



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

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### Looking Inside “Robert C. Byrd Mine Safety Protection Act of 2015”

By: Adele L. Abrams, Esq., CMSP & Gary Visscher, Esq.

Legislation designed to increase the Mine Safety and Health Administration’s (MSHA’s) enforcement tools and penalties against mine operators was introduced on April 22, 2015 in the U.S. House of Representatives. The bill was introduced in advance of an Education and Workforce Committee oversight hearing that was held on April 23.

The legislation, H.R. 1926, is mostly identical to legislation introduced in the previous two Congresses. The proposed legislation is named the “Robert C. Byrd Mine Safety Protection Act,” after the former senator from West Virginia. The bill was introduced by Rep. Robert Scott of Virginia, the Ranking Member of the Committee on Education and Workforce, and currently has 12 co-sponsors, all Democratic members. The same bill is expected to be introduced soon in the Senate.

As with previous versions, the bill includes a large number of specific changes to the Mine Act, but at the April 23 hearing, sponsors of the bill indicated certain provisions are priorities. They include: (1) giving MSHA subpoena power to compel witnesses and other persons to appear and testify, as well as the production of documents, during MSHA inspections and investigations; (2) a provision requiring MSHA to issue a withdrawal order on any mine which has unpaid penalties 180 days after entry of the final order; and (3) increasing criminal and civil penalties for certain violations of the Mine Act or of mandatory standards under the Act.

The 72-page bill includes numerous other enforcement and penalty changes. For example, the bill would statutorily define “significant and substantial” to change the Commission’s long-standing definition, in order to apply the classification to more violations. The bill would also broaden the statute’s definition of “imminent danger” to allow MSHA to use that authority to shut down operations when it considers that “multiple conditions or practices, when considered in the aggregate,” could reasonably be expected to cause death or serious physical harm. The bill would authorize MSHA to seek a court injunction to close a mine when there is a “course of conduct” that threatens miners’ health and safety, and codifies MSHA’s pattern of violations regulations that were issued in January, 2013.

The bill would increase civil and criminal penalties for giving “advance notice” of inspections, and set minimum and maximum penalties (\$10,000 to \$100,000 for first time violation) for violating miners’ rights under section 105 (c) of the Mine Act. The bill would also create a new criminal penalty for knowingly violating miners’ rights under that section.

The bill would limit the Federal Mine Safety and Health Review Commission’s (Commission’s) authority in penalty assessment by prohibiting the Commission from decreasing (but not increasing) the penalties that would be assessed under MSHA’s “point system” in the Part 100 regulations. The bill also seeks to discourage operator contests of citations and penalties by making penalties subject to “prejudgment interest” from the date of contest to the

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## **Robert C. Byrd Bill, Con't**

date of final order. The bill would restrict the ability of attorneys who represent the operator from also representing individual agents of the operator. Such joint representation is already subject to normal ethics rules regarding conflicts. These changes would establish additional limits and authorize the Secretary of Labor to challenge joint representation in federal district court.

The bill includes several changes to the “anti-retaliation” provisions of section 105 (c) of the Mine Act, in addition to the penalty provisions described above. The time for filing a complaint would increase from 60 days to 180 days from the date of the alleged violation. The bill would continue a miner’s temporary reinstatement if MSHA decided not to allege a violation and the miner filed an individual action under section 105(c)(3). Further, the bill allows punitive damages, in addition to back pay, compensatory damages, and reinstatement for miners.

The bill provides that miners would receive continuation pay during any time in which a mine is partially or totally closed by an MSHA order, up to 60 days of pay. The bill also increases the number of hours required for miners’ annual refresher training, from 8 to 9 hours, with at least one hour on miners’ rights under the Mine Act. The training would be done by either MSHA or by an independent trainer approved by MSHA.

Among other provisions, the bill would allow MSHA to create a program to certify (and decertify) mine foremen, superintendents, and others, if the state did not have equivalent requirements. The bill also requires additional reporting of injuries and illnesses and hours worked by mines contractors, to include mine specific reports.

