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OSHA Draft Policy on Joint Employer Relationship By: Adele L. Abrams, Esq., CMSP

Companies involved in franchising activities are the target of a draft Department of Labor (DOL) policy, released recently in relation to a National Labor Relations Board (NLRB) ruling in the Browning Ferris case on August 27, 2015, that will make franchising corporations partly responsible for OSHA and other labor law violations by franchise businesses. The policy is viewed as providing OSHA with new enforcement powers against companies found to be “joint employers.”

For more than three decades, OSHA has had a multi-employer worksite doctrine, which allows the agency to site a host employer (or general contractor) as the “controlling employer,” the company that causes the violation as the “creating employer,” any companies whose workers could be harmed by the violative conditions as the “exposing employer,” and the entity that is responsible for abatement of violative conditions as the “correcting employer.” OSHA can choose to cite one or more entities for the same violation. Although this policy has been frequently challenged in court, it remains in legal effect.

The new policy examines whether, for purposes of the Occupational Safety & Health Act of 1970, a joint employment relationship exists between the franchisor and the franchisee, which could permit citations to be issued holding both entities liable as employers. The draft guidance states: “Ultimate

determination will be reached based on factual information about the relationship between the franchisor and franchisee over the terms and conditions of employment.” The policy, prepared by the DOL Office of the Solicitor (which also prosecutes OSHA and MSHA cases) stresses that while the two entities may appear to be separate and independent employers, “a joint employer standard may apply where the corporate entity exercises direct or indirect control over working conditions, has the unexercised potential to control working conditions or based on the economic realities.” OSHA historically used the IRS “20 factor” test, which has been modified to an “economic realities” test, to determine whether companies were improperly classifying employees as “independent contractors.”

The guidance from the Solicitor’s Office states that generally two entities will be found to be joint employers “when they share or codetermine those matters governing the essential terms and conditions of employment and the putative joint employer meaningfully affects the matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction.”

There are four main categories of information that OSHA is directed to obtain: (1) Overall Relationship Between Corporate and Franchise; (2) Written Documentation of Corporation Direction and Control of Franchise; (3) Corporate Control Over the Essential Terms and Conditions of Employment of the Workers at the Franchise; and (4) Corporate Control Over Safety and

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Joint Employer, Con't.

Health Policies and Practices at the Franchisee.

OSHA will ask employers for such evidence as: franchise agreements and collateral documents addressing the relationship, how the franchise was obtained, what the franchise submits to corporate, what fees are paid to corporate by the franchise, whether compensation is paid for use of corporate logos, trademarks and marketing systems, whether the franchisee has agreed to certain corporate conditions, and whether the franchise has to submit plans to corporate. Significant documentation would also be sought by the government on whether there is corporate direction and control of things like terms and conditions of employment of workers and of the franchisee's safety and health policies and practices.

The agency will also look at whether there are common operating procedures for the corporation, whether there are corporate-created products or menus for the franchise to sell, and whether there is a specified computer system. This examination of the relationship will be significant for purposes of characterizing OSHA citations as "repeat" and could be aimed at undermining a decision that was unfavorable to OSHA, in the Loreto-Oswego case, which delineated what was needed to find commonality among affiliates for purposes of "repeated" violations. In that case, because there was not a unified corporate-wide safety and health program or auditing system, the entities were not found to be sufficiently related to warrant imposition of "repeat" violation sanctions. Particular scrutiny will be directed at safety and health issues such as:

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

Companies should review their policies surrounding these items to determine areas of susceptibility. For assistance with comments or determining whether your franchise may have exposure if this proposal becomes a rule, please contact the Law Office.

OSHA RE-ISSUES & REVISES AMPUTATIONS NEP

By: Gary Visscher, Esq.

One of the Occupational Safety and Health Administrations (OSHA's) longest-running National Emphasis Programs is aimed at reducing the number of amputations that occur in the workplace. National Emphasis Programs, or NEPs, are created by OSHA to focus enforcement (and, sometimes, compliance assistance) on a particular hazard or industry. Because of the legal requirement that OSHA schedule its inspections according to administratively neutral criteria, OSHA must explain and justify inspections that are scheduled on the basis of an NEP.

