respiratory Protection standard, to amend rules of practice for OSHA access to employee medical records, and to make technical corrections to 35 standards and regulations. In addition, OSHA plans to finalize two rules growing out of the recent standard on beryllium exposure. Both rules would codify changes to the beryllium standard that OSHA made shortly after the rule was promulgated in 2017.

MSHA

MSHA identifies 6 items in its "active" Regulatory Agenda, including a standard on exposure to respirable crystalline silica. The Agenda states that MSHA plans to publish a Request for Information on a silica rule in July 2019.

MSHA also plans to continue work on its Retrospective Study of the Respirable Coal Dust Rule, though no specific action is listed after the current RFI comment period concludes.

Two items on MSHA's Agenda were subjects identified during the agency's review of existing regulations, as required by Executive Order 13771. MSHA plans to issue a Direct Final Rule and a Notice of Proposed Rulemaking on the use of electronic detonators for explosives and blasting at metal/nonmetal mines. MSHA also plans to issue a Direct Final Rule and Notice of Proposed Rulemaking on the use of non-permissible surveying equipment in underground coal mines.

MSHA also plans to issue a proposed rule on safety programs for mobile equipment and powered haulage equipment at surface mines and surface areas of underground mines. MSHA held a series of stakeholder meetings and RFI on this topic in 2018. The proposed rule is projected for publication in March 2020.

MSHA lists just one final rule (in addition to the Direct Final Rules listed above): a final rule addressing issues resulting from the remand of the Refuge Alternatives Final Rule, which MSHA originally issued in 2009.

If you have questions or would like more information about any of these items, please contact the law office.

OSHA Issues Request for Information On Possible Updates to the Lockout/Tagout Standard By Brian S. Yellin, Esq., CIH, CSP

On May 17, 2019, OSHA issued a request for information (RFI) seeking comments on the use of control circuit-type devices to isolate energy. The RFI also seeks comments regarding evolving technology involving robotics and the potential risks workers may encounter when interacting with robotic machines. Comments to OSHA's RFI are due on or before August 19, 2019.

Background

OSHA's Lockout/Tagout final rule, 29 C.F.R. 1910.147, became effective September 1, 1989. The Lockout/Tagout standard requires employers to develop and utilize standardized procedures for the control of potentially hazardous energy (e.g. electrical, pneumatic, steam, chemical, gravity, etc.) during servicing and maintenance of machines or equipment. The intent of the standard is to prevent the unexpected energization or start-up of machines or equipment.

29 C.F.R. 1910.147 recognizes that some activities, which are classified as servicing or maintenance, but that are frequently performed during normal production operations (e.g. lubricating, cleaning, unjamming, minor adjustments and simple tool changes), do not require the application of lockout/tagout so long as "the activity is performed using alternative measures which the employer can demonstrate are equally effective." Such "alternative measures" include control circuit devices (other "alternative measures" include control equipment and operating procedures).

Control circuit devices are used to "turn on" or "turn off" current flow in an electrical circuit. Control circuit devices include a variety of switches, relays, and solenoids, and are needed to start, stop or redirect current flow in an electrical circuit and can be found as part of push buttons and selector switches. The basis of OSHA's Lockout/Tagout RFI is to solicit industry input whether control circuit devices can properly be considered "energy isolation devices." OSHA's Lockout/Tagout standard, 29 C.F.R. 1910.147(b) defines "energy isolation device" as:

LOTO Comments, con't

A mechanical device that physically prevents the transmission or release of energy, including but not limited to the following: A manually operated electrical circuit breaker; a disconnect switch; a manually operated switch by which the conductors of a circuit can be disconnected from all ungrounded supply conductors, and, in addition, no pole can be operated independently; a line valve; a block; and any similar device used to block or isolate energy. Push buttons, selector switches and other control circuit type devices are not energy isolating devices.

Examples of “energy isolation devices” include manually operated electrical circuit breakers, disconnect switches, a line-valve, bolted blank flanges, blocks, etc. OSHA clearly states in the preamble to the final rule that the agency intended the Lockout/Tagout standard to be performance based providing employers flexibility “to develop an effective program (procedures, training and inspections) which meets the needs of the particular workplace and the particular types of machines and equipment being maintained or serviced.” In its Final Rule, OSHA determined that the use of control circuit devices was not permissible as a means of energy isolation.