The initial version of the “Byrd bill” was introduced in 2011, in the aftermath of the Upper Big Branch (UBB) mine disaster in 2010. Since then, under current law, a criminal case has been brought against the former CEO of the UBB mine, and the mine’s new owner paid nearly \$11 million in civil penalties for violations at the mine at the time of the explosion. A 2012 report by the National Institute for Occupational Safety and Health (NIOSH) identified numerous shortcomings in MSHA’s enforcement and oversight at the time of the disaster. At the April 23 hearing, Assistant Secretary Joe Main testified that MSHA has made “about 100 changes” to address problems and shortcomings that were identified in internal and

independent reviews of MSHA’s role in the tragedy at the UBB mine.

### **Assistant Secretary Main Stresses Proactive Fatality Prevention By: Joshua Schultz, Esq., MSP**

Mine Safety and Health Administration (MSHA) Assistant Secretary Joseph A. Main spoke to mine health and safety trainers on Wednesday, April 29, 2015, to discuss the rise in fatalities in the Metal/Non-Metal (M/NM) sector during 2014. The rise was the highest since 2008. Additionally, MSHA noted that ten miners died in the first quarter of 2015.

Main noted that mines should utilize MSHA’s Rules to Live By (RTLB) Calculator and Pattern of Violations Monitoring Tool to target standards which require additional attention. MSHA’s RTLB calculator is available on the Agency’s website and allows operators to compare their citation rate on RTLB standards to the industry average. MSHA reiterated that mines with higher than average RTLB citation rates may be subject to spot or impact inspections.

MSHA noted that the task training standard is frequently cited in accident investigations and that it is on the RTLB initiative. MSHA requires task training not just for every type of equipment but for each individual equipment model. Detailed examination of how training was conducted and by whom often occurs during an investigation.

MSHA announced their Small Mine Handbook, developed as a compliance assistance tool for small mine operators. It was added on April 29, 2015 to the MSHA website. The handbook is intended to help operators with training requirements and Part 50 reporting requirements. This section of the website contains a “MSHA Training Plan Advisor,” which allows operators to enter information which will help customize a training plan for their mine.

The Training Plan Advisor (TPA) allows operators to customize their training plan with topics specific to their mine site as well as mandatory topics required by MSHA regulations. Operators can use the TPA to submit plans to MSHA, but must provide their Miners Representative with a copy of the training plan at least two weeks before submission.

## MSHA Effectiveness Takes Center Stage at House Hearing

By: Adele L. Abrams, Esq., CMSP

On April 23, 2015, the House Education & Workforce Committee's subcommittee on workforce protections held a hearing on the topic: "Protecting America's Workers: An Enforcement Update from the Mine Safety & Health Administration." The sole witness was MSHA Assistant Secretary Joe Main. The big news coming out of the hearing was not from Mr. Main's testimony, but an announcement by Reps. Scott and Wilson that they had introduced HR 1926, the Byrd Mine Safety Act, to "reform" MSHA by adding increased criminal penalties, enhanced subpoena power, greater whistleblower protections, and provisions to allow closure of a mine (via withdrawal orders) if all penalties are not paid within 180 days of the due date or pursuant to a payment plan. See the related article on the key provisions of HR 1926.

Subcommittee chairman Walberg and several of the members noted that it is five years since the Upper Big Branch (UBB) mine disaster that claimed 29 lives. Rep. Walberg said that it is a terrible reminder that bad actors will cut corners and jeopardize the lives of miners, but that they are now being held accountable and justice is being served. He noted that the report on the UBB disaster indicated that if MSHA had engaged in timely enforcement of the Mine Act, MSHA possibly could have prevented this tragedy.

The committee urged MSHA to do better in changing enforcement, and that the hearing was intended to examine whether MSHA was serving the best interests of the miners. Rep. Walberg noted that MSHA has been busy, with enhanced respirable coal dust regulations, proposed changes to its civil penalty and citation structure, and mandates for proximity detection equipment in underground coal mines. He added that "while we don't agree on every issue, when the agency takes steps to improve safety and health, you have our full support."

