



New DOL Rule Raises Overtime Salary Threshold

By Diana R. Schroeher, Esq.

The U.S. Department of Labor, Wage and Hour Division, published a Final Rule which raises the threshold overtime salary to \$684 per week, annualized to \$35,568 a year, for exempt executive, administrative and professional employees (“white collar exemptions”). The new regulations, published in the Federal Register on September 27, 2019, will extend overtime pay to approximately 1.3 million workers. Employers will now be required to pay time and one-half to employees working over 40 hours per work week, who earn less than the \$35,568 annual salary. The Final Rule will be effective on January 1, 2020.

The DOL’s September 24th Press Release quoted Acting Secretary Patrick Pizzella: “For the first time in over 15 years, America’s workers will have an update to overtime regulations that will put overtime pay into the pockets of more than a million working Americans. The rule brings a commonsense approach that offers consistency and certainty for employers as well as clarity and prosperity for American workers.”

The Final Rule was preceded by the Obama-era overtime initiative in 2016, which was more aggressive at a threshold level of \$47,476. This rule would have covered four times as many employees. The 2016 Rule was challenged in the U.S. District Court for the Eastern District of Texas, which invalidated the Rule in late 2016. An appeal to the U.S. Court of Appeals for the Fifth Circuit was stayed pending further rulemaking.

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The new 2019 Rule formally rescinds the 2016 Rulemaking.

The 2019 Final Rule also raises the salary threshold for “highly compensated” employees to \$107,432 per year, which is up from the previous cutoff of \$100,000 per year. The DOL has estimated that nearly 102,000 more workers will be entitled to overtime with the increase in the threshold for highly compensated employees.

The Rule allows employers to use nondiscretionary bonuses and incentive payments (including commissions), to satisfy up to 10% of the standard salary levels. The bonus and incentive payments must be paid at least on an annual basis.

The DOL did not make any changes to the established standard “duties” test, which has traditionally exempted workers from receiving overtime, provided they meet the duties test, and if they earn more than the minimum salary level. The regulations establish separate duties requirements for executive, administrative, professional, outside sales, and computer employees.

The DOL Wage and Hour Division website includes new guidance documents to assist employers with compliance – see link below:

<https://www.dol.gov/whd/overtime2019/>

For more information, or assistance with workplace audits and compliance assistance, please contact the Law Firm.



Glynn Voisin selected as Chief Judge of the Mine Safety and Health Review Commission

As of September 30, 2019, Judge Glynn F. Voisin is the new Chief Administrative Law Judge of the Federal Mine Safety and Health Review Commission.

Immediately prior to this position, Judge Voisin served as the Supervisory Administrative Law Judge, Office of Medicare Hearings and Appeals in the Department of Health and Human Services in New Orleans, Louisiana. For the last 14 years, he has served as a Social Security Administration, Office of Hearings Operations administrative law judge.

Judge Voisin also served 28 years in the United States Marine Corps Reserve, with four years of active duty and 24 years of reserve duty, including tours in Vietnam and Desert Storm.



MSHA Workplace Exam Rule Revised (Again)

By Adele L. Abrams, Esq., CMSP

On September 30, 2019, the Mine Safety and Health Administration (MSHA) published a notice in the Federal Register regarding the reinstatement of the regulatory provisions for examinations of working places in metal and nonmetal mines originally published on January 23, 2017. The 2017 rule is being reinstated as the result of an order from the U.S. Court of Appeals for the District of Columbia. The court invalidated a 2018 Trump Administration revision of the rule this summer, holding that it weakened protections for miners. MSHA did not appeal the decision.

The 2017 rule takes effect on September 30, 2019, although MSHA may provide some latitude initially on the revised paperwork requirements. The standard (30 CFR 56.18002 and 57.18002) applies at all surface and underground metal and nonmetal mines, including cement plants, stone quarries and sand and gravel operations. It now mandates that examinations be performed by mine operators and contractors in every active work area, on every shift, by each employer in that area, BEFORE workers enter and commence work.

The person performing the examination must be deemed “competent” by the employer, receive task training on how to adequately perform the exam, and have authority to promptly initiate corrective action, and withdraw miners as needed. As a result, the examiner may be regarded as an “agent of management” because of having the power to direct the workforce. This can result in personal civil penalties of up to \$72,000 if an exam is not performed adequately, and can lead to criminal prosecution — particularly if the

examination records are found to be falsified as the examiner’s name must be included, along with the date of corrective action for each entry.