Discussion

Since the Final Rule became effective, OSHA received numerous questions regarding the use of control circuit devices as energy isolation devices. For example, in an April 5, 1991 Letter of Interpretation (LOI), OSHA responded to a question regarding the use of a motor starter (a control circuit device) as an energy isolation device. OSHA stated, “[t]he intent of the standard was not to include motor starter circuits within the scope of the definition of energy isolation devices” and that “such mechanisms will not be sufficient to provide the protection envisioned by the standard.”

OSHA’s response was based on the fact that if a control circuit device such as a motor starter fails, the failure could cause the actual three-phase wires feeding electricity to the motor, coils, armature, and other related circuits to become energized. Similarly, in a January 25, 2008 LOI, OSHA stated that reliance on a “programmable logic controller” (PLC) as a means to isolate hazardous energy “is prohibited by the LOTO standard and, as a result, is presumed to be ineffective employee protection from injuries resulting

from hazards such as component failure, program errors, magnetic field interference, electrical surges, and improper use or maintenance.” However, both OSHA’s preamble and its various pertinent LOI’s recognize the role that circuit control devices play in safeguarding employees performing routine adjustments to, and clearing of equipment.

More specifically, OSHA stated in a July 23, 2003 LOI:

... a circuit that meets the control reliability and control-component-failure-protection requirements of the American National Standards for machine tools (ANSI B11.19-1990) would provide alternative safeguarding measures with respect to the minor servicing exception contained in 1910.147(a)(2)(ii). In other words, a circuit meeting the above referenced control reliability standards may be used in cases in which minor tool changes and adjustment, and other minor servicing activities, are performed during normal production operations, and are routine, repetitive, and integral to the use of equipment for production.

Thus, employers may use circuit control devices to stop equipment in order to perform routine adjustments, clearing jams, changing tools, etc., but may not use circuit control devices as “energy isolation devices” when maintaining and repairing equipment.

It is important to note that National Fire Protection Association (NFPA) publication 70E, Standard for Electrical Safety in the Workplace (2018), also prohibits the use of circuit control devices as “energy isolation devices.” More specifically, NFPA 70E, Art. 120.2.(F) states: “Locks/tags shall be installed only on circuit disconnecting means. Control devices, such as push-buttons or selector switches shall not be used as the primary isolating device.”

In order for industry to prevail upon OSHA that circuit control devices should be considered “energy isolation devices,” proponents will have to demonstrate that advancements to circuit control device technology have eliminated such risks as “component failure, program errors, magnetic field interference, electrical surges, etc.” Additionally, proponents of circuit control devices as “energy isolation devices” will need to demonstrate their reliability (if properly maintained), and feasible means and methods that ensure they are used properly.

Brian serves in the capacity, Of Counsel, and has nearly twenty-nine (29) years of experience as an occupational safety and health professional. Please contact the Law Office for more information or assistance with submitting comments.

Illinois Law that Never Stops Giving

By Michael Peelish, Esq.

Under a 2015 Illinois Supreme Court Decision (*Folta v Ferro Engineering*), the court upheld the 25-year statute of limitations under the state's Workers' Compensation and Workers' Occupational Diseases Acts. In that case, James Folta was diagnosed with mesothelioma 41 years after his exposure to asbestos-containing products during his four years as a shipping clerk and product tester for Ferro Engineering. The court ruled the state's Workers' Compensation and Workers' Occupational Diseases Acts barred Folta and his family from seeking compensation from Ferro Engineering. The court ruled that while Folta and his family could not receive compensation from his former employer, they could recover damages from third parties like the products' manufacturers.

To correct this perceived wrong, the Illinois legislature passed a new law. The new law allows Illinois workers and their families to sue employers for long-developing occupational illnesses. The law enables workers and their families to file civil suits against employers after the clock has run out on the state's workers' compensation and occupational diseases laws. The new law also:

- Has no cap on employer liabilities, including punitive damages; and
- Allows an employee, employee's heirs, or anyone with standing to sue an employer.

While there was opposition to the legislative bill, it came late since the Chamber of Commerce stated that employers were not consulted during its development. Now, the bargain that workers compensation laws have historically provided is being whittled away in Illinois.



Adele Abrams presents
"Medical Marijuana & Workplace Safety",
at the Minnesota Safety Council annual conference in May 2019.

MSHA's Regulatory Agenda and Prerule Stage – Respirable Crystalline Silica

By Michael Peelish, Esq.

MSHA released its semi-annual regulatory agenda and this is what it said regarding Respirable Crystalline Silica ("RCS"):

MSHA has issued a Request for Information to solicit information and data on the best and most feasible ways to protect miners' health from exposure to quartz in respirable dust, including an examination of an appropriately reduced permissible exposure limit, potential new or developing protective technologies, and/or technical and educational assistance.

