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NLRB Proposes Rule to Define Joint Employer

By Gary Visscher, Esq.

A few months ago (April 2018 Newsletter), we described the confusing situation regarding the standards to be used to define "joint employer" under the National Labor Relations Act (NLRA).

In a nutshell, in 2015, in the *Browning-Ferris Industries* (BFI) case, the National Labor Relations Board (NLRB) reversed long-standing case law, and adopted a more "relaxed" test for when two employers would be considered "joint employers." In December 2017, in the *Hy-Brand Industrial Contractors* case, the Board reversed *BFI*, and reinstated the previous test. However, after the NLRB's Inspector General raised questions about whether one of the Board members in the majority in *Hy-Brand* should have participated in the decision, the Board voted to vacate the *Hy-Brand* decision. Thus, the *BFI* test was reinstated, even though it is not supported by a majority of the current Board. In addition, the decision in *BFI* was appealed to the Court of Appeals, and the appeal is pending before the D.C. Circuit.

The Board has described the practical importance of a "joint employer" determination: "When the Board finds a joint employer relationship, it may compel the joint employer to bargain in good faith with a Board-certified or voluntarily recognized bargaining representative of the jointly employed workers. Additionally, each joint employer may be found jointly and severally liable for unfair labor practices committed by the other. And a finding of joint employer status may determine whether picketing directed at a particular business is primary and lawful, or secondary and unlawful."

Earlier this year, the Board announced that it planned to clarify and settle the standard for joint employer through rulemaking. The Board noted that although it generally makes "most substantive policy determinations through case adjudications," it has used rulemaking for significant policy determinations. The proposed rule was published in the Federal Register on September 14, 2018. The Board will accept comments on the proposed rule until November 13, 2018, and reply comments may be submitted until November 20, 2018.

The proposed rule defines joint employer:

> "[A]n employer … may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine."

The text of the proposed rule includes 12 examples to illustrate when joint employment does or does not exist. The standard for joint employer in the proposed rule is similar to the test that the NLRB had applied prior to the *BFI* decision. The *BFI* decision allowed a finding of "joint employer" where the putative employer's control was indirect, limited and routine, or contractually reserved but never exercised.

The preamble to the proposed rule includes a thorough and useful history of

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the progression of cases on "joint employer" liability under the NLRA, and presents the proposed rule as grounded in the common law definition of employer and employee, as well as the legislative history, particularly the Taft-Hartley Amendments of 1947. The preamble also includes a dissenting view by Board Member McFerren, who argued against using the rulemaking process as well as the substantive provisions of the proposed rule.

What effect might an NLRB rule defining joint employer have on other areas of employment law, including OSHA? OSHA's multi-employer enforcement policy in construction is not likely to be affected. (The multi-employer enforcement policy is currently being challenged in a case before the Court of Appeals for the 5th Circuit, *Hensel Phelps Construction* – see article in the December 2017 newsletter). However, the NLRB's rule may impact OSHA's enforcement in other areas, such as in the franchisor/franchisee and staffing agency/host employer contexts. The NLRB's proposed rule is based upon the same common law definition of employer and employee that the OSH Review Commission has applied to questions of "who is the employer" under the OSH Act. *Froedtert Memorial Lutheran Hospital* (2004). The NLRB rulemaking may provide guidance for how the common law doctrine should be applied amid the diverse economic and business relationships that exist today.

Appropriations Update

By Adele Abrams, Esq., CMSP

On September 28, 2018, President Trump signed a "minibus" appropriations bill, including FY 2019 funding for the Department of Defense and the Departments of Labor, Education, and Health & Human Services, which was approved by the Senate on September 18, 2018, and the House on September 26, 2018. The $854 billion spending bill funds the federal government through December 7, 2018.

Under the conference report agreement, OSHA will receive $557.8 million for FY19, which is a $5 million hike from FY18. This is also $12 million more than was originally approved in the House-passed version. The enforcement exemption for employers with 10 or fewer employees in low risk DART categories was continued, but the agency can still inspect based upon employee complaints, in imminent danger and health hazard situations, and in response to accidents involving fatalities or hospitalization of two or more employees. These small employers also remain liable for any penalties and citations issued as a result of such inspections, and can also be prosecuted for violations of the whistleblower protections in Section 11(c) of the OSH Act.