The examination for each active area must be documented, including every hazard found (even if immediately corrected). Records must be kept for 12 months, and made available to workers and to MSHA. If a hazard poses an imminent danger, all miners must be withdrawn immediately other than those involved in abatement work.

For more information on MSHA workplace exams, or for assistance with MSHA Part 46 or 48 training or audits, contact the Law Office at 301-595-3520 (East) or 303-228-2170 (west).



Mine Commission Steps in to Approve Settlement

By Gary Visscher, Esq.

In a recent decision, *Solar Sources Mining*, (Sept. 30, 2019), the Federal Mine Safety and Health Review Commission once again waded into the issue of “Secretary vs. Commission” authorities in approving settlements of contested citations and penalties.

In the *American Coal Co.* cases (*American Coal I*, 38 FMSHRC 1972 (Aug. 25, 2016)) and *American Coal II*, 40 FMSHRC 983 (Aug. 2, 2018)), the Review Commission affirmed that (1) section 110 (k) of the Mine Act gives the Review Commission “exclusive responsibility for approving all proposed settlements of contested



civil penalties.”; (2) in reviewing a proposed settlement, the Commission and ALJs must “consider whether the settlement of the proposed penalty is fair, reasonable, appropriate under the facts, and protects the public interest.”; (3) in order to carry out the review responsibilities, “the Commission and its Judges ‘must have information sufficient to’ determine if the proposed settlement meets the criteria, and (4) while the Commission and ALJs may consider the six factors listed in section 110 (i), those factors are not exclusive and “there may be considerations beyond the six statutory criteria of section 110 (i) that are relevant to whether a settlement proposal is fair, reasonable, appropriate under the facts, and protects the public interest.”

As an example of criteria beyond the 110 (i) factors, in *American Coal II* the Commission credited the Secretary’s argument that a settlement involving a 30% across the board reduction in penalty with the operator’s acceptance of the citations as issued “could assist the Secretary in future enforcement efforts against this operator.” The Commission found that the ALJ had erroneously dismissed this factor in evaluating whether the settlement met the criteria of “fair, reasonable, appropriate under the facts and protects the public interest.”

The settlement in *Solar Sources Mining* involved three citations. MSHA initially assessed two of the three citations under the regular assessment formula in Part 100, and assessed the third under special assessment provisions. In the settlement, the operator agreed to accept all three citations as issued and the Secretary agreed to apply the regular assessment formula to all three citations, which reduced the overall penalty from \$77,396.00 to \$13,644.00.

The ALJ denied the Secretary’s motion to approve the settlement, finding that the motion to approve the settlement presented no facts to

support the change in penalty. On appeal, the Commission unanimously agreed that the ALJ had abused his discretion in refusing to consider the settlement agreement, but split 3-2 on whether the Commission should approve the settlement, or remand the case to the ALJ to reconsider, with the majority voting to approve the settlement as submitted.

The Commission found that the ALJ had failed to apply the legal standards set forth by the Commission in the *American Coal* decisions, and in fact had failed to even cite those decisions in denying the motion to approve the settlement. The Commission also found that the ALJ had erred in insisting that he would not approve the settlement unless and until the Secretary produced the inspector’s notes and photos. The Commission said an ALJ may request additional facts from the parties to support a settlement, but the ALJ in this case erred by demanding specific documents in order to consider whether the settlement was fair and reasonable.

The additional wrinkle in this case was the proposed settlement agreement’s elimination of the specially assessed penalty for one citation. Before the Commission, the Secretary asserted that he has “unreviewable discretion” to withdraw a specially assessed penalty. The Commission did not specifically address that question. Instead the Commission said that the Secretary had “made what amounts to a binding admission that there was no factual basis for the original special assessment.”

In light of the Secretary’s admission that the alleged violation supports only a regular penalty, the Commission said that “[u]nder these circumstances, it is entirely reasonable for the Secretary to settle for the penalty he [now] deems appropriate . . . , while avoiding the risk of trial on an alleged violation that faces legal challenges, and securing a result valuable for future



enforcement purposes. The Judge should have considered all these factors.”



OSHA Announces a Slew of New Regional Emphasis Programs

By Josh Schultz, Esq.,

On October 1, 2019, OSHA issued 13 new regional and local emphasis programs. These local and regional emphasis programs are enforcement strategies designed and implemented at the regional office and/or area office levels which are intended to address hazards or industries that pose a particular risk to workers in the office's jurisdiction. These programs typically focus on a major industry within a region which is experiencing high injury rates.