What MSHA is saying is that it will reduce the RCS permissible exposure limit to the OSHA standard of 50 $\mu\text{g}/\text{m}^3$. While MSHA may believe it is different than OSHA in many aspects of addressing RCS exposure, it is hard for MSHA to make that argument when it comes to the dose and health effects of exposure to RCS. I am not opining from a scientific point of view; I am just noting the practical/policy landscape that has been in play within the Department of Labor for many years and the decision of the DC Circuit Court in December 2017 that states the adverse health effects to RCS exposure of 50 $\mu\text{g}/\text{m}^3$ is supported by the evidence.

What MSHA is saying is that it will require engineering controls as the means to reducing miners' exposure. This approach follows the industrial hygiene triangle for managing risk. MSHA should also include administrative controls such as operator rotation. It is nonsensical to take coal dust samples of designated occupations wherein miners would be required to transfer a pump during the sampling process when another miner steps into the designated occupation. Once this transfer is done, this sample is akin to an area sample and no longer a personal sample.

What MSHA is not saying is that respiratory protection is an acceptable compliance measure. Currently, under the new coal dust standard, respiratory protection is acceptable only after a non-compliant sample is obtained and during the corrective action period. At what point does MSHA recognize the full value of respiratory protection and provide for the use of respirators for compliance purposes as OSHA does?

MSHA's Respirable Crystalline Silica, con't

The interim mandatory health standards for coal mines set forth in Section 202 of the Mine Act of 1977 prevented the use of respirators for compliance purposes. However, that was an interim mandatory health standard. Nothing in the Mine Act prevented the ongoing use of respirators for compliance purposes for non-coal mines except when drilling rock. Thus, MSHA has the statutory authority to allow for the use of respirators in all mining for compliance purposes.

The interim health standards were put in place in coal over 40 years ago when production was a fraction of where it is today. The approach of lowering the coal dust standard or lowering the RCS standard while maintaining an outdated approach to proper industrial hygiene practices is nonsensical. Indeed, MSHA has accepted the use of respirators for compliance purposes under the diesel standard (30 CFR §57.5060) when "...controls are infeasible, or controls do not produce significant reductions in DPM exposures...".

It is time the reports of black lung or silicosis stop making the news. MSHA has within its authority to make a break-through in managing exposures to coal dust as well as silica in all types of mining. Please don't miss the opportunity.

MSHA Discusses Updated Mine Data Retrieval System During Quarterly Training Call

By Joshua Schultz, Esq.

During a May 2, 2019 Quarterly Training Call, MSHA discussed changes to MSHA's Mine Data Retrieval System. The new system is available on MSHA's homepage under a link titled "***New and Improved Mine Data Retrieval System (MDRS Beta Testing)**". The former Data Retrieval System is still available on their website at the same URL. The new system allows users to generate comprehensive reports for each mine or multiple mines sorted by name, commodity or county name. MSHA walked participants through the use of their new system on the call; an instructional user guide is available on their [website](#).

Assistant Secretary of Labor for Mine Safety and Health David Zatezalo also noted that MSHA is moving forward with the second phase of the "One MSHA" initiative, adding about 117 mines to those which are already being inspected by "cross-trained inspectors" - a program in which MSHA trains inspectors to visit both coal and metal/nonmetal mines. Further, Assistant Secretary Zatezalo noted that the agency is accepting

applications to fill the Deputy Administrator for Mine Safety and Health Enforcement position, which would have a coal focus.

MSHA also reminded stakeholders of the availability of up to \$400,000 in funding for training and education through its Brookwood-Sago grant program. The grants focus on "powered haulage safety, emergency prevention and preparedness, examinations of working places at metal and nonmetal mines, or other programs to prevent unsafe conditions in and around mines." Priority will be given to programs and materials that target miners at smaller mines, including training miners and employers about new agency standards, high-risk activities, or hazards identified by MSHA.

Finally, MSHA addressed the five fatalities which have occurred in the Coal and Metal/Nonmetal sectors in 2019, addressing best practices to prevent future occurrences.

Commission Finds Connected Boiler Subject to PSM, but denies "Repeat" Violation

By Gary Visscher, Esq.

In *Wynnewood Refining* (3/28/2019), the OSH Review Commission addressed two long-standing issues: (1) when are containers (vessels) which do not themselves contain the threshold amount of hazardous chemicals nonetheless covered by the Process Safety Management (PSM) standard because the vessel is part of a covered "process," and (2) when may a successor enterprise be liable for a "repeat" violation based on violations by a predecessor.

