



OSHA Issues Revised Policy on Safety Incentive & Drug Testing Programs

By Adele L. Abrams, Esq., CMSP

On October 11, 2018, OSHA issued a memorandum, clarifying the agency's position on how the new e-recordkeeping rule (which amended 29 CFR Part 1904, and added new anti-retaliation provisions to protect workers who report an injury or illness) relates to workplace safety incentive programs and to post-injury/illness drug testing of the worker reporting the condition.

The 2018 Standard Interpretation Memorandum was issued by OSHA's Acting Director of Enforcement Programs Kim Stille, addressed to Regional Administrators and State Designees. The policy will likely be utilized by OSHA state-plan states as well, although they do have authority to have more stringent requirements than federal OSHA. Therefore, programs that would now be permitted under the 2018 federal OSHA memo may still be impermissible in certain states.

The October 2018 memorandum clarifies that new standard 1904.25(b)(1)(iv) does not prohibit workplace safety incentive programs or post-incident drug testing. It takes the position that many safety incentive programs or post-incident drug testing is done by employers "to promote workplace safety and health." It clarifies that "evidence that the employer consistently enforces legitimate work rules (whether or not an injury or illness is reported) would demonstrate that the employer is serious about creating a culture of safety, not just the appearance of reducing rates."

The memorandum clarifies that action taken under a safety incentive program or post-incident drug testing program would only constitute a violation "if the employer took the action to penalize an employee for reporting a work-related injury or illness rather than for the legitimate purpose of promoting workplace safety and health."

While the agency memorandum does promote proactive incentive programs, where rewards are based on reporting of near-misses or hazards, involvement in a safety and health management system (and the 2012 policy added other options such as having a party at the completion of training, or contests for safety slogans), it now re-legitimizes rate-based incentive programs "as long as they are not implemented in a manner that discourages reporting." Therefore, no citation would be issued if an employee loses a prize or bonus after reporting an injury, "as long as the employer has implemented adequate precautions to ensure that employees feel free to report an injury or illness."

This is clearly a subjective standard, and it raises questions as to how an inspector will react if a worker reports losing a benefit due to injury and says that injuries will be concealed in the future as a result of the incentive program. Inaccurate reporting will, of course, skew the injury/illness data now being collected electronically by OSHA from many employers, and was the basis for addressing incentive programs, discipline and drug testing in the final rule. According to the revised policy, which supersedes previous policy on the topic, OSHA will look at rate-based

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OSHA Memorandum, Con't.

programs to determine whether it includes elements such as:

- Rewards for employees who identify unsafe conditions in the workplace;
- Training for workers to reinforce Section 11(c) and Part 1904 reporting rights and responsibilities and emphasizes the employer's non-retaliation policy; and
- A mechanism for accurately evaluating employees' willingness to report injuries and illnesses.

With respect to post-incident drug testing programs, the memorandum clarifies that Part 1904 does not affect random testing, drug testing unrelated to the reporting of a work-related injury/illness, testing under a state workers' compensation law requirement or a federal law (e.g., DOT testing of commercial drivers).

For post-incident testing, done "to evaluate the root cause of a workplace incident that harmed or could have harmed employees," testing of the injured worker can legally be done as long as the employer also tests "all employees whose conduct could have contributed to the incident, not just employees who reported injuries."

From a legal perspective, the final rule's preamble discussion of how the rule applies to actions taken under workplace safety incentive programs, discipline and drug testing programs is likely to carry more weight when, inevitably, enforcement against such programs either occurs arising from a Part 1904 citation, or via an employee complaint under Section 11(c) of the OSH Act.

But, the final rule's preamble largely relates back to the now-superseded 2012 memorandum, sent to Regional Administrators under the Obama administration, which clarified the agency's view that the act of reporting an injury or illness was a protected activity under Section 11(c) of the Occupational Safety & Health Act of 1970 (OSH Act), and that certain safety incentive programs based on going a period of time without a recordable injury, and denying an injured worker a benefit as a result of the injury/illness, would be viewed as a Section 11(c) violation.