Ranking minority member Wilson also commented on UBB and the issue of advance notice of inspections. She said that MSHA is successfully using impact inspections now to target high risk mines, and using its revised pattern of violation (POV) powers to target serial violators, but that UBB pointed out deficiencies in the Mine Act, including the need for pre-citation subpoena powers. She asked for bi-partisan support for this issue, even though it is only one part of the Byrd bill.

Mr. Main provided data on mine fatalities (which were higher last year in the metal/nonmetal (M/NM) sector than in the coal sector), and recounted the regulatory actions taken by the agency under his watch. He discussed the Pattern of Violations rule impact and his initiative "Rules to Live By," which now includes a facet that measures citations issued to a mine under the designated RTL standards against the national average.

Assistant Secretary Main also said that MSHA has increased the number of whistleblower discrimination cases it is prosecuting, as well as successful action to obtain temporary reinstatement for miners while their discrimination cases are pending before the FMSHRC. He noted that since the new respirable coal dust rule was enacted, 99 percent of mines are in compliance. He also noted that funding for the state grants program was \$8.4 in FY 2015 and the same amount has been requested in the FY 2016 budget proposal.

When questioning Mr. Main, Rep. Walberg led off discussing the ongoing lawsuits challenging the POV rule as a violation of due process (relying on issued citations instead of finally adjudicated citations, and MSHA's failure to include POV criteria in the final rule, allowing MSHA to change the criteria at will in the future without notice/comment rulemaking). Mr. Main responded that the POV rule should be in place and that no mine will be under POV if they follow the rules and use the tools at their disposal. He said only 12 mines out of over 13,000 have received POV notices in 2014. The focus is on chronic violators, he said.

Rep. Scott, Chairman of the full House Education & Workforce Committee, discussed the newly introduced legislation and urged MSHA to review it and provide feedback. He asked Mr. Main why enhanced subpoena power was so important, and was told that, under the current law, MSHA can only obtain subpoenas if there is a public hearing convened. During the UBB investigation, MSHA had to rely on the State of WV using its subpoena power to secure documents. Mr. Main noted that a number of other agencies already have pre-enforcement subpoena power.

Rep. Scott also asked about collection of civil penalties, and Main said that over 90 percent of penalties are collected but some mines go out of business rather than pay MSHA fines. Scott also asked about the impact of MSHA's "stagnant budget" and

## **MSHA Effectiveness, Con't**

Main said that while he has been able to hire new inspectors and “staff up” the agency, a forward-looking budget is needed.

Rep. Russell asked why, if there are three times more M/NM mines than coal mines, coal gets more of the budget funding. Main responded that they examine this constantly and that they are getting help from the coal side in M/NM inspections now. They are looking at training models to help MSHA be a more versatile agency. Mr. Main also noted that contractors are a weakness and that MSHA needs better data on contractor manhours; nearly one third of fatalities in 2014 involved contractors.

Rep. Bishop asked about the impact on MSHA from the changes in the coal industry, with closure of mines and declining employment. Main said the issue had his attention but wherever mines are operating, they will implement the Mine Act. In areas where mines have been closed, they need to be able to make adjustments in personnel. Rep. Pocan asked about the Crandall Canyon disaster and the fact that Murray Energy was only convicted of misdemeanors even though there were 9 fatalities. Assistant Secretary Main seemed supportive of making violations felonies and increasing penalties, saying that additional tools to deter bad actors were needed.

In conclusion, Chairman Walberg said that Mr. Main had done “impressive work” and asked whether mines were developing “best practices.” He responded that MSHA was seeing a culture of improvement in mine safety, and that the secret was good dialogue with miners and training. Rep. Wilson added “Congress must ensure that MSHA has the tools and funding it needs, and the Byrd bill provides those tools.”

### **Commission Case Presents Issues on Heat Stress, Temporary Workers**

**By: Gary Visscher, Esq.**

A judge’s decision recently accepted for review by the Occupational Safety and Health Review Commission raises important issues regarding employers’ duties to prevent heat-related illnesses, and for employers who use temporary employment agencies to occasionally supplement their own workforces.

A.H. Sturgill Roofing Company is a commercial roofing company that has been in the roofing business for nearly 20 years. In the summer of 2013, while working on a roofing project of a bank building in

Ohio, Sturgill contracted with a temporary employment agency for 3 workers to supplement the nine permanent employees working on the project.

