



**LAW OFFICE OF
ADELE L. ABRAMS P.C.**

ISSUE 5
JUNE 29, 2017
Copyright 2017

**“Joint Employment” Changes at DOL
Impact Safety, Employment Laws**

By: Adele L. Abrams, Esq., CMSP

On June 17, 2017, U.S. Secretary of Labor Alexander Acosta announced the withdrawal of the U.S. Department of Labor’s (DOL) 2015 and 2016 informal guidance on joint employment and independent contractors. It appears that this guidance has already been removed from the DOL website, although some related fact sheets remain.

For years, the DOL has viewed joint employment as existing “when an employee is employed by two (or more) employers such that the employers are responsible, both individually and jointly, to the employee for compliance with a statute.” Joint employment of the type addressed by the now-rejected guidance is common in the construction, agricultural, janitorial, warehousing/logistics, staffing and hospitality industries. It also significantly affects franchise operations where the franchisor maintains significant control over the operations, HR policies and safety requirements for its franchise holders.

The DOL has stressed that removal of the 2015-2016 guidance does not change the legal responsibilities of employers under the Fair Labor Standards Act (which governs overtime pay, minimum wage, and child labor restrictions) and the Migrant and Seasonal Agricultural Worker Protection Act, as reflected in the agency’s codified regulations and in case law interpreting the statutes. However, the future willingness of the DOL to prosecute multiple entities as “joint employers” going forward, when temporary or contingent worker issues are raised, is questionable.

The policy changes will impact how

liability can be extended for DOL violations of many types to a host employer for actions of subcontractors or other contingent and temporary workers, from sources such as staffing agencies. An example of “joint employer” status under the rescinded Obama-era guidance would be where one employer provides labor to another employer and the workers are economically dependent on both employers. The other main scenario is where the employee has two (or more) technically separate but related or associated employers (e.g., an arrangement to share the worker’s services, share control of the worker, or one employer acts in the interest of the other in relation to the worker).

While the policy modification will not change preexisting case law (which can vary based on the jurisdiction where a matter is litigated), it will influence how the DOL chooses to litigate cases in the future. For example, a determination under the revised DOL policy that an entity is not a “joint employer” will impact whether a company can be cited for violations of the “General Duty Clause” (Section 5(a)(1) of the Occupational Safety and Health Act of 1970). The General Duty Clause (GDC) is used as a gap filler, to address recognized hazards that could kill or seriously injure employees in situations where OSHA lacks a codified, applicable standard. Examples of GDC use range from ergonomic injuries to workplace violence to safety of off-road construction equipment.

INSIDE THIS ISSUE

“Joint Employment” Changes at DOL Impact Safety, Employment Laws	1
MSHA Stakeholder Meeting: Eliminating Coal Mine Fatalities and Coal Impoundment in Upstream Construction	2
Review Commission Cases Raise Questions Over Multi-Employer Citation Policy	3
In Growing Industry, Rock Climbing Gyms Face Unique Challenges in OSHA Compliance	4
EEOC Compensatory Damage Awards Must be Adjusted for Inflation	5

**Law Office of
Adele L. Abrams, P.C.**
www.safety-law.com

D.C. Metro
4740 Corridor Place,
Suite D
Beltsville, MD 20705
(301) 595-3520
(301) 595-3525 fax

Colorado
600 17th St Ste 2800,
Denver, CO 80202
(303) 228-2170
(301) 595-3525 fax

West Virginia
1045 Bridge Road
Charleston, WV 25301
(301) 595-3520
(301) 595-3525 fax

Abrams Safety & Health
www.abramssafety.com

“Joint Employment” Changes at DOL, cont.

By law, an employer can only be cited for GDC violations if its own employee is exposed to the hazard, rather than workers employed by third parties or working as contractors. Therefore, the newly announced limitations on joint employer status will impact OSHA’s enforcement powers, and could also potentially affect which entity (if any) will record and report injuries, illnesses and fatalities to OSHA and maintain the requisite logs for temporary and contingent worker incidents.