The conference report specifically reinstates funding for OSHA's Susan Harwood Training Grant program, which has been targeted for elimination in each budget released by the Trump Administration. The conference report directs OSHA to publish funding opportunity notices for the grants no later than June 30, 2019. The program has $10.5 million in continued funding. It also earmarks a minimum of $3.5 million for continuation of the Voluntary Protection Program.

For the Mine Safety and Health Administration, the approved funding totals $373.8 million, with a minimum of $10.5 million for its State Grants Program, which provides many training and consultation services for small mine operators and contractors who perform work at mine sites.

The conference report directs a total of $336.3 million for NIOSH, which includes $116 million for the National Occupational Research Agenda, preservation of funding for the Education and Research Centers ($29 million) which goes toward terminal degree programs and other training in occupational safety and health. The measure also allocates $59.5 million for NIOSH to continue its mine safety and health research, and includes specified funding for the agency's "Total Worker Health" initiative within its general occupational safety and health research line item.

Changes at MSHA

By Tina Stanczewski, Esq., MSP

Recently, MSHA officials have indicated that there will be administrative realignments between the coal and metal/nonmetal divisions. In essence, the Agency will be moving towards the concept of a "One MSHA" with inspectors being trained as an MSHA inspector, not one specific to coal or metal/nonmetal. Some mines have already received notice of changes in field office assignment.

Metal/nonmetal mines will begin to receive inspections from previous coal inspectors who have been retrained to inspect metal/nonmetal mines. The training has been estimated to be 56 hours with additional field time training. Time will tell how the realignment will impact metal/nonmetal and coal operators.

The Evolution of the OSHA Silica Standard

By Michael Peelish, Esq.

OSHA delivered its latest guidance, and by far its most clarifying statement, of its Silica Construction standard in the form of 53 Frequently Asked Questions. OSHA's responses were developed in consultation with industry and organized labor and are grouped in broad categories including: scope, Table 1, housekeeping, written exposure control plan (WECP), medical surveillance, and training. OSHA states that the "document is advisory in nature and informational in content. It is not a standard or regulation, and it neither creates new legal obligations nor alters existing obligations created by OSHA standards."

Having said that, OSHA's responses are thoughtful and make sense in the real-world workplace, making them more likely to withstand future revision. Also, many of the responses apply to the General Industry standard since the language and process is the same. This guidance document provides key regulatory interpretations that can be relied upon notwithstanding OSHA's qualifying statement. (The question number addressed is noted in parenthesis.) For instance:

- Under the Scope section, OSHA states more specifically that "none of the standard's requirements apply if, without implementing any controls, all employees' exposures to silica will remain below the Action Level (AL) of 25 µg/m3 as an 8-hour TWA under any foreseeable circumstances." (Q5).
- Under the Table 1 section, OSHA affirms that employers do not have to use manufacturer's recommendations for respirators. (Q10). Also, no independent air flow test needs to be conducted by the employer on dust collection systems. (Q11). And, employers can use scheduled monitoring data and then switch to the performance option setting an employer up to use objective data with the goal to stop monitoring completely.
- Under the Housekeeping section, OSHA has provided the most clarification by allowing the use of compressed air if the exposure remains below the AL under any foreseeable circumstances without the use of any controls. (Q23). OSHA then clarifies how an employer demonstrates "infeasibility" by showing that the standard's control measures (e.g. wet-sweeping, vacuuming) "negatively affect the quality of the work". (Q25). Also, OSHA expounds on its 10/19/2017 sweeping interim compliance document, which allowed for oil and wax-based sweeping compounds, by permitting use of compounds that contain crystalline silica as well. (Qs 26 and 27).
- Under the WECP section, OSHA states that tasks are not covered under a WECP if exposures will remain below the AL without implementing any controls under any foreseeable circumstances. (Q31) Also, a "competent person" can leave the site periodically, so long as he or she fulfills the responsibilities" to implement the WECP. (Q38).
- Under the Medical Surveillance section, OSHA clarifies that the standard requires employers make available medical surveillance but does not require qualifying employees to participate (Q43), and OSHA confirms that voluntary use of respirators does not count towards the 30-day threshold for making medical surveillance available. (Q49).
- Under the Training section, OSHA provides leeway to the employers regarding how they conduct training and when to conduct retraining, although no schedule is required. (Q51).