While, the final rule's preamble usually carries more weight in litigation over a citation than would a policy documents inconsistency in an agency's interpretation and enforcement of a binding rule can be evidence of its vagueness and can invalidate enforcement actions

in the future. Ultimately, this issue will likely be determined by the federal courts.

There is also an issue of overlapping protections and how the new policy will apply to them. The E-Recordkeeping rule, published on May 12, 2016, added an enforceable provision prohibiting employers from retaliating against employees for reporting work-related injuries or illnesses. See 29 C.F.R. § 1904.35(b)(1)(iv). OSHA also made clear, in that rule (1904.36) and in the 2012 memorandum, that denying a worker a benefit (e.g., through a safety incentive program) due to his/her recordable injury or illness constituted a violation of Section 11(c) of the OSH Act.

While these may seem like redundant protections, there is a critical distinction. Under Section 11(c), the worker must affirmatively file a whistleblower complaint with OSHA within 30 days of the discriminatory event, or else the right is waived. If a Section 11(c) complaint is timely filed, relief is generally limited to "make whole" remedies including back pay, reinstatement, restoration of seniority and benefits, and sometimes compensatory/punitive damages.

By contrast, if OSHA finds that such discrimination has occurred (either due to an employee complaint or during a record audit or other inspection event), within 180 days of the adverse treatment of the injured worker, it can issue a citation to the employer, with a maximum penalty of \$129,336 per affected worker. While there is no direct relief, per se, for the affected worker, OSHA can negotiate such relief as part of a settlement of the Part 1904 citation matter.

So, as a practical matter, an employer's exposure for violation of whistleblower protections, arising from a denial of benefit under an incentive program, has expanded from 30 days to 180 days. It is also important to note that the 2018 policy applies to the E-Recordkeeping rule's application but does not alter any existing case law or directly affect any pending litigation arising under Section 11(c) (which cases are not litigated before the Occupational Safety & Health Review Commission (OSHRC), but ultimately before the U.S. District Court if not resolved administratively with a Dept. of Labor Administrative Law Judge). In addition, while the 2018 OSHA policy interpretation of the 2016 final rule will be in effect in the short term, it could be altered without notice or comment opportunity through subsequent administrative action in a new administration.

Moreover, OSHA could be subject to oversight hearings in 2019 before the House Education & Workforce

OSHA Memorandum, Con't.

committee over the policy shift, now that control of the House changes to the Democratic party. The unions are not pleased at all about this shift, as inclusion of injury-based incentive programs as a whistleblower offense has been a key initiative of workers' rights groups for well over a decade, so they will certainly seek such hearings.

Finally, alteration of existing safety incentive programs that met the old OSHA criteria (being proactive, without reliance on lagging indicators) unilaterally may violate requirements of collective bargaining agreements that may be in effect in some locations. This would likely be construed as a violation of the National Labor Relations Act, as constituting a unilateral change in the terms and conditions of employment.

Therefore, it may be wise to refrain from making further substantive changes to your incentive programs that were designed to conform to the 2016 final rule or the preceding 2012 Section 11(c) memorandum, with respect to utilizing lagging indicators and workplace injuries as a rationale for disqualifying injured workers from receiving any type of benefit. For assistance with review of your incentive, discipline or drug testing programs, contact Adele Abrams at safetylawyer@gmail.com.

Chemical Safety Board "Call to Action" on Combustible Dust Hazards **By Gary Visscher, Esq.**

The U.S. Chemical Safety Board (CSB) investigates major industrial explosions, fires and releases of hazardous chemicals. Among the most frequently investigated have been fires and explosions caused by accumulations of combustible dust.

In 2003, the occurrence within a few months of each other of three deadly dust explosions led the CSB to conduct a general investigation of dust explosions and incidents in the United States. In 2006, the CSB reported the results of the study, which identified 281 combustible dust incidents between 1980 and 2005.