Despite this policy change, remember that, as the “controlling employer,” the host employer will still have legal responsibility (other than under the General Duty Clause) for ensuring that all employers on its worksite provide a safe and healthful work environment for their respective workers and for others exposed to their hazardous activities on the worksite. All employers must still comply with applicable OSHA, MSHA and/or state safety and health laws.

For now, OSHA continues to promote its [Temporary Worker Safety](#) webpage and to stress: “While the extent of responsibility under the law of staffing agencies and host employers is dependent on the specific facts of each case, staffing agencies and host employers are *jointly responsible* for maintaining a safe work environment for temporary workers - including, for example, ensuring that OSHA’s training, hazard communication, and recordkeeping requirements are fulfilled. . . . Host employers *must treat temporary workers like any other workers* in terms of training and safety and health protections.”

For more information on proactive workforce protections, training, or related OSHA/MSHA and employment law matters, contact Adele Abrams at safetylawyer@aol.com.

MSHA Stakeholder Meeting: Eliminating Coal Mine Fatalities and Coal Impoundment In Upstream Construction

**By: Sarah Ghiz Korwan, Esq.
Michael R. Peelish, Esq.**

On June 8, 2017, the Mine Safety and Health Administration (MSHA) hosted a stakeholder meeting at the National Mine Safety and Health Academy in Beckley, WV. The first topic presented was regarding recent trends in coal mine related fatalities and MSHA’s training assistance initiative. Tim Watkins, MSHA’s Deputy Administrator for Coal Mine Safety and Health,

opened by noting that there were eight coal fatalities in 2016, yet, already, there have been seven coal fatalities in the first five months of 2017. MSHA is alarmed by these numbers and is rolling out an initiative, collaborating with operators, to eliminate all fatalities entirely.

As an initial matter, Mr. Watkins reviewed the statistics related to the 2017 coal fatalities. Of the seven fatalities, three occurred at surface mines, three occurred at underground mines and one at a surface facility. The most common cause of an accident was related to power haulage, which was involved in four of the accidents. The other fatalities related to a slip/fall of a worker, a roof fall, and a face/rib/highwall fall. Most striking, however, is the fact that six of those killed on the job had only one year or less of experience at the mine, and in five instances, the miner had one year or less experience at the job.

To address, and hopefully reverse, these patterns, MSHA plans to partner with operators by offering Educational Field and Small Mine Services (EFSMS) to talk to and observe work practices of miners with less experience at the mine or on the job. EFSMS will work to identify deficiencies and offer suggestions in training, as well as work with the operator to improve training programs. To accomplish this initiative, MSHA coal districts will be reaching out to operators to explain the details of the initiative. MSHA will seek participation from miners who were hired in the prior 12 months or less and have been in their current job activity for 12 months or less. For miners in these categories, MSHA will also request information regarding their work shifts and job activities. During the stakeholder meeting, Mr. Watkins emphasized the importance of this mission, encouraged operators to participate, and noted that this is an outreach mission which will not fall into the investigation or inspection class.

During the MSHA Stakeholder meeting, MSHA also included a segment on construction of coal impoundments. This was an odd mixture of topics which was made more confusing because MSHA did not indicate that there were any industry-wide issues with coal impoundments that gave rise to this presentation. Perhaps MSHA is trying to get ahead of a potential issue in central Appalachia with the recent uptick in coal production in that region. Notwithstanding, MSHA provided valuable information and observations on the planning and execution of pushout construction. Several key factors contributing to pushout failure were noted. These factors include (1) lack of an extensive fine coal

MSHA Stakeholder Meeting, cont.

