



**MSHA Issues Guidance on POV  
Corrective Action Programs**  
By Adele L. Abrams, Esq., CMSP and  
Tina M. Stanczewski, Esq., MSP

MSHA's Pattern of Violations (POV) saga continues. On April 3, 2014, the U.S. Department of Labor's Mine Safety and Health Administration (MSHA) issued a Program Information Bulletin (PIB) detailing the corrective action program (CAP) for mines facing a POV status. The purpose of a CAP, which an MSHA District Manager must approve, is to reduce the significant and substantial (S&S) violations at a mine. For MSHA, approaching or existing in POV status, places a mine in the category of repeat offender. Without corrective action, the mine may face closure. The POV program is not just for coal, and a number of mines in the metal/nonmetal sector are finding that they already meet 3 out of the 4 POV criteria, which then raises the issue of whether a CAP should be prepared.

But submission of a CAP, which must outline how to address "deficiencies" cited during the inspections leading to POV status, also has an aspect of self-incrimination. If the "deficiencies" are acknowledged in a submitted CAP, at the same time that the citations/orders they relate to are under contest (since POV status is now based on "issued" rather than "final" citations/orders), it is possible that acknowledging the deficiencies could be admissible in court against the mine operator when the time eventually comes to hold a hearing on the underlying citations/orders. The CAP is a new regulatory requirement for operators, added to the 2013 POV final rule. First, since the passage of the final POV rule in January 2013, which changed the entire landscape of POV monitoring, operators are now responsible for determining their potential for POV. Prior to 2013, MSHA determined your potential.

Many operators remain perplexed by the change whereby issued, not finally adjudicated citations, create the mine's POV status. Some still remember the phrase "innocent until proven guilty," and wonder why it doesn't apply to POV, given the significant power that MSHA has at POV-status mines: each new S&S citation serves as a closure order for that area of the mine or piece of equipment. Once placed on POV status, mine operators remain there until they have an inspection that is 100 percent free from S&S citations. Therefore, any inspector can keep a POV mine in this status simply by issuing a single S&S citation!



The April 2014 PIB reiterated MSHA's tools aimed at assisting operators deal with POV compliance. According to MSHA, a CAP encourages mines facing POV status to be proactive. If you are approaching POV status, act now in an attempt to avoid receiving a POV Notice. Specifically, it can be a mitigating circumstance when "approved and implemented" with "concrete, meaningful, measures specifically tailored to address the repeated S&S violations accompanied by positive results in reducing S&S violations," according to MSHA's Procedures Summary. The mine should create a plan to reduce its S&S violations with measurable benchmarks. If an operator may enter POV status, the CAP should be developed and submitted to MSHA for approval. Otherwise, if an operator does not submit a CAP and no other mitigating circumstances can be argued, the operator faces sanctions under Section 104(e) of the

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Federal Mine Safety and Health Act of 1977. There are several subject areas that must be addressed in your CAP:

- 1) Corrective actions the operator intends to take, including benchmarks or milestones that are likely to result in meaningful, measurable, and significant reductions in S&S violations;
- 2) Specific S&S frequency rates and the dates by which these rates will be achieved;
- 3) Specific changes the operator will make to improve the quality and/or increase the frequency of examinations conducted by qualified and competent personnel, including examinations for violations of health and safety standards, and the methods by which hazardous conditions will be timely abated;
- 4) Any changes in mine management that recently occurred, or management changes that will affect corrective actions at the mine;
- 5) The specific actions the mine management (superintendent/ mine manager and mine foreman) will take to provide greater attention in the review of the examination books and records and discuss the examination results with examiners each day;
- 6) The frequency with which mine management (mine superintendent / mine manager and mine foreman) will conduct unannounced examinations of the mine to audit mine examinations and compliance with health and safety standards;
- 7) The additional health and safety staff that will be added to the mine to assist in the daily auditing of compliance performance and a description of the authority they will be delegated to halt production / work when violations are identified;
- 8) Specific training miners will receive on miners' rights to report hazards and unsafe conditions and on protection against retaliation;
- 9) Training the mine operator will conduct for mine officials, mine examiners, competent persons and miners to address each of the conditions that caused the unacceptable levels of citations and orders;
- 10) Planned modifications or additions to engineering and/or administrative controls to address specific conditions or practices;
- 11) Identification of the personnel who will be responsible for implementing and monitoring the corrective action program;
- 12) Milestones and benchmarks for implementation of each component of the program, including date by which they will be achieved;

- 13) How the operator intends to ensure the corrective action program's milestones are achieved and the method by which the operator will update the District Manager on the program's progress. These updates should occur as often as possible, ideally, on a weekly or bi-weekly basis.