One of the workers provided by the temporary employment agency was a 60 year old worker. He had been with the temporary employment agency for ten years. His previous assignment for the temporary employment agency was working night shift in an air conditioned printing facility, where he had worked for 3 years prior to being sent to Sturgill to work on the roofing project.

Upon arrival at the Sturgill worksite, the worker represented to Sturgill’s foreman that he had previous experience with roofing and construction work. The foreman did not inquire about how long ago that experience was, or what his most recent work involved. Nor did he apparently inquire about the worker’s age or any other physical limitations, though the foreman observed that the worker was “a much older guy” and so assigned him to what he considered to be the least strenuous work on the roof, which involved taking discarded roofing materials from a cart, lifting them over the parapet wall, and dropping them to a dump truck below.

The foreman gave the worker instructions as to the safety warning lines on the roof, and also gave him instructions related to working in the heat, such as where the water coolers were, and told him to take a break whenever he felt that he needed to. He did not give specific instructions about recognizing the warning signs of heat-related illness.

Later in the morning, other workers observed the worker showing signs of possible heat-related illness. Despite the foreman’s inquiry as to how he was feeling, the worker declined to take a break. After he was observed walking unsteadily, the foreman insisted that he sit down. Shortly thereafter he collapsed and was taken to a hospital, where he died 21 days later. The coroner ruled the cause of death was complications of heat stroke.

OSHA charged Sturgill with two violations, one for violating the general duty clause and the other for failing to adequately train its employees, including both permanent and temporary employees, on the recognition and avoidance of heat related illnesses.

## Sturgill, Con't

The administrative law judge first determined that Sturgill was the deceased worker's employer for purposes of the OSH Act, under the Commission's decision in *Froedtert Memorial Lutheran Hospital*.

The judge also found that both Sturgill and the roofing industry recognized the hazard of heat stress, and that there were feasible abatement methods that would reduce the hazard. Sturgill had a heat-related illness prevention program. However, the judge found that Sturgill did not do enough to insure that the worker involved received instruction on recognizing heat-related illness, and put too much responsibility on the worker to understand the symptoms of heat illness and take breaks when necessary.

The judge cited several abatement measures that Sturgill could have provided: acclimatization for the worker (who had previously been working in an air conditioned workplace, though it is not clear that this was known to Sturgill) to working in hot weather; suitable clothing (the worker had shown up on his first day of work wearing all dark clothes); a formalized work-rest regimen (rather than leaving it up to the worker when a break was needed); a formalized hydration policy (again, rather than leaving it to the worker when he or she wanted a drink); and a practice of monitoring employees for signs of heat-related illness.



The case is a sobering reminder of the dangers of working in hot weather. It also presents important issues regarding accommodation for temporary workers, as the Commission recognized in its direction for review. OSHA's medical expert testified that the working conditions on the jobsite "were more likely to result in heat cramps or heat exhaustion in a younger worker and were more likely to result in heat stroke in a 60-year old employee, especially when it was the employee's first day working in hot conditions without acclimatization." In its direction for review of the case, the Commission specifically requested the parties to brief "whether an employer's knowledge or lack of knowledge of its employees' underlying health conditions or ages, and any legal restrictions upon the employer in obtaining such information, are relevant to the Secretary's burden to establish a violation of the general duty clause."

## Is Strict Liability Replacing the Reasonably Prudent Person Test?

By: Sarah Korwan, Esq.

For nearly thirty years, MSHA has been required to produce objective evidence that would have alerted a "reasonably prudent mine operator that a violative condition" existed. However, the Commission seems to be moving away from this tenet.

The "reasonably prudent person" standard was most notably framed in *Canon Coal Company, Inc.*, 9 FMSHRC 667 (Apr. 1987), a matter in which a miner, working in a haulage way, was killed by a large rock that fell without warning. At the time of the accident, the roof was considered to be in excellent condition and was thoroughly bolted. An investigation conducted by the operator established that the rock that killed the miner was formed by the convergence of two slips. In addition, twenty-nine 6-foot bolts had recently been installed along the brow and directly over the place where the miner was at the time of the accident.