refuse (FCR) delta upstream of the embankment, (2) not minimizing free water, (3) low to extremely low undrained strength of FCR, (4) low permeability and slow dissipation of excess pore pressure slowing strength gain, (5) higher rates of construction allowing load to increase faster than strength, and (6) less sand-sized particles in the FCR. To avoid issues during pushout construction, MSHA provided suggestions for construction of what MSHA refers to as the “traditional FCR beach”. By adhering to MSHA’s suggestions, operators can ensure smooth and uninterrupted impoundment operations which are far better than the option of installing belt presses, conducting additional engineering analysis and field testing, or other costly solutions. MSHA’s suggestions include (1) reduce load by minimizing the height of the working surface above the pool, (2) reduce the distance advanced into the pool each day to allow for strength gain, (3) ensure FCR contains predominantly sand-sized material, and (4) allow the FCR to emerge above the pool, drain and dry. With the number of active impoundments no doubt increasing at this time, MSHA is prudent to get operators attention on this topic. Perhaps MSHA’s message to the safety professionals in attendance is to take a hard look at impoundment operations in your company. Impoundment construction is normally left to the engineering and environmental departments and not an area safety professionals usually provide their opinion. However, it appears MSHA is asking them to do just that.

Review Commission Cases Raise Questions Over Multi-Employer Citation Policy

By: Gary L. Visscher, Esq.

Two recent cases in which the Occupational Safety and Health Review Commission (OSHRC) chose not to issue a Commission decision have raised new questions regarding OSHA’s multi-employer worksite citation policy.

OSHA’s policy of citing the general contractor as the “controlling” employer, even if the general contractor’s own employees are not exposed to the alleged violation, dates to the early days of the OSH Act. Initially OSHRC rejected such efforts to hold a “controlling” or “creating” employer responsible where its own employees were not exposed to the hazard. But after two courts of appeals found that OSHA did have such authority under section 5 (a)(2) of the OSH Act, OSHRC held that OSHA does have authority under section 5(a)(2) to cite not

only the employer whose own employees are exposed to the hazard, but also an employer who controls the worksite or created the hazardous condition, even if its own employees are not exposed.

Since then nearly all of the Courts of Appeals which have considered the issue have upheld OSHA’s authority under section 5 (a)(2) of the OSH Act to cite employers even if the general contractor’s own employees are not exposed to the hazard, on the basis of being the controlling or creating employer. The Fifth Circuit (which encompasses Texas, Louisiana, and Mississippi) is often considered the exception. In an early case, *Southeast Contractors*, 512 F.2d 675 (5th Cir. 1975), the Fifth Circuit, without going into any analysis, held that an employer could only be held responsible for violations to which its own employees were exposed. Since then, the Fifth Circuit has not addressed the issue in an OSHA enforcement case, but has affirmed its holding in *Southeast Contractors* in several private tort cases, including *Melerine v. Avondale Shipyards*, 659 F.2d 706 (5th Cir. 1981).

The Review Commission has previously questioned whether the Fifth Circuit would continue to hold to the *Southeast Contractors* precedent in an OSHA enforcement case in light of the later decisions by the Commission and by the other courts of appeals. But a recent decision by an OSHRC administrative law judge, in *Hensel Phelps Construction Co.*, (June 1, 2017) held that Fifth Circuit precedent (citing the *Melerine v. Avondale Shipyards* decision) prevents OSHA from citing a general contractor on the basis of being the “controlling” employer. Although OSHA appealed the decision to the Commission, the Commission, which currently has only one member, did not direct the case for review, thus leaving the ALJ decision as a final decision of the Commission.

In another case involving the multi-employer citation policy, *Evergreen Construction*, (Apr. 26, 2017), the (then) two members of the Review Commission disagreed about the application of the multi-employer citation policy. Since there was no majority opinion, the two commissioners left in place the ALJ decision, upholding a citation against the general contractor as the “controlling” employer, as a non-precedential final decision.

The Evergreen Construction case did not directly raise the issue of OSHA’s authority under the statute to cite the general contractor as the “controlling employer,” (which Evergreen Construction did not contest), but raised the question of the

Multi-Employer Citation Policy, cont.

nature and extent of the “controlling” employer’s duties and obligations in insuring that subcontractors comply with OSHA standards.