The goal of the CAP is to achieve a 50% reduction in the S&S rate of the mine's most recent POV report or an S&S rate at or below the most recent median S&S rate for similar mines. Once you create a CAP and MSHA approves it, you must keep it in place. Abandoning it is not taken lightly by MSHA. Consequently, if circumstances change at the mine, your CAP should be amended to reflect current safety and production conditions. Consider it a living document.

Since January 2013, when MSHA issued the final rule on POV that took effect just over a year ago, a number of operators have already faced the wrath of this new and expansive landscape. About seven months after the passage of the POV rule, MSHA placed four mine operators on its POV list in October and November 2013. With MSHA maintaining sole discretion on how to construe the definitions of "criteria" and "pattern," operators must understand the POV rule and how it applies to their mine.

The key for operators is to stay off the list in the first place. This is where being proactive is key. Currently, mine operators must monitor their POV status via the Mine Data Retrieval System on the MSHA website. Here, operators can enter their mine ID, and a self-generating tool explains whether you are facing POV status. There are "No" and "Yes" indicators to explain the criteria to you. MSHA no longer has a duty to warn you that POV status is pending. It is now your duty to assess POV status.

To be placed in POV status there are two methods of determination. The first method requires a mine to meet the following four criteria: (1) At least 50 citations/orders for significant and substantial (S&S) violations issued in the most recent 12 months. (2) A rate of eight or more S&S citations/orders issued per 100 inspection hours during the most recent 12 months OR the degree of negligence for at least 25 percent of the S&S citations/orders issued during the most recent 12 months is "high" or "reckless disregard," (3) At least 0.5 elevated citations and orders [issued under section 104(b); 104(d); 104(g); or 107(a) of the Mine Act] issued per 100 inspection hours during the most recent 12 months, (4) An Injury Severity Measure (SM) for the mine that is greater than the overall Industry SM for all mines in the same mine type and classification over the



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most recent 12 months. The second method requires mine to meet the following two criteria: (1) At least 100 S&S citations/orders issued in the most recent 12 months, and (2) .At least 40 elevated citations and orders [issued under section 104(b); 104(d);104(g); or 107(a) of the Mine Act] issued during the most recent 12 months.

According to MSHA Assistant Secretary Joseph A. Main, "Mine operators should closely track their violation and injury histories." However, MSHA encourages operators to independently track their violation and injury histories even though the MSHA POV tracking tool is supposed to be updated on the 15th of each month. The lesson is: do not rely solely on MSHA's technology.

So what should you do, if after monitoring via the MSHA website and independently, you determine that your mine has the potential to reach POV status? First, if you are in real danger of receiving a POV Notice, you must develop, submit and implement a CAP. However, if there is concern, but no real likelihood, then examine the S&S citation standard. If the mine repeatedly is being issued S&S citations under a specific standard, then develop a targeted program to address the issue. This may require monetary investment for engineering changes, or it may require less expensive yet new processes and procedures, training, restricted access to an area of concern, and more.

Second, are you receiving unwarrantable failure citations/orders issued as high negligence or reckless disregard under Section 104(d) of the Mine Act? These categories usually have MSHA alleging that agents of management had some knowledge about the condition or that there are no mitigating circumstances surrounding the alleged violations. Policies, training, procedures, thorough workplace examinations, and internal corrective actions are items that promote mitigating circumstances. Review your programs related to the standards issued. Ensure your management understands timely correction of possible hazards and that they have the authority to stop work, if necessary.

If elevated actions under the Act are being issued ((104(b), 107(a), 104(d) and 104(g)(1)), investigate the circumstances and determine if new policies, training, or procedures are necessary. Also, review and analyze your injury rates and types of accidents. If you are encountering multiple slip and trip injuries combined with a rise in housekeeping citations (S&S or non S&S), identify what or who is creating the hazard.

Look to retraining, additional hiring, new policies, or automation, to eliminate the problem.

Operators are the only ones with specific knowledge about their mine, and they are in the best position to identify and implement changes. From MSHA's perspective, the CAP is a method for operators to be proactive in determining what approach best fits their situation. For operators, it may be a cumbersome and costly addition to their already time-constrained lives, but it is necessary to avoid the peril of the POV. Ultimately, for now, it is a process that we all must accept.