OSHA instituted an NEP on Mechanical Power Presses in February, 1997. As the name indicates, the focus of the NEP was on manufacturing facilities that had mechanical power presses. In 2002 OSHA expanded the scope of the NEP to target more types of machinery, and to include "all types of power presses (hydraulic, pneumatic, etc.), as well as press brakes, saws, shears, slicers, and slitters" (referred to as "the Four S's and a P") in the NEP. The 2002 NEP included a list of 29 industries, all within manufacturing, based on the number of violations of OSHA's machine guarding standards (29 C.F.R.1910.212, .213, and .217) for targeted inspections under the NEP.

The NEP on Amputations was revised and reissued in October 2006. The 2006 NEP modified the criteria for targeting facilities for inspection. OSHA listed manufacturing sectors, based on both the history of violations and total number of amputation injuries, or rate of amputation injuries, using data from the Bureau of Labor Statistics. The 2006 NEP also added additional standards (lockout/tagout (1910.147) and mechanical power transmission apparatus (1910.219)) to the reference list for determining an industry's history of violations.

The new Directive, which was issued on August 13, 2015 (CPL 03-00-019) follows the 2006 NEP in selecting manufacturing industries based on the industry's history of violations and the number or rate of amputation injuries. The result is a list of 80 industries from which worksites may be selected for inspection. In addition, however, the new NEP allows inspection of "general industry establishments where amputation injuries or fatalities related to machinery and equipment have occurred in the five years preceding the effective date of this directive." (con't page 5)

MSHA's Final Respirable Dust Rules, Phase II

By: Sarah Korwan, Esq.

At a stakeholder outreach meeting on August 26, 2015, Kevin Stricklin, Mine Safety and Health Administration (MSHA) Administrator for Coal Mine Safety, discussed MSHA's Final Respirable Dust Rules, Phase II and praised the industry for working towards compliance. Stricklin said that MSHA is encouraged by sampling from the past year, noting that between August 1, 2014, and July 31, 2015, MSHA inspectors and mine operators, combined, took approximately 30,000 coal mine respirable dust samples, and only about 1% of the samples were in violation of the Regulation. In addition, samples reflected a significant decrease in silica exposure.

Stricklin acknowledged the significant decline in fatal accidents for coal. There was a record low number in 2014 and for 2015 there have been 8 fatalities to date which supports progress by industry in reducing fatal accidents. He noted, however, that black lung related deaths are around 330 per year, a number which is not reported as often and, seemingly overlooked.

The emphasis of the outreach meeting was to help the coal mining industry prepare for the next phase of the respirable dust rule, which takes affect February 1, 2016. Three take away points were emphasized: equipment, certification, and education. Currently, the Rule limits respirable dust exposure to 2.0 milligrams per cubic meter (mg/m³), with a 1.0 mg/m³ per cubic meter standard in outby areas. Phase II of the rule takes effect of February 16, 2016, when the standard drops to 1.5 mg/m³, and Phase III of the Rule takes effect on August 16, 2016, when the standard will drop to .5% mg/m³.

Beginning February 1, 2016, samples will be obtained with continuous personal dust monitors, (CPDMs), which will be used to monitor underground coal mine occupations exposed to the highest respirable dust concentrations, as well as all miners with evidence of black lung. These new, state-of-the-art devices provide miners and mine operators with dust exposure results in real time during the miner's shift, unlike the current device that requires that dust collected on a cassette be sent to labs for analysis, which can take days or weeks for results. The manufacturer of the CPDMs, Thermo Fisher Scientific, assured production will meet demand for the devices.

Under Phase II, mine operators must sample the dust in the air for all shifts during the sampling cycle, and the sample must be taken when the mines are operating at least 80 % of normal production so that

they are representative of miners' actual working conditions. Compliance will be based on a single, full shift sample of coal dust, portal-to-portal, rather than simply on an average of multiple samples. Also, if a shift lasts longer than twelve hours, the CPDM must be changed out well before the twelfth hour. Sampling will occur for Designated Occupations (DO) and Designated Area (DA). Other Designated Occupations (ODO) will also be sampled (former DAs on the MMU). The approved CPDM will be used for DA as well as Designated Work Place (DWP) sampling.