As guidance documents go, OSHA has struck a practical and effective balance to achieve its stated purpose of reducing employees' exposure to respirable crystalline silica.

NIOSH Links Work Practices and Miner Health

By Sarah Ghiz Korwin, Esq.

A new study entitled "Work Practices and Respiratory Health Status of Appalachian Coal Miners with Progressive Massive Fibrosis", released in eary September, connects coal miners with black lung and their unsafe work conditions. The study, produced by the Centers for Disease Control and Prevention's National Institute for Occupational Safety and Health (NIOSH), will be published in the Journal of Occupational and Environmental Medicine. The goal of the study was to characterize workplace practices and respiratory health among coal miners with progressive massive fibrosis, also known as black lung disease, who received care at a federally-funded black lung clinic network in Virginia.

By conducting "semi-structured" interviews of nineteen former coal miners at a federally-funded black lung clinic in Virginia, NIOSH and the clinic were able to pull together a "case series" that exposed a potential attitude of indifference toward protecting miners' safety. Medical records were also reviewed. During the interviews, miners reported cutting rock, sometimes for up to three months with a continuous mining machine. They also reported working downwind of dust-generating

Coal Miner Health, Cont'd

equipment. There were reports of non-adherence to mine ventilation plans (including dust controls), working after developing respiratory illness, and suffering from debilitating respiratory symptoms. Many said they had not properly worn personal dust samplers, and sometimes dust samplers were placed in areas of the mine known to have the lowest dust levels. Eight men stated they would be more diligent about following proper ventilation when inspectors from the Mine Safety and Health Administration or corporate safety officials were present.

Ultimately, the study found that patterns of sub-optimal workplace practices contributed to the development of black lung disease. In fact, some of the practices reported were unsafe and unacceptable. The report also concluded that "miners must feel empowered to follow mine ventilation plans and participate in respiratory health screenings throughout their careers". Predictably, the report concluded that further research is needed to determine the prevalence of these factors and how best to address them.

New Prop 65 Hazard Warning Now in Effect

By Gary Visscher, Esq.

Since 1986, businesses operating in California and products sold in California have been covered by the state's Safe Drinking Water and Toxic Enforcement Act, better known as Proposition 65 (which was the number for the ballot proposal approved by California voters).

Under Prop 65, the State develops a list of chemicals "known to the State of California" to cause cancer or reproductive harm. The list is updated annually, and currently includes about 800 chemicals. (The list of chemicals is available at www.oehha.ca.gov/prop65). Businesses are required to provide a "clear and reasonable" warning before knowingly exposing anyone to a listed chemical.

Although there was initially some uncertainty on this point, a 1997 decision by the 9th Circuit Court of Appeals, in *Indusrial Truck Ass'n v. Henry*, held that for occupational exposures, Prop 65 is pre-empted by the OSH Act. The California regulations now state, with regard to employees and occupational exposures, that compliance with the CalOSHA (and federal) Hazard Communication Standard "shall be deemed compliance with" Prop 65.

The regulations define "occupational exposure" as "an exposure to any employee at his or her place of employment."

Products sold to consumers, either directly (including through internet) or through retailers, must include a "clear and reasonable" hazard warning. The state of California has long provided "safe harbor" language, which if included on the package or posted on signs, is considered a "clear and reasonable" warning. Companies are not required to use the safe harbor warning, but nearly every covered entity does, since it provides certainty as to the adequacy of the warning.