### Presidential Memorandum Seeks to Expand Overtime Eligibility

**Nicholas Scala, Esq., CMSP**

On March 13, 2014, President Obama issued a memorandum to the Secretary of Labor about expanding eligibility for overtime pay. The memorandum instructs the Secretary of Labor to evaluate and modernize the overtime regulations for executive, administrative, and professional employees. These targeted employees are often exempt from overtime wages under what is called the "white collar" exemption.

President Obama intends for the Department of Labor to implement its rulemaking authority for the updates to existing overtime regulation. Thus far, a prominent element of the President's second term agenda is the reexamination of federal labor regulations, specifically wage regulations. The President and Department of Labor launched an exhaustive campaign to increase the federal minimum wage to \$10.10/hour, raised federal contractor minimum wage to \$10.10 per hour from \$7.25 per hour, and now the aim is to expand overtime eligibility.

Overtime eligibility, with exceptions, includes pay of at least 1.5 times the hourly pay rate for persons working over 40 hours per week. However, under current Department of Labor regulations, salaried employees making over \$455 per week can be exempted from receipt of overtime wages. One such goal of the memorandum is to increase that weekly threshold for exemption to an amount between \$570 and \$970 per week. Depending on which side of this range the Department of Labor aims for, a great many employees will be eligible for overtime payment.

This not only will affect white collar industries or professionals, but it will affect the entire national workforce. Therefore, regardless of the industry, employers must remain cognizant of this coming change.



## Supreme Court Weighs in on Payment for Putting on Protective Gear

By Adele L. Abrams, Esq., CMSP

**The Supreme Court ruled, in *Sandifer v. United States Steel Corp.*, that the time workers spend “donning and doffing” their protective gear such as safety glasses or respiratory protection is not compensable under the wage/hour law.**

It is rare that safety-related cases make it to the highest court of the land - the United States Supreme Court – but this occurred recently, in a hybrid matter that arose under the Fair Labor Standards Act (FLSA). On January 27, 2014, the Supreme Court ruled, in *Sandifer v. United States Steel Corp.*, that the time workers spend “donning and doffing” their protective gear such as safety glasses or respiratory protection is not compensable under the wage/hour law.

The FLSA was amended, back in 1949, to hold that the compensability of time spent changing clothes or washing at the beginning and end of each workday was a subject committed to a company’s collective bargaining agreement (CBA). Whether donning/doffing (putting on and taking off) clothing qualifies as “changing clothes” depends on the meaning of that statutory phrase. The court found there was no reason to interpret this as excluding protective work clothing. However, Section 203(o) of the Act has an exception that applies when the changing of clothes is “an integral and indispensable part of the principal activities” for which covered workers are employed, and thus is compensable. In some occupations, such as butchers and longshoremen, protective clothing does fall within this definition.

The U.S. Steel lawsuit was filed as a “collective action” under the FLSA for back pay covering time putting on clothing and safety protective devices at the start of the shift and taking them off at the end of the shift. About 800 workers working for the defendant’s steel mill were part of the collective group. The plaintiffs asserted that the employer required them to wear all of the items due to hazards encountered on the job. The protective items listed in the complaint were: a flame-retardant jacket, pair of pants, and hood; a hardhat; a snood; wristlets; work gloves; leggings; metatarsal boots; safety glasses; earplugs; and a respirator. They sought to be paid for the time involved with putting on and removing these items each workday.

Because this time would normally be compensable under the FLSA, the court looked to the parties’ collective

bargaining agreement, which said the time was non-compensable, but that did not end the analysis, because the CBA provision turned on the applicability of 29 U.S.C. 203(o) to the time at issue. US Steel did not dispute that, had the clothes-changing time not been rendered non-compensable under Section 203(o), it would have been a “principal activity” and subject to payment. It was the workers who argued that the donning/doffing of protective equipment did not qualify as “changing clothes” for purposes of the FLSA and its collective bargaining agreement.

In the initial ruling at the US District Court level, U.S. Steel prevailed, with the court holding that donning and doffing of protective gear constituted changing clothes within the meaning of Section 203(o); the US Court of Appeals, 7th Circuit, upheld those findings. In its 2014 decision, the US Supreme Court affirmed.