Miners must be trained prior to use of the CPDM and recertified every twelve months. In addition, persons must be certified to conduct sampling, maintenance, and calibration, with recertification on these tasks occurring every three years. Maintenance and calibration will involve some overlap in training and tasks. Once sampling is complete, the information will be transmitted electronically to MSHA by the certified individual who took the sample. MSHA has created a program to test data file transmission from the CPDM to MSHA. This will allow MSHA and operators to become familiar with transmitting this data. No data transmitted will be used for enforcement purposes.

If any dust sample exceeds the concentration limit, mine operators must take immediate action. Specifically, the final rule requires immediate corrective actions to lower dust concentrations when a single, full-shift operator sample meets or exceeds the excessive concentration value (ECV) for the dust standard. Respirators must be available for miners affected and corrective action must be taken immediately to lower to or below applicable standard. The operator must make a record of the corrective action taken, certified by the mine foreman or other mine official. The record must be maintained in a secure book (for at least one year).

When a citation is issued, the operator must, within 8 calendar days, sample consecutive shifts until 5 valid samples are obtained. The citation will be terminated after the equivalent concentration of each of the 5 valid samples are equal to or less than the applicable standard obtained during 5 valid consecutive shifts. Also, the operator must submit a revised ventilation plan, incorporating the corrective actions, and this must be approved by the District.

Finally, MSHA is providing extensive guidance and support. There will be outreach to coal mine operators as well as comprehensive compliance assistance material, including distribution of guidance documents, as well as information on software and electronic reporting is available.

U.S. Court of Appeals: ADA Does Not Protect Employees Who Make Verbal Threats of Violence

By: Gary Visscher, Esq.

Unfortunately, workplace violence, including incidents and threats of violence by employees against co-workers, is an all-too-real issue for employers. Even if an employer has not had an incident or threat in the past, it is important to have a policy on workplace violence, including zero tolerance for acts or threats of violence.

Employers may wonder whether such a policy would be upheld, particularly when there have been verbal threats but no acts of violence. A recent decision by the Court of Appeals for the Ninth Circuit helps to reinforce employers' right to take appropriate actions where an employee threatens workplace violence.

The case, *Mayo v. PCC Structural, Inc.*, involved an employee who had been diagnosed with major depressive disorder. With medication and treatment, he had worked for the same employer for over a decade without significant incident. However in 2010, Mayo and several co-workers began to complain about a supervisor to whom they had been assigned. After a meeting was held to discuss the complaints with the company's Human Resources Director, Mayo made threatening statements to co-workers about wanting to shoot the supervisor and another manager. The co-workers reported the comments to management and management suspended Mayo and also called law enforcement. Mayo subsequently took FMLA leave for two months. Near the end of the leave, a treating psychologist cleared Mayo to return to work, but recommended that he be assigned to a different supervisor. Rather than taking him back, the company terminated Mayo's employment.

Mayo sued the company for discrimination based on disability under the Oregon statute, which closely follows the federal Americans with Disabilities (ADA) law. The trial court granted the company summary judgment and the case was appealed to the Ninth Circuit, which affirmed the district court's decision.

The Court of Appeals held that a person who threatens violence is not a "qualified individual" under the statute, and therefore Mayo could not make a prima facie case of discrimination. "The Act does not require an employer to retain a potentially violent employee. Such a requirement would place the employer on a razor's edge – in jeopardy of violating the Act if it fired such an employee, yet in jeopardy of being deemed

negligent if it retained him and he hurt someone. The Act protects only 'qualified' employees, that is, employees qualified to do the job for which they were hired; and threatening other employees disqualifies one."

The Court of Appeals for the Ninth Circuit cited several similar holdings by other federal courts of appeals and state appellate courts. The Ninth Circuit also cited 1997 guidance from the EEOC which stated that an employee who "has a hostile altercation with his supervisor and threatens the supervisor with physical harm" is not a qualified individual. In the case before the Ninth Circuit, the employee made verbal threats of his intent to harm the supervisor; the Court said an employer need not "simply cross their fingers and hope the violent threats ring hollow."