In 2008, the CSB investigated a dust explosion at a sugar refinery in Port Wentworth, Georgia that killed 14 workers and injured 40 others. The CSB report issued in 2009 on the Imperial Sugar explosion recommended, among other things, that OSHA issue a national standard on combustible dust. While OSHA has conducted a National Emphasis Program on

combustible dust hazards since 2008, using existing standards and the General Duty Clause, work on a separate standard has stalled and the issue is not included on the list of standards that OSHA is currently working on, according to the fall 2018 Regulatory Agenda.

In the time period subsequent to the Imperial Sugar explosion and CSB's report, CSB has investigated five dust fires and/or explosions at industrial facilities. Most recently, CSB is investigating a May 2017 dust explosion at a corn milling facility in Cambria, Wisconsin. The dust explosion killed 5 workers, injured 14 others, and destroyed the mill.

Last month CSB issued a "Call to Action: Combustible Dust." Included in the "Call to Action" was an invitation for comments, from companies, regulators, inspectors, safety trainers, researchers, unions, and workers on "the management and control of combustible dust." CSB Board Member and current interim executive, Kristin Kulinowski, stated that "while there is shared understanding of the hazards of dust...efforts to manage those hazards have often failed to prevent a catastrophic explosion." The initiative asks for comments on such topics as recognizing and measuring unsafe levels of dust and communicating the "low-frequency but high-consequence hazards of combustible dust" to workers and managers. A number of other questions on which CSB seeks testimony are included in the announcement and on the CSB website.

In addition to the request for comments, CSB also released an updated list of industrial dust incidents since the CSB's 2006 report. CSB found 105 dust incidents occurred between 2006 and 2017. Responses to the "Call to Action: Combustible Dust" are currently due to CSB by November 26, 2018.

"One MSHA" and Fire Suppression System Initiatives **By Joshua Schultz, Esq., MSP**

During an October 16, 2018 Quarterly Training Call, Assistant Secretary of Labor for Mine Safety and Health David Zatezalo noted that 90 mines have been switched from one field office to another as part of the "One MSHA" initiative as of October 1, 2018. This change reflects a shift in mining dynamics, as the agency responds to a decrease in coal mining, by training coal inspectors to inspect metal/nonmetal sites.

MSHA further detailed their Fire Suppression System Initiative during the Quarterly Training Call. The agency noted a September 7, 2018 incident in which a miner was

MSHA Initiatives, Con't.

burned when a fire occurred on the haul truck he was operating. After stopping the truck, the miner evacuated but received burns as he traveled down the stairs which are beside the engine compartment. The miner was transported to a hospital and a burn center for treatment, but he died from his injuries five days after the accident. MSHA's subsequent investigation revealed that the fire suppression system did not function when activated.

As part of the Fire Suppression System Initiative, MSHA inspectors will focus on fire suppression systems on surface mining vehicles. Inspectors will check critical portions of fire suppression systems and will discuss key requirements of proper installation and maintenance of these systems. Systems must adhere to the requirements in National Fire Protection Association (NFPA) 17 and 17A (Standards for Dry and Wet Chemical Extinguishing Systems). Inspectors will be trained to do a visual exam for installation and maintenance problems as well as look for specific conditions noted in recent fires at mine sites.

Surface metal nonmetal mines are required to inspect fire suppression systems at least once every twelve months, in accordance with 30 CFR §56.4201(a)(5). The regulations do contain an exemption for fire suppression systems which "are used solely for the protection of property and no persons would be affected by a fire." Further, the agency asks operators to ensure miners are trained to understand and use the primary, secondary, and alternate (emergency) means of egress.