In its 1999 “multi-employer citation policy” OSHA stated that a “controlling employer” must exercise “reasonable care to prevent and detect violations on the site.” The policy also states that the steps that the controlling employer “must implement to satisfy this duty of reasonable care is less than what is required of an employer with respect to protecting its own employees. This means that the controlling employer is not normally required to inspect for hazards as frequently or to have the same level of knowledge of the applicable standards or of trade expertise” as the subcontractor it has hired for the task.

Evergreen Construction was the general contractor on construction of a six story building, with multiple (at least 8 to 10) subcontractors working on the site. Evergreen was cited after an OSHA inspector witnessed employees of a masonry subcontractor working without fall protection. Evergreen’s site superintendent generally walked the site at least a couple of times per day, and if any safety issues were identified, would bring them to the attention of the employee and the subcontractor’s foreman or supervisor.

The Evergreen site superintendent had on several occasions, including twice on the day before the inspection, found the masonry subcontractor’s employees working without fall protection and each time had stopped the work and insisted that the situation be corrected. However, on the day of the inspection, Evergreen’s site superintendent had been in meetings and so had not yet taken any site walk-arounds.

In her separate opinion, Chairman McDougall said that the general contractor’s duty was only to exercise “reasonable” care and diligence in supervising the worksite, and that Evergreen had fulfilled that duty. Commissioner Attwood found on the same evidence that Evergreen had not fulfilled the duty – particularly, she wrote, the fact that the site superintendent had on the previous day found non-compliance by the masonry subcontractor meant that “reasonable diligence required [Evergreen] to determine [the masonry subcontractor’s] compliance status at the beginning of the work day on June 12,” the day of OSHA’s inspection.

Beyond the unresolved questions regarding the nature and extent of the controlling employer’s duties

– what does “reasonable care and diligence” on the part of the controlling employer require – the two separate opinions in Evergreen Construction also reflected the split among the Commissioners on OSHA’s authority to cite an employer whose own employees are not exposed to a hazard, at least in construction. In a footnote, Chairman McDougall re-stated her previous position that OSHA’s multi-employer citation policy “is in tension with the OSH Act’s statutory language.” In contrast, Commissioner Attwood indicated agreement with the line of cases in which the Commission found that OSHA does have authority to cite employers whose own employees are not exposed, on the basis of being the controlling employer. The Commission currently has only one member, Commissioner Attwood. The President recently re-nominated Chairman McDougall for another term on the Commission, and has nominated attorney James Sullivan for the third Commission position.

In Growing Industry, Rock Climbing Gyms Face Unique Challenges in OSHA Compliance

By: Joshua Schultz, Esq., MSP

Indoor rock climbing gyms are one of the fastest growing businesses in the United States. The rock climbing website MountainProject.com lists 839 indoor rock climbing gyms in its directory, and new gyms are opening rapidly across the country. The climbing industry as a whole grew by 13 percent from January 2016 to January 2017, according to the NPD Group, a retail tracking service. With increased press coverage of the sport and climbing industry now officially part of the 2020 Olympic Games, it is expected that this growth will continue.

With the first indoor rock climbing gym opening just 30 years ago, this rapid growth presents new challenges to business owners and regulators. Some gym owners may not even realize their facilities are under the jurisdiction of the federal Occupational Safety and Health Administration (“OSHA”) or state occupational safety and health agencies, both of which have many regulations that greatly impact their operations. Gym owners may encounter OSHA if one of their employees suffers a serious injury or files a complaint. Unlike other regulatory agencies, OSHA does not have mandatory inspections or warrantless inspection authority, but these gyms are open to the public, which allows inspectors to freely enter and evaluate conditions.

Companies may face stiff penalties and even criminal prosecution in the wake of an accident if they are not compliant with OSHA’s regulations. These penalties

Rock Climbing Gyms Face OSHA, cont.

may be as high as \$126,749 per violation.