Wynnewood Refining Company, LLC operates an oil and gas refinery in Oklahoma. During a 2012 "turnaround," a boiler exploded, killing one employee and critically injuring another, and triggering an inspection by OSHA. OSHA issued 12 citation items, a second inspection resulted in an additional 3 items involving the boiler, and all alleged violations of the PSM standard. Wynnewood LLC argued that the boiler did not contain the threshold level of flammable material, and therefore was not covered by PSM. OSHA alleged that the boiler was covered because the boiler was part of a covered "process" under PSM.

The PSM standard defines a "process" as "any group of vessels which are interconnected and separate vessels which are located such that a highly hazardous chemical could be involved in a potential release." The Commission interpreted this definition as including two separate tests, either of which would trigger PSM coverage: interconnectedness or location.

Boiler Subject, con't

Citing the dictionary definition of “interconnect,” the Commission said the “interconnectedness” test did not require a direct connection between the vessel and processing units or equipment. The boiler which exploded at Wynnewood was one of four boilers that were fed into a steam header which in turn provided steam for powering equipment and use in refining processes. The Commission distinguished the term “interconnect,” which “contemplate[s] the linking together of multiple objects, which necessarily includes an indirect link between some of them,” with “connect,” which would describe a direct link.

The Commission also found that the boiler met the “location” test, which the standard defines as “located such that a highly hazardous chemical could be involved in a potential release.” The boiler was located 100 feet from a reactor column containing highly hazardous chemicals. Wynnewood argued that the standard requires the potential for release of a highly hazardous chemical would be “probable.” The Commission rejected this argument, citing the language in the standard – “could be involved in a potential release.” The Commission also cited evidence from the hearing that the consequences of the boiler explosion at Wynnewood could have been much more catastrophic than was in fact the case.

While siding with the Secretary on upholding the PSM citations, the Commission declined to find that any of the citations were “repeat,” as had been alleged by OSHA. The “repeat” characterization as alleged by OSHA was based on PSM citations which became final in 2008, when the refinery was owned and operated by Wynnewood Refining Company. Wynnewood Refining Company was then owned by Gary-Williams Energy Corporation. The stock of the parent corporation was subsequently purchased by CVR Energy, and the new owners registered Wynnewood as an LLC.

Previous Commission decisions applied a “substantial continuity” test to determine whether repeat violations would be upheld where the legal identity of the cited employer has been changed from that of the predecessor employer. The Commission acknowledged that “the refinery’s business, products, jobs, and working conditions were the same under both entities.” However, the Commission majority (the decision was 2-1 on this part) found that the refinery had hired several new managers, including persons responsible for health and safety at the refinery, and so found that there was not “substantial continuity” of personnel.

The two commissioners in the majority, however, also indicated that that they did not agree that “substantial continuity” was the appropriate test, and that the applicability of the test should be revisited. Without expressly adopting this as a new test, the majority indicated that any change in legal identity would prevent a “repeat” violation, unless the cited employer had altered its legal identity “simply to avoid a repeat characterization.”

The Commission’s decision is the second significant decision in recent months affecting and limiting OSHA’s characterization of violations as “repeat” violations (which currently carry a maximum penalty of \$132,598). In *Angelica Textile Services*, (6/24/2018), the Commission held that a violation of the same standard was not a “repeat” if the conditions and circumstances of the later violation were different from the earlier violations, even if the same standard was cited (see August 2018 newsletter). The Secretary of Labor has appealed the Commission decision in *Angelica Textile* to the U.S. Court of Appeals for the Second Circuit.

Please let us know if you have any questions or would like additional information regarding either of these cases.

Inspector General Critiques OSHA’s Issuance of “Guidance” Products By Gary Visscher, Esq.

A recent report by the Department of Labor’s Office of Inspector General (OIG) reported that “OSHA’s procedures for issuing guidance were not adequate and mostly not followed.”

The “guidance” referred to in the OIG report was a wide array of written products and publications. The OIG report focused on publications and documents issued by OSHA between October 1, 2013 and March 18, 2016. The OIG found that during that time period OSHA issued 296 guidance documents. They included Memos for Regional Administrators, Letters of Interpretation, Fact Sheets, Quick Cards, Hazard Bulletins, Safety Booklets and Guides, Health and Safety Bulletins, web pages, posters (e.g. Workers’ Rights poster), Compliance Directives, Safety Alerts, and Program Guides and Manuals.