Proximity Detection Systems for Coal Haulage Equipment in Underground Coal and Metal/Nonmetal Mines

By: Sarah Korwan, Esq.

On September 1, 2015, MSHA announced it was proposing a rule requiring all haulage machinery in underground coal mines, including shuttle cars, ram cars and scoops, be equipped with technology that prevents miners from becoming struck, pinned or crushed. According to MSHA, between 1984 and 2014, pinning, crushing and striking accidents killed 42 miners and injured 179 others.

In underground coal mines, the proposed rule requires coal mine operators to use proximity detection systems that do the following:

- cause a coal-hauling machine or scoop to stop before contacting a miner;
- provide audible and visual warning signals when a miner gets too close to the machine (within the machine's warning zone);
- provide a visual signal on the machine that indicates the system is functioning properly;
- prevent movement of the machine if the system is not functioning properly;
- prevent interference with or from other electrical systems;
- be installed and maintained by a person trained in the system's installation and maintenance;

Proximity Detection, Con't.

The proposed rule includes a phase-in period for compliance. Specifically, eight months after the rule goes into effect, coal-hauling machines and scoops would be required to be equipped with an existing proximity manufactured after the effective date of the rule; and coal-hauling machines and scoops would be required to be equipped with an existing proximity detection system, which can be modified underground, to comply with the new rule. Operators would have thirty-six months after the rule goes into effect to bring into compliance coal hauling machines and scoops equipped with an existing proximity detection system, which cannot be modified underground or need to be replaced with a new proximity detection system. Coal hauling machines and scoops manufactured on or before the effective date of the rule and not equipped with a proximity detection system would also have thirty-six months to be updated for purposes of compliance.

In addition, MSHA is considering requiring proximity detection equipment in underground metal/nonmetal mines. According to MSHA, since 1984, there were five fatalities in underground metal and nonmetal mines which potentially could have been prevented had the equipment be equipped with devices.

MSHA is soliciting comments on the proposed rules requiring proximity detection equipment on all haulage equipment in underground coal mines and in underground metal and nonmetal mines. Public hearings will be held. The comment period will close on December 1, 2015. If your company is interested in submitting comments, our firm is available to assist you. Please contact us at (301) 595-3520.

Amputation, Con't from Page 2.

Although the NEP states that the Area Office may learn about specific amputation injuries from “workers compensation data, OSHA 300 data, NIOSH data, and other reliable sources of information.” The most likely source of injury information is OSHA’s revised injury reporting rule which went into effect on January 1, 2015. Under the rule, employers must report any amputations (as well as any in-patient hospitalization or loss of an eye) within 24 hours of the event.

According to OSHA, more than 2000 amputation injuries occur each year. In recent months, OSHA has issued significant penalties in several cases where amputation injuries were a prominent concern. Employers should give special attention to eliminating or protecting employees against this hazard.

Attorney-Client Privilege Prevails

By: Justin M. Winter, Esq.

On August 11th, 2015, the U.S. Court of Appeals for the D.C. Circuit in *Kellogg Brown & Root, Inc., ET AL*, reversed a U.S. District Court decision ordering the production of documents generated during an internal investigation by the company. In reversing the U.S. District Court ruling, the Circuit Court ultimately held that documents produced during an internal investigation led by company lawyers were protected by the attorney-client privilege.

A False Claims Act case was filed against Kellogg Brown & Root, Inc. (KBR), and in order to investigate the details of the allegations contained in the claim, KBR conducted an internal investigation. The Petitioners in the claim sought the documents discovered during the internal investigation. KBR argued that the documents related to the internal investigation were privileged due to the fact that the investigation was conducted for legal advice and preparation for potential legal defense. The claimant argued that the investigation documents were unprivileged business records. In *Kellogg Brown & Root, Inc., ET AL, v. The United States of America*, the US District Court held that the internal investigation documents were unprivileged because KBR failed to show that the “communication would not have been made ‘but for’ the fact that legal advice was sought.”