In this case, of the 12 items at issue, only three – safety glasses, earplugs, and a respirator – did not fall within the interpretation of clothes, according to the court. The remaining items listed above (e.g., the shirt, pants, hood and gloves) were “clothes” as they were designed and used to cover the body and were commonly regarded as articles of dress. It found the metatarsal boots (steel-toed boots) were “just a special kind of shoe.”

Apparently concerned that courts would have to separate the minutes spent clothes-changing from the minutes devoted to other activities during the relevant pre/post work periods, some courts of appeal had adopted a “de minimis” approach, but the Supreme Court found it was best to ask whether the period at issue, as a whole, could be fairly characterized as time spent in changing clothes or in washing, rather than having to determine which portion of the donning/doffing period was associated with non-compensable clothing changes under the CBA.

The court noted that there was no basis to conclude that the unmodified term “clothes” somehow omitted protective clothing, such as the fire-resistant garb in this case (a type often worn by electricians and even welders).

It wrote that the object of Section 203(o) is to permit collective bargaining over the compensability of clothes-changing time and to promote the predictability achieved through negotiation. It also refused to adopt an interpretation that defined clothes “changing” for simple substitution of street clothes with other clothes as a matter of choice, or layering of garments.



## Supreme Court Weighs in on Payment for Putting on Protective Gear, Continued From Page 3, 4

Simply put, if an employee devotes the vast majority of that time to putting on or taking off safety equipment listed above or other non-clothes items (e.g., a hard hat or reflective vest), the entire period would not qualify as “time spent changing clothes” even if some clothes items were also put on or removed by the employee. But if the vast majority of time is spent donning/doffing “clothes” then the entire period would qualify and the time spent putting on the safety gear would not need to be subtracted, as it would be minimal.



Bottom line: the interpretation adopted by the high court leaves room for distinguishing between clothes and wearable items that are not clothes, such as some safety equipment and devices. Where a CBA exempts the employer from payment for time spent changing clothes, no additional pay will be required for the donning/doffing of safety items under most circumstances as long as the majority of the donning/doffing time is related to exempt clothing changes. In a non-union work environment, things may be less clear because no CBA would apply and the court would have to look at the totality of the circumstances and how integral the changing of clothes is to the employer’s principal activities.

One consideration will likely be whether employers are required to provide and enforce the use of such equipment by law. Therefore, as OSHA moves forward on its crystalline silica standard, which (as proposed) would require more prevalent use of respirators in the workplace for certain construction tasks, and even establishment of regulated areas where clothes changing might be required, employers would be well-served to understand the pertinent provisions of the FLSA, regardless of whether they are a unionized workforce.

### MSHA Enforcement Updates Nicholas Scala, Esq., CMSP

Throughout each administration and year, enforcement agencies such as OSHA and MSHA issue Program Policy Letters or similar documents intended to provide guidance to operators. A major issue with this practice is that operators are frequently held responsible for the content of such publications, although they failed to conduct proper rule making. {For more details, see our article at <http://mshaenforcementalerts.com/kcfinder/upload/files/adele/Abrams%20Newsletter%20%20March%202014.pdf>}

Nonetheless operators should do their best to remain aware of MSHA or OSHA policy letters or information, as these can

## MSHA Enforcement Updates, Cont.

show enforcement trends for upcoming inspections. The following are several recent policy updates pertinent to MSHA enforcement:

1. On March 25, 2014, MSHA reissued an existing Program Policy Letter regarding examination of workplaces for Metal and Nonmetal mines. (P14-IV-01). This letter applies to both surface and underground mine operators, contractors, equipment manufacturers, and miners under 30 C.F.R. §§56/57.18002.

The letter is meant to remind operators of the requirements under the workplace exam standard, which includes each working place, to examine for conditions which adversely affect safety or health at least once per shift. Additionally, the letter emphasizes that the record must be made available for review by MSHA inspectors for the 12 months following the date of the exam.

Further, it clarifies the exam must be done by a “competent person” which is defined by §§56/57.2 as a “person having abilities and experience that fully qualify him[her] to perform the duty to which [s]he is assigned.” Moreover, the letter reiterates the content requirements for each workplace exam, including the date, examiner’s name, and workplace examined.

30 C.F.R. §56/57.2 includes definitions for terms used throughout the MSHA standards; operators should make themselves aware of the definitions to better understand their requirements under the Mine Act. (30 C.F.R. can be found on the [mhsa.gov](http://mhsa.gov) website).