MSHA did not conduct a similar comprehensive investigation, but did issue several citations and a 104(d) order alleging a violation of 30 CFR 75.200 shortly after the accident occurred. The operator contested the citations and order, and asserted that the order was unsupported since it was issued on the simple fact that a roof fall occurred, without proof that a violation occurred. The administrative law judge vacated the order, and agreed with the operator that the inspectors failed to investigate beyond the fact of the roof fall itself or "produce any evidence to the effect that any objective signs existed prior to the accident that would have alerted a reasonably prudent mine operator to a condition that required roof support over and above that normally required."

The "reasonably prudent person" test has been eroding for some time and the Commission may have closed the door entirely in *Jim Walter Resources, Inc.*, SE 2007-203-R (Mar. 31, 2015). In that case, a miner and special projects manager, was fatally injured by a rock fall while investigating ventilation options and inspecting permanent stoppings. MSHA issued a citation a few hours after the accident occurred, alleging a violation of 30 CFR 75.202(a). Now-retired Administrative Law Judge Avram Weisberger vacated the citation and held that MSHA failed to establish that, prior to the roof fall at issue, the roof conditions

## Reasonably Prudent Person, Con't

would have alerted a reasonably prudent person of the need for support. The Secretary and operator disputed where the miner was standing when he was struck by the rock - under an unsupported brow, or under north of the prior roof fall which was supported (per the operator). In any event, the ALJ found that the miner was not in a "work or travel" area, and held that the Secretary failed to prove a violation of the cited standard, referring to the "reasonably prudent person test" set forth in *Canon Coal*, and dismissed the citation. *Jim Walters Res., Inc.*, 34 FMSHRC 1386 (June 2012)(ALJ).

On appeal, the Commission reversed ALJ Weisberger, and concluded that the operator violated 30 CFR 75.202. Notably, the Commissioners recognized the factual similarity in the *Canon Coal* and the *Jim Walter Res.* cases, but distinguished the case *Jim Walter Res.* by finding that the accident occurred in a "work or travel" area. The Commission also held the ALJ erred in not making the same finding. Therefore, in light of the fact that the roof fall occurred in an area they determined was an area where persons work or travel, the Commission found, "under the plain language of the standard and the strict liability approach", a violation had occurred. Despite the reference to the strict liability standard, Commissioners Patrick Nakamura and William Althen declined to say whether the "reasonably prudent test" or the "strict liability" test would apply to all future cases. However, Commissioner Robert F. Cohen, Jr. unequivocally concluded that "the disposition in this proceeding effectively overrules the Commission decision in *Canon Coal Co.*, 9 FMSHRC 667 (Apr. 1987).

If "strict liability" becomes the new standard, and the slope is slippery, it could be problematic for operators. First, it means that even if an operator appears to be in full compliance, and a roof fall, or some other ground control event, occurs, the *Jim Walters Res.* decision could give MSHA some authority to issue a citation. In addition, the new standard may be costly for operators because many ground control citations are part of MSHA's Rules to Live By (<http://www.msha.gov/focuson/rulestoliveby.asp>), and will be considered for special assessments (meaning higher penalties, outside 30 CFR Part 100 formula). Be assured, the Commission is holding operators to every letter of the law and strict liability is here to stay.

## **Distracted Driving – It's Not Just Cell Phones**

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

Whether you are distracted by your cell phone or by the passenger in your vehicle, one thing is true, distraction while driving can kill. On March 31, 2015, the National Transportation Safety Board held a roundtable entitled "Disconnect from Deadly Distractions." Although hands-free portable electronic device ("PED") use is a continuing concern, the roundtable reflected the dangers of hands-free use in addition to the issue of general distraction regardless of PED usage.

The NTSB investigates every civil aviation accident in the United States and significant accidents on the railroad, highway, water and pipelines. According to the NTSB, since 2003, PED use has been a factor in 11 major accident investigations, with 50 people dying and 260 plus injured. The NTSB has been investigating accidents related to distracted driving and found that PEDs have contributed to accidents for all types of transportation, whether individuals are driving for business or personal purposes. The NTSB has recommended a ban on the non-emergency use of PEDs.