California recently made changes to the "safe harbor" warning language. The changes were adopted in 2016, but a transition period was provided during which either the old language or the new language was allowed to operate as a safe harbor. The transition period ended on August 30, 2018; thereafter, only the new language provides a "safe harbor" as to an adequate warning.

The new warning language requires that the warning include the name of the chemical known to cause cancer or reproductive harm. (The previous language simply said the product contained "a chemical" known to cause cancer or reproductive harm.) The new warning language also must include the word "expose" (rather than "contains"). It must also include the word WARNING in all caps and bold print, and next to that, a symbol with black exclamation point in a yellow triangle with black outline. For example, the warning for a product containing respirable crystalline silica (which is on the state's list of chemicals known to cause cancer or reproductive harm) must include the yellow triangle symbol and the words: WARNING: This product can expose you to chemicals including silica, which is known to the State of California to cause cancer. For more information, go to www.P65warnings.ca.gov.

The new regulations also address how the hazard warning is displayed on websites for internet purchases. The regulations require that the safe harbor language be included on the product display page, or in a hyperlink using the word WARNING on the product display page, or by otherwise prominently displaying the warning to the purchaser.

The new regulations specify when the warning language must be provided in a language other than English. If other consumer information on the package, sign, or shelf tag is provided in a language other than English, then the Prop

Prop 65, Cont'd

65 warning must also be provided in that language.

The new regulations put more of the responsibility for providing the hazard warning on product manufacturers, producers or packagers, and provide protection for retailers, if the manufacturer, producer or packager does not provide warning information or notify the retailer that the product must have a Prop 65 warning. Product manufacturers, producers or packagers must either label products sold in California, or document that they have notified retailers of the need to label, and provide warning materials and information.

Producers and processors (such as sand and mineral producers and processors) which sell products by bulk to a processor or packager of consumer products sold in California should assure that bulk shipments have the appropriate HazCom warnings (Safety Data Sheets and labels) for occupational exposures. In addition, California recommends that shippers of bulk products work with their customers/ processors/packagers (and we would add, document those contacts!) to assure that they are aware that products sold to consumers in California may require the Prop 65 hazard warning.

If you have any questions about OSHA HazCom and Prop 65 requirements, please let us know.

Surface Haulage Stakeholder Meeting: Report from the Mine Academy

By Michael Peelish, Esq.

On September 11, 2018, MSHA held its fifth Stakeholder meeting at the Mine Academy to discuss and share Information Regarding Using Technology to Improve Mine Safety. Only three parties testified: one party testified about the use of an active restraint seat-belt system for large mobile vehicles; the second party testified about a water-based fire suppression system (Fogmaker) that could be used on underground electrical installations and on diesel powered haulage equipment in underground coal and metal/nonmetal mines and on surface haulage equipment; and I was the third party to testify. I testified as an individual very familiar with the efforts of the mining industry and MSHA to get a handle on surface haulage incidents.

The Mine Academy retains valuable information regarding surface haulage best practices developed by industry and MSHA back in 1998. The content is there, and the process that was used to disseminate these best practices in the form of pocket cards already exists. Using these as a platform for developing new best practice guidance for surface haulage safety is a sensible approach, which may prove more fruitful in the long-term. If MSHA chooses the regulatory path, it may take many years to finalize a rule.

Memorandum of Understanding Between OSHA and EPA on Worker Health Issues

By Tina Stanczewski, Esq.

With growing tension over worker exposure to chemicals in the workplace, the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA) are developing a memorandum of understanding (MOU) to address chemicals that the EPA reviews under the Toxic Substances Control Act (TSCA). TSCA permits the EPA to require additional worker protections such as Personal Protective Equipment (PPE) for a chemical, but EPA has consistently considered OSHA's Permissible Exposure Limit's (PEL) as outdated. The MOU continues EPA's historical efforts to collaborate with OSHA concerning worker safety, but also meets the mandates of the 2016 updates to TSCA, titled the "Lautenberg Chemical Safety for the 21st Century Act".