Operators in an industry covered by one of the emphasis programs have an increased likelihood of seeing an OSHA inspection at their sites. Courts have held that random selection of a company covered under one of these emphasis programs may constitute probable cause for a search and inspection when OSHA attempts to obtain a warrant.

The directives released by OSHA instruct the covered OSHA offices to conduct random, target inspections in accordance with the agency's Field Operations Manual. Operations in the following industries and regions should be on a heightened alert:

- Oil and Gas Operations
- Maritime employers in the Des Moines Area Office
- Work places with noise and respiratory hazards across OSHA's Region 7 (Iowa, Kansas, Missouri, and Nebraska)
- Grain handling facilities in Kansas
- Powered industrial trucks and other material or personnel handling motorized equipment in construction, general industry, and maritime across Region 7
- High hazard safety and health workplace inspections across Region 7
- Meat processing industries in Nebraska
- Fertilizer grade ammonium nitrate and agricultural anhydrous ammonia facilities across Region 7
- Fall hazards in construction across Region 10 (Alaska, Idaho, Oregon, and Washington)
- Grain handling industry in Nebraska
- Federal agencies in the Des Moines Area Office
- Automotive services across Region 8 (Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming)
- Beverage manufacturing across Region 8





New Secretary of Labor Scalia Confirmed

By Gary Visscher, Esq.

On September 26th, the U.S. Senate confirmed Eugene Scalia as the 33rd Secretary of Labor. Secretary Scalia is an attorney who has practiced in the areas of employment and administrative law for many years. He was also the (acting) Solicitor of Labor during part of President George W. Bush's administration.

During confirmation hearings Mr. Scalia's nomination for head of the Labor Department was criticized by some Democratic Senators, who said his representation of businesses and business associations in several important litigation matters as a private attorney showed that he was too closely aligned with business interests. Mr. Scalia said that as a private sector lawyer he represented his clients' interests, but as Secretary he would have a different client, and would take seriously the Department of Labor's role and obligation to enforce laws passed by Congress. Referring to several DOL enforcement actions during his time as Solicitor, he said, "I took these and other actions because I believe they were right, they further the department's mission, and because I believe in law and order."

Secretary Scalia's assurances during confirmation that DOL would not "go soft" on enforcement under his watch seems likely to be the case. As Solicitor, he and his office often took notably tough positions in negotiating settlement agreements in individual enforcement cases. Mr. Scalia also pushed OSHA to adopt a more aggressive enforcement policy against multi-site corporations which had serious violations at one or more locations, an enforcement policy which

was adopted and has evolved into OSHA's Severe Violators Enforcement Program.

On the regulatory side, with only a year left before the Presidential election, Secretary Scalia is expected to focus on bringing to completion changes that are already well along in the regulatory process. No major changes either extending or rolling back existing OSHA or MSHA regulations or standards seem to meet that criteria.



Firm attorney Brian Yellin, a CIH and CSP already, is now a Safety Ninja, having completed Regina McMichael's outstanding course at the recent ASSP Region VI conference. Brian was also a featured speaker, providing an OSHA and MSHA update.



New California Law Limits Ability to Classify Workers as Independent Contractors

By Josh Schultz, Esq.

On September 18, 2019, California governor Gavin Newsom signed into law a bill limiting employers' ability to classify workers as independent contractors instead of employees. Industry advocates estimate that hiring workers as employees rather than independent contractors can add up to 30% in labor costs, given additional taxes, insurance, workers' compensation, sick leave, overtime, rest breaks and discrimination and sexual harassment protections. The law, California Assembly Bill 5 or AB 5, will take effect January 1, 2020.

The bill has garnered most attention for how it will impact rideshare companies like Uber and Lyft, but it will likely have a large impact across a variety of industries. The California Trucking Association filed a lawsuit alleging that federal law governing interstate commerce will preempt AB 5. A group of more than 5,000 translators and interpreters issued an open letter to California legislators requesting to remain classified as independent contractors.

Uber and Lyft, which treat drivers as independent contractors, have declared their intention to file a ballot initiative exempting themselves from the law. Some professions are exempt from AB 5, including doctors, dentists, psychologists, insurance agents, stockbrokers, lawyers, accountants, engineers, and real estate agents.