MSHA also reviewed the agency's Powered Haulage Safety Initiative, noting that more than half of the 2018 mine fatalities involved some type of powered haulage. This initiative covers the haulage of materials and personnel, including mobile equipment and conveyor belts. Finally, MSHA addressed fatalities which have occurred in the coal and metal/nonmetal sectors in the 3rd Quarter of 2018, addressing best practices to prevent future occurrences.

Legislation Introduced to Address Workplace Violence in High Risk Sectors

By Adele L. Abrams, Esq., CMSP

On November 16, 2018, Rep. Joe Courtney (D-CT), along with 21 Democratic co-sponsors, introduced HR 7141, legislation to direct the Secretary of Labor to issue an occupational safety and health standard that requires covered employers within the health care and

social service industries to develop and implement a comprehensive workplace violence prevention plan. The legislation was referred to the House Education & Workforce Committee for further consideration.

The Workplace Violence Prevention for Health Care and Social Service Workers Act would require OSHA to create a binding federal standard that would require affected employers to implement workplace violence prevention programs, in recognition of the extremely high rates of workplace violence in the health care and social services sectors. OSHA would be required to adopt an "Interim Final Standard" within one year of enactment of the legislation. If OSHA missed its deadline to finalize the rule, the legislation provides that its provisions could be enforceable by OSHA in lieu of a codified standard. A final rule would be required within two years of the legislation's enactment.

To date, it has received the endorsement of the American Federation of Teachers, AFL-CIO, AFSCME, American Federation of Government Employees, International Association of Fire Fighters, National Nurses United, United Steelworkers, and Public Citizen.

Currently, OSHA can take enforcement actions against employers under the "General Duty Clause" (Section 5(a)(1) of the Occupational Safety & Health Act of 1970) and can issue penalties of up to \$129,336 per affected worker. However, OSHA has the burden of proving that the cited employer was aware of a recognized hazard (in this case, workplace violence risks) that could cause death or serious bodily harm to its own employees, that employees were exposed to the hazard within the previous six months, and that there is a feasible method of abatement. These citations are often difficult for the agency to sustain, and there is no coverage for third party workers such as contractors or temporary staffers, who are not the direct employees of the employer. This is one exception to OSHA's multi-employer worksite enforcement policy.

In 2015, OSHA issued "Guidelines for Preventing Workplace Violence for Healthcare and Social Service Workers," but the guidance did not go through formal rulemaking and so it is advisory and not enforceable. OSHA was in the early stages of promulgating a binding workplace violence standard at the end of the Obama administration, but it then went onto the back burner. The 2016 rulemaking was triggered by two Petitions for Rulemaking calling on OSHA to promulgate a workplace violence prevention rule for the health care and social services sectors. The proposed legislation, HR 7141, would require employers' programs to at least meet OSHA's

Workplace Violence, Con't.

2015 Guidelines.

However, in the most recent regulatory agenda, which was also published on November 16, 2018, OSHA included its "Prevention of Workplace Violence in Health Care and Social Assistance" rulemaking, and indicated that a "SBREFA" panel would be held in March 2019. The panel is mandated under the Small Business Regulatory Enforcement Fairness Act for OSHA regulatory proposals with a significant impact, to discuss small business considerations and to review a draft standard. The agency had filed a Request for Information (RFI) from affected stakeholders in December 2016, and the RFI comment period closed in April 2017. Therefore, it is possible that consideration of HR 7141 could occur contemporaneously with an OSHA rulemaking initiative.

In introducing the measure, Rep. Courtney said: "We expect health care and social service employees to care for us in our times of need, but we know that each year, these men and women are faced with rising rates of violence, often from patients and their families." The rule comes after adoption of a health care sector workplace violence standard in California (which runs its own state plan OSHA enforcement and regulatory program). State plan states are permitted to have unique regulations that are more stringent than those of federal OSHA. In total, 9 states currently have mandated that certain types of health care facilities implement workplace violence prevention programs.