2. Also on March 25, 2014, MSHA reissued a prior Program Policy Letter regarding the use of safety belts and lines under 30 C.F.R. §§56/57.15005 at surface and underground Metal and Nonmetal mines. (P14-IV-02). This letter also applies to mine operators, contractors, equipment manufacturers and miners.

The letter restates MSHA’s intention to enforce the use of safety belts and lines where there is a danger of falling, that a second person must tend to lifelines when bins, tanks or other dangerous areas are entered. MSHA also restates its reliance on the OSHA fall protection standard 29 C.F.R. §1926/501(b)(1), better known as the OSHA six (6) foot rule. However, operators should not rely on the six (6) foot rule as protection or immunity from being cited. MSHA’s rule clearly states, “where there is a danger of falling,” which is a subjective standard that each inspector can interpret as they see fit. This means that even working at a height of 13 inches without fall protection could result in a citation if the issuing inspector believes there is a danger of falling.



## MSHA Enforcement Updates, Cont.

Operators should remain diligent in their effective and safe use of fall protection equipment where able to do so. Operators should also make themselves familiar with MSHA requirements under §§56/57.15005, and do not rely on protection under the OSHA six (6) foot rule. This is especially true for contractors who work at both MSHA and OSHA sites. The operator must ensure miners follow the appropriate standards at each site.

3. MSHA part 50 recordkeeping/recording enforcement has increased in the recent years. This includes well known requirements, such as the strict adherence to the 15 minute rule for reporting serious injuries or fatalities to MSHA under 30 C.F.R. §50.10. However, there are many operator requirements under part 50, many of which operators if not previously exposed to a specific scenario, may not be aware.

One such reporting requirement falls under §50.20(a), which imposes upon each mine operator (owner) the responsibility to submit and maintain accident reports for contractor employee injuries at the operator's mine. Regardless of a contractor submission of a Form 7000-1 for any injury, the mine operator must also file a Form 7000-1. This responsibility stems from the operator's strict liability for maintaining health and safety at the mine site, which means the operator is responsible even for actions of contract miners on site.

### MSHA's Flagrant Violations: Are We Any Closer to What it Means?

By Gary Visscher, Esq.

Eight years after the law was passed that authorized MSHA to issue "flagrant" violations to mine operators, the criteria by which MSHA does so remains shrouded in a lack of transparency or consistency.

The provision creating "flagrant" violations was included in the 2006 Mine Improvement and New Emergency Response Act (MINER Act). The provision, section 110 (b)(2) of the Mine Act, states

*Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than \$220,000. For purposes of the preceding sentence, the term "flagrant" with respect to a violation means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.*

## Flagrant Violations, Cont.

Although Congress directed that MSHA promulgate regulations to implement the provision, MSHA issued a rule, 30 C.F.R. §100.5, that simply restates the language of section 110(b)(2). The only criteria that MSHA has published for issuing "flagrant violations" was a 2006 Procedure Instruction Letter (No. I06-III-04), reissued in 2008 (No. I08-III-2), and a 2011 press release. Neither of those provides any real protection against arbitrary application.

Despite the lack of clear criteria, MSHA has continued to issue flagrant violation citations, and the Commission judges have been forced to try to interpret the ambiguous language of the statute without clear or consistent application from MSHA. Most of the cases have involved the question of what test should be applied to find a "repeated failure" under section 110(b)(2). In *Wolf Run*, the Commission reversed the judge's ruling that MSHA may not consider previous violations in determining whether to issue citations as flagrant violations. But the Commission also observed that the Secretary had not provided a clear or consistent interpretation of the statute's flagrant violation provision, including even changing his interpretation several times during the course of the litigation.

In a recent decision in *Secretary v. Blue Diamond Coal Co.*, Judge Paez rejected MSHA's allegations that violations in the case were flagrant. The judge held that a flagrant violation based on a "reckless" failure requires MSHA to prove more than that the operator made an "unreasonable mistake," but that the operator acted with "conscious or deliberate disregard for safety." The judge also applied a definition of "repeated failure" that had been provided by the Secretary, but held that the Secretary did not carry his burden of proof to show "a predicate, previous failure to make reasonable efforts to eliminate a previous violation" by merely introducing the record of the operator's past citations and orders.