This law, which will amend §2750.3 of the California Labor Code, puts the burden of proof on employers to show that a worker is properly classified as an independent contractor where all three of the following conditions are met:

- The worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact.
- The worker performs work that is outside the usual course of the hiring entity's business.
- The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

If a company cannot demonstrate these three requirements, the workers in question are presumed to be employees, rather than independent contractors. The bill allows California's attorney general, city attorneys, and local prosecutors to sue companies over employees who they believe are wrongly classified.

Other states may follow suit with similar legislation. Bills in Oregon and Washington failed recently but could see increased support after California's bill becomes law. Advocates are lobbying for similar legislation in New York and city officials in Philadelphia have expressed interest in similar legislation.





President Trump Limits Agency Guidance

By Adele L. Abrams, Esq., CMSP

On October 9, 2019, President Trump signed two Executive Orders aimed at limiting the ability of federal agencies to issue non-binding guidance documents, such as policy statements, memoranda, bulletins and letters of interpretation (LOI). The president called such guidance “a back door for regulators to effectively change the laws and vastly expand their scope and reach.”

In practice, agency policy is often used to expand exemptions in current rules, easing compliance obligations. By law (the Administrative Procedure Act) such policy issuances cannot add any binding requirements to new or existing rules. Policy documents are typically not issued through rulemaking, but may be published for comment at the agency’s election. OSHA did this with its audit “safe harbor” policy, and MSHA has also done this on a variety of documents.

OSHA and MSHA have long utilized such guidance to help explain new rules, to issue FAQs for rules that could create confusion and OSHA uses LOI to clarify requirements as they pertain to unique situations. Attorneys and safety professionals often rely on these documents as they reflect agency interpretation and often can help in getting citations reduced or vacated entirely.

Recent significant guidance in the safety arena concerned OSHA’s crystalline silica standards, its revised general industry walking and working surfaces rule, lockout/tagout rule exceptions, and MSHA’s workplace examination regulation. The agencies also issue more general guidance

documents addressing inspection and investigation protocols, such as OSHA’s Field Operations Manual and MSHA’s Program Policy Manual and health inspection handbooks. Among pending items that could be affected is OSHA’s review of its policy on joint employers.

One of the new Executive Orders, “Promoting the Rule of Law Through Improved Agency Guidance Documents,” requires all agencies to post all guidance documents on a searchable website with the understanding that anything not posted is considered rescinded. The other Executive Order, “Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication,” is intended to safeguard against “secret or unlawful interpretations of regulations, or from unfair or unexpected penalties.” The Orders took effect immediately but its far-reaching implications will take a while to sort out as agencies begin work revising their guidance access.



Firm Attorney and Principal Adele L. Abrams with other panelists at the Chesapeake Region Safety Council Panel on Medical Cannabis & Safety, October 9, 2019.



2019 SPEAKING SCHEDULE

ADELE ABRAMS:

- October 22: BLR, Master Class on OSHA Recordkeeping, Dallas, TX
- October 24: ASSP Hudson Valley NY PDC, Presentation on Safety in the Age of Trump
- October 29 - 30: National Business Institute workshop on Employment Law, Baltimore MD
- November 5: Southeast Mine Safety & Health Conference, Presentation on Silica & MSHA Update, Birmingham, AL
- November 8: ASSP Ft. Wayne Chapter, Ft. Wayne, IN, Presentation on OSHA Issues
- November 13: ASSP Western PA PDC, Indiana, PA, Keynote Address
- November 15: Penn State Drilling & Blasting Conference, State College, PA, Presentation on OSHA/MSHA Legal Developments
- November 20: SafePro Mine Safety Law Institute, Savannah, GA, Presentation on MSHA law and inspection management
- November 22: Chesapeake Region Safety Council, Baltimore, MD, Workshop on Workplace Violence Prevention
- December 2: Society of Mining Engineers, Webinar, Legal & Ethical Considerations for EHS Professionals
- December 4: ASSP Genesee Valley Conference, Rochester, NY, Presentation on Medical Marijuana & Safety

MICHAEL PEELISH

- November 5: PA Rural Electric Cooperative Assoc., Inc meeting.

JOSH SCHULTZ

- November 22: CRMCA/CSSGA 2019 Annual Conference, Colorado Springs, Co., Respirable Silica Regulation: On the Horizon for Mine Operators