A Government Accountability Office study reported that there were 730,000 cases of health care workplace assaults over the 5-year span from 2009 through 2013, based on Bureau of Justice Statistics data. The health care and social service industries experience the highest rates of injuries caused by workplace violence. Nurses and nursing, psychiatric, home health, and personal care aides all are at high risk. The Bureau of Labor Statistics reports that health care and social service workers suffered 69 percent of all workplace violence injuries caused by persons in 2016 and are nearly 5 times as likely to suffer a workplace violence injury than workers over-all. In a recent five-year period, at least 58 hospital workers died as a result of workplace violence.

The legislation covers a wide range of workplaces within these two sectors, including: hospitals, residential treatment facilities, non-residential treatment settings, social services and medical care in correctional and detention facilities, psychiatric

treatment facilities, addiction treatment centers and clinics, and community care settings including group homes and mental health clinics. It would also apply to facilities operated by the Veterans Administration and the Indian Health Service. The legislation would also cover workers who provide services in field settings, such as home health care and hospice work, as well as emergency and transport services.

The minimum requirements in a mandated program would include:

- Unit-specific assessments and implementation of prevention measures;
- Physical changes to the work environment;
- Staffing for patient care and security;
- Employee involvement in all phases of the workplace violence prevention plan;
- Hands-on training;
- Robust recordkeeping requirements and a violent incident log (such incidents are thought to be heavily underreported); and,
- Protections for employees to report workplace violence to their employer and law enforcement.

While OSHA has whistleblower protections for workers who report hazards internally or to OSHA, or who report being injured, under Section 11(c) of the OSH Act, retaliation complaints must be filed with OSHA within 30 days or else will be time-barred. The 2016 adoption of OSHA's E-Recordkeeping rule provided new protections for injured workers against retaliation for reporting their injuries, and also allows OSHA to issue citations and civil penalties to employers under 29 CFR Part 1904, if the agency learns of such retaliation within 180 days of the event. However, new OSHA policy issued October 11, 2018, weakened those protections to a certain degree (see related article).

While it is unlikely that any action can be taken on the bill prior to adjournment of the current "lame duck" session, it is quite likely that the measure will be reintroduced in January 2019, after Democrats take control of the U.S. House of Representatives. For additional information on this initiative, or for assistance in developing an effective workplace violence prevention program, contact Adele Abrams at safetylawyer@gmail.com.

OSHA Releases Its FY 2018 “Top 10” List

By Adele L. Abrams, Esq., CMSP

In late October 2018, OSHA released its most-cited standards list covering both construction and general industry worksites. The announcement was made at the National Safety Congress in Houston, TX. The list is helpful in ascertaining where OSHA is historically targeting its enforcement efforts. For many years, the standards making this ignoble list have remained fairly constant. For FY 2018 (which ran from October 1, 2017 through September 30, 2018), the major change was inclusion of “eye and face protection” as the 10th most cited standard (29 CFR 1926.102), and Machine Guarding (29 CFR 1910.212) in the 9th slot. These replaced electrical standards that were previously in the top 10. The top standards are evenly divided between construction (Part 1926) and general industry (Part 1910). No maritime or agricultural standards made the list.

Not surprisingly, many of the most-cited standards are associated with OSHA national or regional emphasis and outreach programs (e.g., amputation prevention, silica enforcement, or fall prevention) or have complex training requirements that often are not properly executed or documented.

The FY 2018 top 10 most cited standards, along with the number of citations issued last year, are:

1. Fall Protection – General Requirements (1926.501): 7,270
2. Hazard Communication (1910.1200): 4,552
3. Scaffolding (1926.451): 3,336
4. Respiratory Protection (1910.134): 3,118
5. Lockout/Tagout (1910.147): 2,944
6. Ladders (1926.1053): 2,812
7. Powered Industrial Trucks (1910.178): 2,294
8. Fall Protection – Training Requirements (1926.503): 1,982
9. Machine Guarding (1910.212): 1,972
10. Eye and Face Protection (1926.102): 1,536

For more information on OSHA requirements applicable to your workplace and associated training requirements, contact Adele Abrams, Esq., CMSP at safetylawyer@gmail.com.