Beyond highway PED use, employers must create similar bans for their employees when engaged in any form of "driving." One deadly accident involved a commuter train where the engineer was texting and ran a red signal. Twenty-five people died when the train collided head-on with a freight train. Other cases involving employees include a barge that struck a tour boat killing passengers. Another instance involved a helicopter pilot, texting during flight who did not realize the fuel was low, and ultimately crashed due to no fuel. Other instances in aviation include airline pilots flying 150 miles past their destination because they were distracted by laptop computers.

PEDs are not the only challenge. In-vehicle systems and even the approach of automatic cars are creating even more variables and possible hazards. The overall consensus is that technology is moving faster than humans can integrate it safely into our daily lives. Anything that competes for our attention while driving is a hazard. This includes dispatch calls for truck drivers, listening to the radio, and many others. The degree of hazard may vary, but all distractions, even talking to a passenger, diminish our ability to give the necessary and safe attention to operation of a car, truck, train, boat, airplane, or heavy machinery.

## Distracted Driving, Con't

The scientific studies show that humans cannot multi-task. It is an illusion according to Dr. David Strayer. When driving and performing a task such as talking on the phone, even hands-free, we can only focus on one activity at a time. The same neural processing is being used for speaking and driving (navigating space). Therefore, if talking on the phone, the cognitive processing required is fully used to talk, any focus on driving is suspended while talking. Our attention is limited in capacity.

Naturalistic driving studies have been performed where drivers are videotaped from multiple angles during their drive for extended periods of time in a real-time driving experience. The data provides information on the seconds leading up to crashes and near misses. The most risky distraction occurs when your eyes leave the roadway. Key to safe driving or operation is hands on the wheel (controls) and eyes and mind on the road.

Studies have also been conducted for aviation following pilot responses during manual and automatic operation of a plane. If a person “zones out” for whatever reason either because he/she is talking or the mind wanders, one’s eyes maybe focused on the road but no information is being transmitted to the brain since the brain is processing the “zoned out” activity. It has been shown that when pilots communicate with the tower, there is perceptual disengagement where the pilot misses warnings or instrument changes necessary for safe flying.

Although everyone agreed the issue of cognitive distraction is real, the experts disagreed on how to approach its effect on distraction. It has been shown that cognitive distraction lasts longer than visual. For example, some argued that ten to twenty seconds looking down to text is less risky than talking on the phone for minutes or an hour, even hands-free, because although your eyes are on the road, you are actually not “seeing” the road. Dr. Charlie Klauer from the Virginia Tech Transportation Institute, who conducts the naturalistic studies, believes to make the quickest and biggest gains in reducing distraction-caused accidents, the focus needs to be hands and eyes on the road, therefore hands-free devices would be allowed.

The generational factor is important. The older generation is more willing to acknowledge that it is problematic to use PEDs while operating machinery, whereas the younger generation has been ingrained

with the concept that multi-tasking is key to success. Businesses need to develop policies and training that deters multi-tasking. Although it may appear that production increases if employees are able to communicate continuously while operating vehicles/machines, one accident, erases any gains. Employees need to be focused on their task. If they are driving vehicles the employer must mandate that they pull over or stop to conduct other business. For trains, planes and boats where stopping may not be an option, other employees must take on the responsibility that requires communication with the employer during the operation of the machine.

Automation of vehicles, including planes, is not a fix. The operator assumes that everything is being handled when it may not be. Automation is giving a false sense of security to the operator that he or she can use PEDs or other distractions unfettered. Companies should examine how their employees are handling automated vehicles/machines and develop policies for safe and engaged handling. Another issue concerned training for individuals on the use of technologies such as warning systems. For example, it has been found that warning lights and sounds that a driver / operator does not understand may cause him/her to look for the warning instead of paying attention to the surroundings and what the warning is trying to communicate.

Overall, companies need to ensure their policies address personal and business use of PEDs or other distraction causing activities, such as eating or drinking. If employees are being required to engage in distraction to multi-task or the job, employers should reconsider how they can eliminate this requirement and reduce risk. Finally, employers need to educate their employees on the dangers of distraction, the cost to the employer, his/her family, the bystanders involved, and the business. Awareness campaigns are necessary to change the culture.