Last month, in a preliminary order in *Secretary v. Oak Grove Resources*, Judge Feldman ordered the Secretary to provide the court with responses to several questions regarding the interpretation of the language of section 110(b)(2). The judge's order directed the Secretary's counsel to provide the Secretary's position on such basic issues as the degree of gravity required for a flagrant violation and the degree of negligence for a flagrant violation based on a repeated failure. The reason for the order, the judge wrote, was that "the hearing in this matter cannot proceed without determining the proper evidentiary requirements" for the flagrant violations that were alleged. The lack of clear and consistent definition and criteria for issuing flagrant violations is exacerbated by the lack of transparency in how



## **MSHA'S FLAGRANT VIOLATIONS: ARE WE ANY CLOSER TO WHAT IT MEANS?, CONT.**

MSHA decides to issue flagrant violations. In a recent hearing in a case in which MSHA alleged three guarding violations were "flagrant," the inspector who issued the citations suggested that in fact he had had little to do with their designation as flagrant, and could not explain, beyond repeating the definition in the statute, on what basis the violations were deemed to be "flagrant."

Although MSHA does not report statistics on the number of citations issued as flagrant violations, it appears that MSHA's use of the flagrant violation designation, and the elevated penalties that come with it, may be increasing. Recent decisions by the Commission judges provide some hope that MSHA may have to provide greater clarity and consistency when using this powerful enforcement tool.

## **MARIJUANA IN THE WORKPLACE: WILL YOUR DRUG POLICY PROTECT YOU AS MORE STATES LEGALIZE MARIJUANA?**

**By Tina Stanczewski, Esq., MSP**

As states pass laws to legalize marijuana, employers must proactively address drug use in the workplace. At least 20 states have legalized medical marijuana, some have legalized some recreational use and many more have loosened penalties for recreational use. Although marijuana use and possession is a federal crime (Schedule I drug under the Controlled Substances Act), the Justice Department has "relaxed" enforcement as states legalize its use to balance state versus federal concerns.

Twenty-two states have some form of acceptable use of "medical" marijuana: Alaska, Arizona, California, Colorado, Connecticut, D.C., Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, Oregon, New Mexico, Rhode Island, Vermont, and Washington. Colorado and Washington have also created laws to legalize some recreational use.

Various federal laws govern or outline standards for a drug-free workplace. The Occupational Safety and Health Act (OSHA) encourages drug-free workplace programs because impairment from a drug, such as marijuana, constitutes an avoidable workplace hazard. The Omnibus Transportation Employee Testing Act requires drug testing for employees in "safety" positions for various industries: trucking, mass transit, aviation, railroads, pipelines, and such. Currently, the Mine Safety and Health Administration addresses drug and alcohol use under 30 CFR 56.20001, which prohibits the

## **MARIJUANA IN THE WORKPLACE, CONT.**

use of narcotics on a mine site or while working. Some states prohibit the discrimination of applicants based on their status as a medical marijuana user or if the medical marijuana using employee fails a drug test.

The exception is if the person was impaired while working. This places employers in a precarious situation. In some states, if an employee fails a drug test, you must confirm whether he has a legal right, under state law, to have marijuana in his system.

The Department of Transportation (DOT) is very clear that state laws concerning drug testing will have no bearing on the DOT regulations (49 CFR Part 40): drug tests will not be verified as negative because an employee is a recreational or medical marijuana user in a state where recreational or medical use is permitted.

The next question remains, how do you ensure the employee does not show up to work under the influence. An impaired employee is arguably a hazard to himself and the entire workplace. This opens your business to various tort and/or federal enforcement actions.

The best way to protect your company is to have a clear and detailed drug policy. First, review your state laws surrounding the use and/or possession of drugs. If your employees cross state lines for work or live in surrounding states, assess the governing laws. Second, define your policies (what drugs are prohibited, when does drug testing occur, what disciplinary action will be taken for violation of the policy). Be specific about what drugs are prohibited, including alcohol, but develop broad language to cover items unforeseen. Will your drug testing be pre-employment, post-accident, random, how often, and what drugs will be identified? Develop specific language that prohibits drug use while on lunch or other breaks, prohibit drug-related paraphernalia on company-property, and possession of drug and alcohol.

Ultimately, it is the company's responsibility to provide a safe environment. With the changing landscape, an employer must be specific, assertive, and knowledgeable about state and federal laws and create a drug policy that provides a safe work environment while protecting the interest of the business.