EPA's authority is very broad, so modifications to worker protections could be implemented under new chemicals, chemicals under review, or chemicals that took effect in 1976. During the risk evaluation process, EPA would discuss with OSHA the types of worker protections that it believes are necessary for the chemical in accordance with Section 5(f)(5), which states "[t]o the extent practicable, the Administrator shall consult with the Assistant Secretary of Labor for Occupational Safety and Health prior to adopting any prohibition or other restriction relating to a chemical substance with respect to which the Administrator has made a determination … to address workplace exposures." Workers are considered a "susceptible subpopulation" under TSCA and thereby protected by EPA's risk assessment of chemical hazards.

The last time OSHA and EPA entered into a MOU concerning TSCA was in 1986 (EPA Agreement No. PW 16931704-01-1). The MOU outlined consultation and notification requirements between the Agencies under Section 9(a) of TSCA. This Agreement required the EPA to submit a list of substances under consideration for a Section 9(a) report twice per year to OSHA. The Agencies may incorporate processes from the 1986 Agreement into the new MOU currently under development.

Federal Court Upholds State Law Protecting Medical Marijuana Users

By Diana Schroeher, Esq.

On September 5, 2018, a federal court in Connecticut held that a qualified medical marijuana user who applies for a job, and who fails a pre-hire drug test, is protected from discrimination under Connecticut's Palliative Use of Marijuana Act (PUMA). The federal court held that, even though marijuana remains an illegal controlled substance under federal law, federal law does not preempt the PUMA state law and its protections for applicants and employees (and others) who are qualified medical marijuana users under the law.

In the case of *Noffsinger v. SSC Niantic Operating Co.,* the plaintiff applied for and was offered a job by a federal contractor, but the offer was conditional on passing their standard pre-hire drug test. Plaintiff had informed the employer that she suffered from PTSD and was treated for this condition with medical marijuana, showing the employer her state-issued registration certificate and dosage. She informed the employer that she only used the medicinal marijuana in the evenings. Plaintiff's urine test returned positive for THC, and the employer rescinded the job offer. Plaintiff filed suit under PUMA, claiming the employer had violated the law's anti-discrimination provision when it rescinded her offer because she was a qualified medical marijuana user.

The PUMA statute provides (in part):

> [U]nless required by federal law or required to obtain federal funding: . . . [n]o employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient. . . . Nothing in this subdivision shall restrict an employer's ability to prohibit the use of intoxicating substances during work hours or restrict an employer's ability to discipline an employee for being under the influence of intoxicating substances during work hours.

Conn. Gen. Stat. § 21a-408p. PUMA protects job applicants and employees from adverse actions taken by the employer based on the fact that the employee is a qualified medical marijuana user. But PUMA also protects an employer's ability to maintain a safe and productive workplace. The law explicitly permits employers to prohibit use of "intoxicating substances" during work hours, and protects an employer's ability to discipline or discharge an employee found under the influence during work hours.

In *Noffsinger*, the plaintiff and employer filed cross-motions for summary judgment. In finding for plaintiff, the court rejected the employer's three primary arguments, the first two involving assertions that federal laws preempt state law. First, the employer argued that the Federal Drug-Free Workplace Act requires federal contractors to maintain a workplace free from any illegal drug use. The court dismissed this argument stating that the Drug-Free Workplace Act does not regulate employees' conduct outside of work and while off-duty. Next, the court dismissed the employer's Federal False Claims Act argument -- that hiring the plaintiff would amount to defrauding the federal government in violation of the False Claims Act. The Court concluded that there is "no federal law that bars the defendant from hiring plaintiff on account of her medicinal use of marijuana outside work hours." The Court then rejected the employer's third argument – that PUMA was not violated because it rescinded the job offer based on her failed drug test, not because of her status as a qualifying medicinal marijuana patient. After analyzing the language and purpose of PUMA, the Court stated that the Act "protects employees from discrimination based on their use of medical marijuana pursuant to their qualifying status under PUMA." The Court held that the employer's actions were discriminatory and violated PUMA.

Federal contractors and private employers alike should consider the broad implications for potentially outdated drug-testing programs, particularly those that include a 'zero-tolerance' policy for drug use. Many jurisdictions now provide protections for medical marijuana users, and the number of states considering similar employment protections is ever-growing.