OSHA Regulatory Agenda Released

By Adele L. Abrams, Esq., CMSP

On November 16, 2018, the U.S. Department of Labor (DOL) published its semi-annual regulatory agenda covering OSHA and MSHA rulemaking activities forecast for the coming 12 months. 83 Fed. Reg. 58046. OSHA has four items listed at the prerule stage:

- **Communication Tower Safety:** This rulemaking, which commenced as an RFI in 2015, is at the SBREFA panel stage, which was initiated in May 2018 and was set to be completed in October 2018. This industry sector, while small, has a high fatality rate, and after concluding its RFI, OSHA determined that current rules for fall protection and personnel hoisting may not adequately cover all hazards in this sector. While the SBREFA panel focuses on communication towers, OSHA will consider expanding the rule to over structures that have telecommunications equipment on or attached to them, such as buildings, rooftops, water towers, and billboards.
- **Emergency Response & Preparedness:** This activity commenced with stakeholder meetings in 2014, followed by NACOSH review and workgroup reports on the topic. OSHA now intends to initiate a SBREFA panel (scheduled for 10/18). OSHA currently regulates some aspects of emergency response and preparedness, but standards are decades old and do not address the full range of hazards, nor are they current with respect to performance specifications for protective clothing and equipment. OSHA plans to update the standards based on information gathered from stakeholders.
- **Tree Care Standard:** OSHA convened a stakeholder meeting on this topic in 2016 and plans to initiate a SBREFA panel in June 2019. There is currently no OSHA standard for tree care operations, and the agency applies a patchwork of standards to address the serious hazards. The tree care industry previously petitioned the agency for a rulemaking, and there was a ANPRM issued in 2008.
- **Prevention of Workplace Violence in Health Care and Social Assistance:** OSHA published an RFI in December 2016, and comments were received through April 2017. The agency plans to initiate a SBREFA panel in March 2019. OSHA published guidelines in 1996 and 2014 on this topic and has generally used Section 5(a)(1) of the OSH Act

Regulatory Agenda, Con't.

(General Duty Clause) for enforcement. OSHA was petitioned for a standard in 2016 by a coalition of labor unions and the group National Nurses United. OSHA granted the Petitions in January 2017 (see related article in this issue).

There are two items listed on the agenda as “Long-Term Actions”:

- **Infectious Diseases:** OSHA commenced rulemaking with an RFI in 2010, and held a SBREFA panel, which was completed in December 2014. The next steps are “to be determined.” OSHA recognizes the need for a standard to address a variety of infectious disease hazards for those in health care and other high risk environments. The rulemaking also seeks to address threats from emerging infectious diseases such as SARS, MRSA, pandemic influenza, and antibiotic resistant TB. These can be transmitted through a variety of exposure routes and are not addressed through the OSHA Bloodborne Pathogens rule. Potentially covered workplaces include: health care, emergency response, correctional facilities, homeless shelters, drug treatment programs, laboratories, coroners’ offices, medical examiners and mortuaries.
- **Process Safety Management & Prevention of Major Chemical Accidents:** This action commenced in 2013 with an RFI, and the SBREFA report was issued in August 2016. The next action is “undetermined.” The RFI was published in accordance with Executive Order 13650, which was issued by President Obama after the West, TX disaster. The RFI related to issues of modernization of the PSM standard and related standards to help prevent major chemical accidents.