### **Concrete Truck Drivers Receive Hours of Service Exemption By: Nicholas W. Scala, Esq., CMSP**

The Federal Motor Carrier Safety Administration (FMCSA) recently granted concrete truck drivers an exemption to the 30-minute rest requirement under the hours-of-service regulations for commercial motor vehicle drivers. Effective April 2, 2015, ready-mix concrete truck drivers use count 30 minutes or more of “on-duty waiting time” to fulfill 30-minute rest

## **Hours-of-Service Exemption, Con't**

Provision, as long as no work is done during the waiting time.

In July 2013, FMCSA began enforcing its new hours-of-service regulations with the intent to reduce driver fatigue and increase safety. The new regulations limited to a maximum average of 70 hours per work week, unless a driver received 34 consecutive hours of rest, including at least two nights sleep between 1-5 a.m. Additionally, the regulation requires that truck drivers take a 30-minute break during the first 8 hours of a shift.

On behalf of its membership, the National Ready Mixed Concrete Association (NRMCA) requested an exemption to the 30-minute rest requirement for ready-mix drivers. However, this exemption does not apply to all carriers. Carriers who choose to exercise the exemption must have a "Satisfactory" safety rating, must have a rating above the intervention threshold in FMCSA's Compliance, Safety, and Accountability program, and all drivers must have a copy of the exemption with them while on duty. The exemption will remain in effect until April 3, 2017.

### **The Equal Employment Commission Issues Proposed Rule Regarding Company Wellness Programs and Americans with Disabilities**

**By: Amged M. Soliman, Esq.**

On April 20, 2015, The US Equal Employment Opportunity Commission (EEOC) published a Notice of Proposed Rulemaking that would amend the regulations and interpretive guidance implementing Title I of the Americans with Disabilities Act (ADA) as they relate to employer wellness programs (programs that require an employee to satisfy a health related standard to obtain a reward as a means of reducing overall health insurance premiums for the company).

The proposed rule follows a series of controversial cases including a case that involved imposed penalties against employees that chose not to undergo certain tests that were required by the respective company's wellness program. Interested members of the public, including those representing both the employer and employee perspectives, have until June 19, 2015, to provide comments regarding the contents of the proposal. The proposed rule will address matters of importance including privacy, incentive exclusions, reasonability, and other rights.

Per the proposed rule, with respect to employee participation, an employer may not require an employee to participate in the program, and an employee may not be denied benefits or have their benefits reduced for not participating, or be disciplined in any other way. Those employees who volunteer to participate in the program must be informed about what medical information will be collected from them, who will receive it, how that information will be used, and how it will be kept confidential. Wellness programs must be reasonably designed to promote employee health. Further, employers' incentives for those employees who choose to participate cannot exceed 30 percent of the total cost of employee-only coverage.

As for employees with disabilities, the employer must provide reasonable accommodations that allow for their participation in such programs and the ability to earn whatever incentives the employer offers. For example, alternatives to blood tests must be provided if an employee's disability would make such a test unsafe. Ultimately, the goal of the proposed rule is to clarify some of the uncertainties employers and wellness plan sponsors face under the ADA when sponsoring a program that otherwise meets all other applicable requirements.

House Education & Workforce Committee Chairman John Kline (R-MN) has introduced HR 1189, to clarify rules relating to non-discriminatory wellness programs. The legislation provides that workplace wellness programs offered by an employer or in conjunction with an employer-sponsored health plan, shall not violate the Americans with Disabilities Act, or the Genetic Information Non-Discrimination Act because the program provides any type of reward to program participants. In addition, it holds that collection of information about the manifested disease or disorder of a family member shall not be considered an unlawful acquisition of genetic information with respect to another family member participating in a workplace wellness program or disease prevention initiative offered by an employer or its health plan.

Individuals interested in commenting on the proposed EEOC rule may do so by logging onto [www.regulations.gov](http://www.regulations.gov) or contact the Law Office to assist with drafting your comments.