For a copy of the decision, or more information or assistance with a drug testing or safety policy, please contact the law firm.

Enforcement Commences on MSHA Workplace Exam Rule

By Adele Abrams, Esq., CMSP

On October 1, 2018, enforcement began in earnest by the Mine Safety & Health Administration (MSHA) for its revised standard governing workplace examination requirements at both surface and underground metal/nonmetal mines. The final rule, which was published in the April 9, 2018 Federal Register, applies to mine operators at a variety of operations (including stone, sand and gravel pits, cement plants, metal mines, and processing facilities for alumina and taconite), as well as to contractors who perform services or maintenance activities at such mine sites.

Technically, the effective date was June 2, 2018, but MSHA agreed to generally refrain from issuing citations under the new requirements until the Fall, in order to complete its series of stakeholder outreach activities and to issue new guidance on the revised requirements. The 2018 rule replaces a long-standing MSHA rule, codified at 30 CFR 56/57.18002, by adding more robust notification and documentation requirements.

The rule was initially updated at the tail end of the Obama administration, and was published on January 23, 2017 – the first day of the Trump administration. But the effective date was stayed and then the rule was reopened, in response to litigation filed by numerous mining trade groups. That litigation is still pending, and it was unclear whether it would be withdrawn, as some of the relief sought was not granted by the agency in the amended standard.

As finalized in the 2018 iteration, the rule requires mine operators and their contractors to:

- Have a *competent person* examine each working place for conditions that may adversely affect the safety or health of miners. The working place must be examined at least once each shift, *before work begins or as miners begin work in that place*;
- Promptly initiate appropriate corrective action when adverse conditions are found;
- Promptly notify miners in affected areas if adverse conditions are found and not corrected before miners are potentially exposed;
- Withdraw all persons from affected areas when alerted to any conditions that may present an imminent danger, until the danger is abated;
- Create an examination record before the end of each shift that includes: The name of the person conducting the examination (not just initials); Date of the examination; Location of all areas examined; A description of each condition found that may adversely affect the safety or health of miners that is not promptly corrected; and the Date when the described condition is corrected;
- Make the examination record available to MSHA and miners' representatives, with a copy provided upon request. Records must be kept for a rolling 12-month period. The previous exception, in MSHA's Program Policy Manual, which allowed records to be discarded once the mine had been inspected, is no longer in effect. The record can be made at any time before the end of the shift. Once an adverse condition is recorded, it does not need to be re-recorded each shift until corrected, but once it is corrected then the date of correction must be added to the original record. Records can be maintained in any format, including electronic, as long as they are available upon request and also cannot be altered if stored on a computer system.

Many of the original rule's provisions remain unchanged, such as the definition of "competent person" and "working place." A working place, MSHA has clarified, applies to all areas in a mine where miners work in the extraction or milling processes. Travelways are considered "working places" that must be examined, if they are used to get to and from other work areas, but they do not include areas not directly involved with mining (such as parking lots, administrative buildings, lunchrooms, toilet facilities, or inactive storage areas). However, remember that MSHA does have authority to inspect all areas of a mine, and any hazardous conditions can be cited even if they are located in these areas exempt from the workplace examination requirement.

A "competent person" for purposes of this standard is one who has the abilities and experience that fully qualifies them to perform the duty, and to be able to recognize hazards and adverse conditions that are expected or known to occur in the work area, and predictable to someone familiar with the mining industry. The competent person must also have task training in the task of workplace examination, but this is enforced through MSHA's existing Part 46/48 training provisions. If a workplace examination is deemed inadequate, this may cause MSHA to question the effectiveness of the task training for the examiner, and can result in additional citations/orders.

The competent person must also have authority to initiate corrective action and to withdraw miners if an imminent danger is identified. While older case law has held that the act of performing a workplace examination may transform an hourly miner into an "agent of management," in its new guidance materials, MSHA clarifies that "a competent person may be an agent based on the totality of his/her responsibilities at the mine, but the sole act of conducting a workplace examination does not make the miner an agent." This position is not altered by the new requirement that the examiner's name must be included on the workplace exam record.