Prior to issuing the Semi-Annual Regulatory agenda in November, on October 17, 2018, the DOL issued its “Unified Agenda” of pending rules that included status reports on several OSHA rulemaking activities, mostly scaling back some final rule provisions issued as “Midnight Rules” within the last year of the Obama Administration. The key features of this earlier agenda, which are not mentioned on the November 2018 version, include:

- Stripping some ancillary provisions from the Beryllium rule for Construction and Shipyards (which was finalized in January 2017 – target date for an amended final rule is June 2019),
- Issuance of a proposed rule to revise certain provisions of the Beryllium rule for General Industry (proposed rule targeted for 12/18),

- Reducing requirements for injury/illness data submission to OSHA under the May 2016 “Electronic Recordkeeping” rule (June 2019 target date for revised final rule),
- Delaying the finalization of its 2016 Standards Improvement Project IV proposed rule (now due 12/18) to update several existing rules and eliminate unnecessary paperwork,
- Delaying the update to the Hazard Communication Standard until March 2019 (the next step is a proposed rule to maintain alignment with the Global Harmonization Systems of other countries), and
- Delaying the due date to finalize amendments to its 2010 crane standard until June 2019 (Note: the final rule on type and capacity requirements for crane operator training was released on 11/9/2018).
- In addition to these items, the October 2018 Unified Agenda indicated that OSHA will be issuing RFIs or an Advanced Notice of Proposed Rulemaking (ANPRM) on the following regulatory items:
 - Crystalline Silica (an RFI is slated for December 2018, to gather information on the effectiveness of control measures not currently included in Table 1 of the March 2016 final rule for construction),
 - Mechanical Power Presses (December 2018 target for an RFI on how to update the current rule to address hydraulic or pneumatic power press technological advances),
 - Powered Industrial Trucks (October 2018 target for an RFI on how to update its standards on powered industrial trucks), and
 - Lockout/Tagout (October 2018 target for an RFI on technological advances employing computer-based controls of hazardous energy that conflict with existing LOTO standards),
 - Blood Lead Level for Medical Removal (March 2019 target for an ANPRM on strengthening the existing lead standard by lowering the level at which an employee may be returned to a former job).

As for the Mine Safety & Health Administration, while there are no MSHA-related items on the November 2018 Semi-Annual Agenda for DOL, the October 2018 Unified Agenda does include the following:

- **Exposure of Underground Miners to Diesel Exhaust:** MSHA had reopened its comment period on the RFI and comments are now due by March 26, 2019. In June 2012, the International Agency for Research on Cancer classified diesel exhaust as a known human carcinogen. The National Institute for Occupational

Safety and Health and the National Cancer Institute also have stated that diesel exhaust exposure has important public health implications, including increasing the risk of death from lung cancer. Because of the carcinogenic health risk to miners from exposure to diesel exhaust, MSHA is requesting information on approaches that would improve control of diesel particulate matter (DPM) and diesel exhaust.

- In March 2019, MSHA intends to issue an RFI seeking stakeholders' input on existing regulations identified by the Agency that could be revised to include alternatives to safety standards which MSHA typically approves in Petitions for Modification submitted by mine operators. Incorporating alternatives into existing regulations would save costs incurred by mine operators who submit such Petitions, according to the agency.
- MSHA is soliciting stakeholder comments, data, and information to assist the Agency in developing the framework for this study to assess the impact of the Dust rule on lowering coal miners' exposures to Respirable coal mine dust to improve miners' health. In addition, as part of the Agency's ongoing effort to provide compliance and technical assistance to mine operators and miners, MSHA is soliciting information and data on engineering controls and best practices that lower miners' exposure to Respirable coal mine dust. The comment period on the RFI ends July 9, 2019.
- MSHA is seeking comments from the regulated community on existing standards and regulations that could be improved or made more effective or less burdensome by accommodating advances in technology, innovative techniques, or less costly methods, including streamlining processes. There is no scheduled end date for submission of these comments at this time, although the agenda shows December 2018 as a target.
- MSHA is currently accepting comments on its RFI regarding Safety Improvement Technologies for Mobile Equipment at Surface Mines, and Belt Conveyors at Surface and Underground Mines. The agency held a series of seven stakeholder meetings throughout 2018, and the deadline for submitting comments ends December 24, 2018.