Rock climbing gyms set “routes” on their walls, a series of hand and feet holds which enable users to climb the walls. Routesetting presents fall from heights challenges for gyms and requires compliance with a multitude of OSHA regulations. OSHA regulations (codified at 29 CFR 1910.23) govern the ladders which employees may use to fasten the holds to the wall. This section governs the construction of ladders, requires inspection before use in each shift, and has specific direction for how employees shall use ladders.

OSHA’s new rule updating “General Industry Walking-Working Surfaces and Fall Protection Standards” also has a major impact on rock climbing gyms. OSHA may interpret the rule, effective January 17, 2017 (although some provisions have delayed effective dates), to apply to rope systems used by rock climbing gyms to install holds on their walls. This would require building owners to identify, test, certify, and maintain anchorage points so they are capable of supporting at least 5,000 pounds in any direction (this provision is effective November 20, 2017). Additionally, this new rule requires that equipment used during a rope decent is secured by a tool lanyard or similar method to prevent it from falling.

An indoor rock climbing gym’s environment may also present serious respiratory issues for employees. Climbers utilize climbing chalk, a substance generally made with magnesium carbonate, to prevent sweaty hands while scaling the rock walls. Dust from the climbing chalk accumulates in a large quantities around climbing gyms – look behind the walls and you will see a dust coating of chalk on the supporting structure at most gyms. Many facilities utilize fans, filtration systems, and other engineering controls to manage the chalk dust in their environments.

OSHA regulates the amount of chalk dust in the air in a climbing gym, allowing exposure to 15 mg/m³ over an eight hour period. This number is lower in California, where their state OSHA allows exposure to 10 mg/m³ over an eight hour period. While this exposure limit is not as restrictive as OSHA’s limits for other substances, gym owners should monitor their facilities to ensure compliance and a safe environment. OSHA puts the burden on employers to conduct air sampling and secure compliance with these exposure limits.

Finally, OSHA requires employers to comply with the General Duty Clause of the Occupational Safety and Health Act, which requires employers to keep their

workplace free of serious recognized hazards. OSHA may use this to cite rock climbing gym owners for conditions that inspectors believe present a hazard where there are no specific regulations applicable to the particular hazard involved. Inspectors may look to national consensus standards, which are not incorporated into OSHA or state agency regulations, to determine that conditions or practices are hazardous. The Climbing Wall Association, Inc., has developed consensus standards for rock climbing gym employees; additionally, inspectors may look to equipment standards such as ASTM F887-11 “Standard Specifications for Personal Climbing Equipment.”

An OSHA inspector is likely not familiar with the atmosphere and safety procedures in place to prevent hazards at a rock climbing gym. Thus, in addition to maintaining a safe environment and complying with OSHA regulations, gym owners may find it necessary to educate inspectors on how their facilities safely operate. These regulations present unique challenges to gym owners, but compliance is necessary to avoid steep financial penalties and negligence findings which plaintiff’s attorneys may use in civil lawsuits.

EEOC Compensatory Damage Awards Must be Adjusted for Inflation By: Diana Schroeder, Esq.

On June 9, 2017, the federal Equal Employment Opportunity Commission (EEOC) issued a groundbreaking decision announcing that compensatory damage awards must be adjusted to account for inflation. On its own motion, the Commission reopened a case that had been closed in 2013, after the Complainant had exhausted all administrative appeals on this issue.

Under the 1991 amendment to the Civil Rights Act of 1964, compensatory damages may be awarded to compensate a complainant in an employment discrimination matter for losses or suffering inflicted due to the intentional discriminatory act or conduct of the employer. Compensatory damages may be awarded in addition to other monetary relief including back pay, front pay and punitive damages. Compensatory damages include damages for past pecuniary loss (out of-pocket loss), future pecuniary loss, and nonpecuniary loss (emotional harm). Compensatory damages are allowed against federal, state, and local governments and private sector employers.