The District Court further held that the internal investigation was motivated by corporate policy. KBR subsequently filed a Writ of Mandamus with the U.S. Circuit Court, who allowed the U.S. District Court to hear arguments as to why the internal investigation documents would be discoverable. The Writ is an order by the higher court requiring the lower court to comply with its direction while a case is ongoing. In this case it was permitting the oral arguments to be heard. The District Court held that documents related to KBR’s Code of Business Conduct, which is an internal mechanism through which potentially illegal acts within the company are discovered, should be discoverable and produced because these documents are not privileged, and the claimant showed “substantial need.”

The Court of Appeals disagreed with the district court with support from the Supreme Court’s decision in *Upjohn v. United States*. In *Upjohn*, the Court held that a privilege that “results in widely varying application by the courts, is little better than no privilege at all.” The balancing test applied by the District Court under Federal Rule of Evidence

Attorney-Client Privilege, Con't.

612(a)(2) was misapplied. The opponent argued that privilege was waived once the in house counsel for KBR testified that he had reviewed the documents to prepare for his testimony and in a motion for summary decision reference to the documents were made. The court disagreed with these assertions. In reference to the motion, the court found that the discussion was simply a footnote reiterating facts and not support for a waiver of privilege. The decision continues to protect a company's ability to conduct internal investigations that are protected by attorney work product and attorney client privilege.

Injunction Issued Against Waters of the US Rule By: Tina M. Stanczewski, Esq., MSP

On August 27, 2015, the U.S. District Court for the District of North Dakota issued an injunction to stop

enforcement of the "Waters of the United States (WOTUS) rule." The Environmental Protection Agency said it would honor the injunction for the 13 states that were part affected by it. Other states would see enforcement of the rule. The 13 states are: Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota and Wyoming. The Court held that it was likely the EPA does not have authority under the Clean Water Act to implement the rule.

Other district courts dismissed similar challenges for lack of jurisdiction. An appeal is expected to determine whether the district court had jurisdiction to issue the injunction and possibly whether the injunction is valid. This issue will continue to evolve as more courts issue rulings and challenges to enforcement actions begin.

SPEAKING SCHEDULE

Adele Abrams

Sept. 29: National Safety Council Annual Congress, Atlanta, GA, presentation on Temporary Worker and Contractor Safety
 Sept 30 & Oct. 2: ASSE Region VI PDC, Myrtle Beach, SC, presentations on Temporary Worker Safety and Roundtable on Safety & Medical Marijuana
 Oct 6: ND Safety Conference, Grand Forks, ND
 Oct 7: Chesapeake Region Safety Council Annual Meeting, Laurel, MD, presentation on Temporary Worker Safety
 Oct. 16: United Safety Associates (USA) Group, Ontario, CA, workshop on MSHA enforcement
 Nov. 3: Safepro Inc., Savannah, GA, Mine Safety Training
 Nov. 4: MSHA Southeast Safety Conference, Birmingham, AL, presentation on Safety & Health Management Programs
 Nov. 6: MSHA Southeast Safety Conference, Birmingham, AL, Lawyer's Roundtable
 Nov 9-10: NRASP Conference, Fargo, ND
 Nov. 12: ASSE Construction Safety Symposium, New Orleans, LA
 Dec. 8: Associated General Contractors, Fargo, ND, Keynote Presentation
 Dec. 9: National Business Institute, Rockville, MD, presentations on Employment Law

Tina Stanczewski

Sept. 18: National Drilling Association Convention, MSHA/OSHA Regulatory Update, Ellicott City, MD
 Sept 28: ASSE Region VI PDC, Myrtle Beach, SC, presentation Contractor Responsibilities: Safety and Training, Risk Management, and Legal Obligations

Nicholas Scala

Sept. 16: North Carolina Department of Labor – Law School, Rocky Mount , NC, MSHA Operator Responsibility and Updates
 Oct. 5-8: Florida Mine Safety Training Conference, Tallahassee, FL, MSHA Supervisor Responsibility Training
 Nov. 2: MSHA Southeast Safety Conference, Birmingham, AL, Industrial Hygiene Panel