For more information on the agencies' regulatory agendas or OSHA/MSHA compliance assistance, contact Adele Abrams at safetylawyer@gmail.com.

OSHA Releases Final Crane Rule

By Tina Stanczewski, Esq., MSP

OSHA released the final crane rule on November 9, 2018 with clarifications and effective dates starting in December 2018, under the construction standard. The overall requirements remain the same, employers must train, certify and evaluate crane operators. The new effective date for compliance with the Crane Operator National Certification is December 10, 2018, a 30 day extension from the previous date. The second effective date is February 9, 2019 which requires employers to train and evaluate crane operators. The two requirements – certification and training/evaluation, impose specific duties on the employer.

First, the certification process first appeared in 2010, giving employers ample time than comply. Certification is different to qualification. This is a national certification, however, state regulations may impose different or additional requirements that also need to be followed. The rule allows certification based on "Type" or by "Type and Capacity." Crane operators must be certified by an accredited certification agency.

Second, by February 9, 2019, employers must ensure that crane operators are trained, certified, licensed and evaluated before operating equipment under subpart CC. This training must be given by an individual with 1) the knowledge and experience to direct the operator-in-training on the crane, and 2) it must be provided by an agent or employee of the employer responsible for the training. During the training, the trainee must first be given basic training before being allowed to operate an actual crane, once operation begins, the trainee must be continually monitored and the trainee and trainer must remain in direct line of sight to enable communication. The trainee should show abilities in inspection, set up of the crane, leveling of the crane, assessing all potential hazards such as weather, environment and speed.

The National Commission for the Certification of Crane Operators has released a [guide](#) for employers or operators to assist with compliance of the new rule. It is broken into the three areas of compliance. For more information on the federal rule or any differences set by your individual state, please contact Tina Stanczewski at tstanczewski@aabramslaw.com

2018 SPEAKING SCHEDULE

ADELE ABRAMS

2018 Speaking

Dec. 7: Chesapeake Region Safety Council, Crystalline Silica Competent Person Training, Baltimore, MD (Adele Abrams & Michael Peelish)

2018 Webinar

Dec. 6: Lorman, Webinar on Safety & Health Systems & Committees

Dec. 10: Pennsylvania Aggregates & Concrete Assn., Webinar on Safety Considerations for Unique Populations

Dec. 10: ClearLaw Webinar, OSHA E-Recordkeeping Rule Update

2019 Speaking

Jan. 16: Associated General Contractors Safety Conference, Miami, FL, Presentation on Legal & Ethical Considerations for EHS Professionals

Jan. 23: Mechanical Contractors Association of America Safety Director's Conference, Lake Buena Vista, FL, Presentation on Traversing Marijuana and Post Accident Drug Testing Traps

Feb. 12: ASSP Northwest Safety Conference, Minneapolis, MN, Presentation on Medical Marijuana and Workplace Safety

Feb. 13: NSSGA Annual Meeting Legal Forum, Indianapolis, IN, Presentation on Sexual Harassment & Workplace Violence Issues

Feb. 26: Society of Mining Engineers, Denver, CO, Presentation on Legal & Ethical Considerations for Mine Safety Professionals

Feb. 28: Indiana Safety & Health Conference, Indianapolis, IN, Presentation on Safety in the "Gig Economy"

2019 Webinars

Jan. 10: BLR Webinar, OSHA E-Recordkeeping Update

Jan. 11: Pennsylvania Aggregate & Concrete Assn. Webinar, OSHA/MSHA Forecast 2019

Feb. 4: ClearLaw Webinar, OSHA Walking/Working Surfaces Rule

GARY VISSCHER

Webinars

December 6, Dealing with Opioids and Marijuana in the Workplace: Strategies for Drug Testing, Managing Leave and Accommodations, and Limiting Liability

December 18, Post Accident Drug Testing: How to Avoid Retaliation Claims Under OSHA