Under the original rule, an exam could be conducted at any point in the shift, and the problems identified did not need to be included in the record. Now, the examination must be done each shift before work begins, or as miners begin work in the area later in the shift. MSHA advises: "The examination should be conducted sufficiently close in time to the start of work so that an operator would reasonably expect conditions to not adversely change before work begins in the examined area."

If a mine has consecutive shifts or operates on a 24-hour basis, the exam for the next shift can be done at the end of the previous shift, as long as it covers all places where miners will be working and is conducted sufficiently close to the start of the next shift. However, if a mine has only a single shift, the examination cannot be performed at the end of the previous day as MSHA believes this is not sufficiently close in time, and conditions could change significantly overnight.

Miners can continue to work in an area where adverse conditions are identified as long as they are promptly notified so they can avoid the condition, but the operator must promptly identify corrective action of any condition that could adversely affect miners' safety or health. If a maintenance shift starts after the commencement of a production shift, an exam must be conducted sufficiently close in time to the start of maintenance work, so conditions would not be expected to change. The notification can be verbal, or warning signs can be used as long as they provide actual notification of the adverse condition (e.g., "Danger – Loose Wire" would be acceptable, whereas "Danger" alone would not be). The warning signage must be sufficiently precise to advise miners of the condition to be avoided. If a condition will remain uncorrected across multiple shifts, then barricades with descriptive signage may be required, in MSHA's view.

Miners who plan to work in an area can travel to it along with the competent person who will conduct the examination, but the exam must be done before miners are exposed to hazards. If the competent person finds an adverse condition, the condition must be corrected OR miners must be notified before any exposure occurs. Once an area is examined, work can proceed while the competent person continues with the examination.

The problem, of course, is that "sufficiently close in time" is not defined in the rule, and because this is a new requirement, there is no existing case law to interpret the phrase. This is likely to be one of the subjective provisions that will end up being defined in litigation.

Contractors are considered "operators" under the Mine Act and so they are also subject to the examinations rule. Production operators (the "host employer") and contractors can arrange any number of ways to ensure that the exams are completed, but if a contractor does not fulfill its obligations, the host mine operator can also be cited and fined up to $259,725 per violation.

For more information on the new rule's requirements, or development of best practices for effective workplace examinations, please contact the law firm.

2018 SPEAKING SCHEDULE

ADELE ABRAMS

Speaking

Oct 16 BLR Recordkeeping Master Class, Irving, TX (all day)
Oct 19: USA Group, Workshop on MSHA Workplace Examinations, Ontario, CA
Oct 23: National Safety Council annual meeting, Presentation on Legal & Ethical Issues for EHS Professionals
Oct 31: Southeast Mine Safety Conference, Birmingham, AL, Presentation on Legal & Ethical Issues for EHS Professionals

Webinars

Oct 15: ASSP Webinar, Electronic Recordkeeping Rule Revisions
Oct 17: Business 21 Webinar, Safety Incentive Programs
Oct 24: Avetta Webinar, OSHA Compliant Training Programs
October 25: ClearLaw Webinar on OSHA Walking/Working Surfaces Regulations
Nov 7: Pennsylvania Aggregates & Concrete Assn., Webinar on Safety Considerations for Aging and Unique Worker Populations
Nov 8: BLR Webinar, Independent Contractor Safety
Nov 9: Progressive Business Conferences, Webinar, Disciplining Unsafe Employees
Dec 6: Lorman Webinar, Effective Safety & Health Systems

MICHAEL PEELISH

Oct. 10: Chesapeake Regional Safety Council Conference, Presentation on OSHA Silica Update
Oct 11: Montgomery County College, OSHA Silica competent person training
Oct 26: Pennsylvania Aggregates and Concrete Assn, How to Perform a Health Assessment

DIANA SCHROEHER

Nov. 1: Mechanical Contractors Association of America, Presentation on Drug Testing Policies and Marijuana Laws