Guidance documents are issued without going through a notice and comment rulemaking. They do not have the force and effect of law, but OSHA may use them to guide enforcement and they may be deemed by courts as providing “notice” of an agency’s interpretation of a standard or legal requirement.

Inspector General, con't

Most of the 296 documents in the OIG study were not controversial when issued, but the OIG report notes that during the studied time period, four were challenged in federal court as constituting illegal rulemaking:

- (1) 2013 letter of interpretation regarding non-employees affiliated with a union or community organization to serve as an employee representative at a non-union worksite if authorized by employees. A lawsuit was filed against the letter of interpretation. Prior to resolution of the lawsuit, the Trump Administration withdrew the letter in 2017.
- (2) 2015 standard interpretation letter which defined a covered process under the Process Safety Management (PSM) standard to include a "one percent" test for chemicals listed in Appendix A. The lawsuit was settled in 2016, after OSHA withdrew the initial letter and issued a new interpretation exempting certain chemical mixtures.
- (3) 2015 standard interpretation letter defining RAGAGEP (Recognized and Generally Accepted Good Engineering Practices) under PSM. The lawsuit was settled after OSHA withdrew the initial letter and issued a revised letter.
- (4) 2015 standard interpretation letter which re-defined "retail facilities" under the PSM standard. In September 2016 the D.C. Circuit overturned the interpretation, holding that it was a "standard" within the definition of the OSH Act and required notice and comment rulemaking.

The OIG faulted OSHA for not establishing adequate procedures for issuing guidance. According to the OIG report, OSHA "lacked procedures to determine if it was appropriate to issue a document as guidance rather than a rule." The OIG said that "OSHA had written procedures for the review and approval of guidance" but "did not have procedures to help staff determine if issuing guidance or making rules was the appropriate course of action." The OIG noted that the "Standards for Internal Control in the Federal Government require OSHA to have effective internal controls to provide reasonable assurance of compliance with federal laws, such as the APA and OSH Act."

The OIG said that OSHA's existing written procedures were not adequate because they did not require "a

written analysis, justification, or other record demonstrating that the guidance would not establish a new policy or procedure."

The OIG also found that OSHA could not assure compliance with the procedures it did have in place. The OIG said that in a sample of guidance documents, OSHA staff either did not follow, or did not document compliance with, existing procedures and criteria for issuance of guidance documents in 80% of the documents in the sample.

OSHA largely accepted the OIG's report and indicated that it has been working on clarifying the procedures for determining when guidance documents are appropriate and assuring that the procedures are followed. OSHA noted, however, that "a different level of review and analysis is appropriate for different types of documents." OSHA said that based on the four challenges to guidance documents discussed earlier, "OSHA leadership and staff, as well as the Solicitor's Office, are acutely aware of the potential legal risks of issuance policy guidance documents. Going forward, the agency will carefully weigh and deliberate the pros and cons of issuing guidance and ensure appropriate documentation of those decisions."

The OIG report has apparently triggered action at the Department of Labor level. Testifying before Congressional committees, Secretary of Labor Acosta said that the Department of Labor is planning an internal audit to look at issuance of guidance documents by all DOL agencies, and is considering a new Department-wide procedural rule to limit and establish procedures for issuing guidance documents.

2019 SPEAKING SCHEDULE**ADELE ABRAMS**

2019 Speaking

June 18: SAFEPRO Mine Safety Law Institute, Savannah, GA

July 16: North American Meat Institute, Washington, DC, Drones & Safety

July 24: AGC Safety Conference, Seattle, presentation on Opiates, Medical Marijuana & Safety

August 12: Southeast Workers Compensation conference, Orlando, Presentation on OSHA in the Age of Trump

September 7: National Safety Council, San Diego, Full Day Workshop on Workplace Violence, Sexual Harassment and Workplace Safety

September 10: National Safety Council Annual Congress, San Diego, Presentation on Joint Employer Safety

September 19: Minnesota Concrete Council, Minneapolis, Training on OSHA Silica Standard

2019 Webinars

June 27: BLR Webinar on Trenching & Excavation Safety (with Brian Yellin, Esq., CIH, CSP)

July 31: Clearlaw Webinar on Workplace Violence and OSHA

MICHAEL PEELISH

6/18 – Chesapeake Regional Safety Council – Competent Person Training – Montgomery County, MD

6/20 – BLR Webinar – Temporary Workers

7/12 – Chesapeake Regional Safety Council – Competent Person Training