In *Lara G. v. U.S. Postal Service*, EEOC No. 0520120027, the administrative judge found

EEOC Compensatory Damage, cont.

intentional discrimination, and ordered an award of back pay, plus \$29,000 in past and future pecuniary losses, restoration of leave and pension losses, and \$100,000 in non-pecuniary compensatory damages for “stress, depression, impact on relationships, and loss of enjoyment of life” suffered over many years as a result of proven discrimination. On appeal on this narrow issue, the complainant argued that the administrative judge should have adjusted the compensatory damage award upwards, to account for inflation. In deciding on an award, administrative judges were required to issue awards “consistent with the amount awarded in similar cases”. There was no requirement to adjust the old award amounts.

Complainant argued that this worked a “manifest injustice on present-day complainants, due to the potential loss in value from the earlier awards”, some based on awards going back to 1991, when the Act was amended to allow compensatory damages. The judge based Lara G.’s award on a comparable 2003 award of \$95,000. The Commission’s June 9th decision modified Lara G.’s award to adjust for inflation, and increased the award by another \$10,000 after considering the six years that had elapsed since the 2003 award.

The Lara G. decision has changed the landscape of compensatory damage awards in federal sector EEOC cases, as all future awards must include an adjustment for inflation.

SPEAKING SCHEDULE

ADELE ABRAMS

07/13/17 BLR Webinar on Lockout/Tagout Requirements and Exemptions
 07/18/17 Lorman Webinar on Disciplining Unsafe Employees
 07/20/17 BLR Webinar on OSHA and the "Direct Threat to Safety" Defense under the ADA
 08/03/17 NWPCA Safety Summit, OSHA Enforcement Emphasis Areas, Chicago, IL,
 08/04/17 Artex Safety Training, Burlington, VT
 08/14/17 Chesapeake Regional Safety Council, OSHA Silica Rule, Baltimore, MD
 08/15/17 EIA, Seminar on Crystalline Silica Issues and the new OSHA Standard, Greensboro, NC
 08/17/17 BLR Webinar on Effective Document Management
 08/18/17 ASSE Construction Practice Specialty Webinar, OSHA Update
 08/31/17 Clearlaw Webinar on OSHA Electronic Recordkeeping & Injury Reporting Rules
 09/13/17 Northern White Sands Conference, OSHA/MSHA Regulation of Crystalline Silica, Denver, CO
 09/21/17 BLR Webinar on Legally Effective Accident Reporting
 09/22/17 ASSE Region VI PDC, speak on OSHA/MSHA Update: Will Safety Be Trumped?
 09/25/17 NSC Annual Congress, Multi-Generational Workforce Training Issues Indianapolis, IN
 09/26/17 NSC Annual Congress, OSHA's Electronic Recordkeeping Rule & Anti-Retaliation Requirements, Indianapolis, IN
 10/02/17 Progressive Business Conferences webinar on Confined Spaces for General Industry
 10/11/17 Chesapeake Region Safety Council Annual Conference, OSHA's Crystalline Silica Rule Update Laurel, MD

DIANA SCHROEHER

09/13/17 Penn State Delaware Mine Safety Seminar, Woodside, DE

TINA STANCZEWSKI

09/19/17 North Carolina Law Seminar, NC Mine Safety & Health Law School, Castle Hayne, NC
 10/18/17 California Joint Technical Symposium, “Environmental Law Update” The Carson Center, Carson, CA

MICHAEL PEELISH

07/26/17 Pennsylvania Aggregates and Concrete Assn, OSHA Silica Rule, Penn State
 08/14/17 Chesapeake Regional Safety Council, OSHA Silica Rule, Baltimore, MD

JOSHUA SCHULTZ

6/22/17 Engineering News-Record Webinar, "Going to Pot"
 10/10/17 BLR Cal/OSHA Summit, "Multi-State Worksites: Mastering Safety Compliance Across State Lines,"
 Costa Mesa, Ca