



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

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### OSHA's New Silica Rule Is At Risk - So Are Employers Who Ignore Its Provisions By: Adele L. Abrams, Esq., CMSP

On May 3, 2017, a coalition of construction industry associations formally petitioned the Occupational Safety & Health Administration (OSHA) to commence a limited reopening of the agency's March 25, 2016, final rule setting requirements for reduction of respirable crystalline silica (RCS) in general industry, construction and maritime workplaces. The Petition asks that the rule's implementation be stayed indefinitely while the reopening of the rulemaking takes place. In doing so, they reference the new Administration's "Regulatory Freeze Pending Review" memorandum dated 1/20/17.

OSHA's final rule would reduce the permissible exposure limit (PEL) for RCS to 50 ug/m<sup>3</sup> for an eight-hour time-weighted average, which is half of the current general industry PEL (100 ug/m<sup>3</sup>) and is 20 percent of the current construction /maritime limit (250 ug/m<sup>3</sup>). That is also the exposure limit first recommended to OSHA by the National Institute for Occupational Safety & Health in 1974, so it essentially took OSHA 42 years to accept NIOSH's advice. The final rule has an Action Level of 25 ug/m<sup>3</sup>, which is consistent with the longstanding ACGIH threshold limit value for this Group 1 human carcinogen. The Action Level serves as the trigger for exposure monitoring as well as worker enrollment in medical surveillance programs.

OSHA's RCS rule disfavors use of respirators, instead calling for exposure monitoring, medical surveillance of highly exposed workers, development of exposure control plans that focus on engineering controls, and work practices (including housekeeping restrictions on the use of dry sweeping and compressed air devices unless equipped with a dust capture mechanism) to protect workers. It also requires worker training on the health hazards of RCS, on controls used in the workplace, and on their rights under the medical surveillance provisions. OSHA projects that about 2.3 million workers would be protected by the final rule, eliminating 600 fatalities per year, and 900 new silicosis cases. Diseases associated with exposures to RCS above the revised PEL include: silicosis, COPD, lung cancer, renal disease and some autoimmune disorders.

Although the final rule is currently in litigation, the U.S. Court of Appeals refused to stay the effective dates. As issued, the rule was slated to take effect for the construction sector on June 23, 2017, but the agency already delayed implementation until September 23, 2017. The general industry/maritime provisions become enforceable on June 23, 2018. All these deadlines could be subject to further modification by the agency through executive action, or by Congress through appropriations constraints included in FY 2018 OSHA appropriations.

In its brief filed March 23, 2017 in the judicial challenge, OSHA maintained that the rule was both feasible, supported by

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## OSHA's Silica Rule at Risk, cont.

sound science, and necessary to protect workers. By contrast, the industry petitioners call the rule "unworkable and infeasible." The issues they want addressed in the requested reopening include the feasibility issue, and alternative approaches to addressing silica hazards on construction worksites.

They claim that "Table 1" does not provide viable compliance options for contractors and that OSHA did not adequately address feasibility for these employers whose tasks fall outside Table 1. The association litigants also want to see changes in the housekeeping restrictions, the exposure control plan requirements, and the medical surveillance mandates. Finally, the petitioners claim that the rule's economic impact on construction will be \$3.8 billion per year, rather than the \$700 million annual cost estimated by OSHA.

It is possible that OSHA's crystalline silica standard revisions may be delayed from the current September 2017 effective date, and it appears that MSHA's companion rulemaking (for which a proposed rule paralleling OSHA's mandates was due in April 2017) will be delayed indefinitely. Despite this, employers would be well-served to be proactive now in determining what their actual exposures are and learn how these exposures can be feasibly reduced through improvements in ventilation, use of water, or equipment that is effective in reducing respirable silica emissions. Demonstrating due diligence in controlling exposures to the lowest feasible levels, and supplementing engineering and work practice controls with effective respiratory protection, are critical to protect workers and to limit corporate liability.

Even absent OSHA and MSHA enforcement, the findings of the U.S. Department of Labor – that RCS exposures above the 50  $\mu\text{g}/\text{m}^3$  PEL are consistent with development of silicosis, cancer and the other enumerated illnesses – will remain in the public record of the *Federal Register*. These can be referenced by trial judges and juries in personal injury or wrongful death cases, as well as by workers' compensation hearing boards, to make a causation finding. The resulting punitive and/or compensatory damages could dwarf anything OSHA or MSHA might do to an employer.

For more information on designing a sampling program to identify silica sources, and help in identifying and implementing effective exposure controls, contact Abrams Safety & Health Consulting, a division of the Law Office, at 301-595-3520 or [www.abramssafety.com](http://www.abramssafety.com).

## MSHA Focuses on Working Alone

By: Joshua Schultz, Esq., MSP

Following a rash of accidents involving miners working alone, MSHA emphasized their working alone standards during an April 25, 2017 Quarterly Training Call. Additionally, the Agency announced that starting May 1, MSHA will begin outreach focused on miners working alone.

Deputy Assistant Secretary for Operations Patricia W. Silvey announced that there will be no changes to MSHA's working alone standards. However, due to the emphasis on working alone and the recent fatalities, mines can expect that MSHA inspectors will focus attention on the working alone standards in forthcoming inspections. MSHA acknowledged that it is not feasible to prevent miners from working alone at all times, but that mines must minimize the number of miners working alone and comply with the working alone standard.

On January 31, MSHA issued a Fatal Accidents Alert following two mining deaths within 24 hours, both involving miners who were working alone. In both of these cases, the miners were not accounted for until the miners failed to exit the mine at the end of their shifts.

In addition to announcing outreach during the April 25<sup>th</sup> Quarterly Training Call, MSHA issued a press release emphasizing working alone standards. The agency will conduct "walk and talks" during regular inspections. These talks will "emphasize accounting for all workers at all times and providing operators with best practices for working alone."

MSHA has the same working alone standard for both underground and surface metal and nonmetal mines, codified at 56.18020 and 57.18025. The standards require that "No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless his cries for help can be heard or he can be seen."

Note that the working alone standard requires only that miners can be heard *or* seen. An Administrative Law Judge has vacated a citation under the working alone standard where a loader operator was working alone and could not communicate with another miner who was working 300 to 400 feet away. However, the Judge noted that the two employees could see each other and the standard does not require that they must also be able to hear each other.

## A Change in Direction for the NLRB

By: Gary Visscher, Esq.

The nomination of two new members to the National Labor Relations Board portends a significant change of direction in Board decisions and labor law going forward.

The White House recently announced the nomination of two new members to the Board – Marvin Kaplan and William Emanuel. If confirmed they would join the current chairman, Philip Miscimarra, to provide a majority on the Board that is likely to reverse or revise many of the Board’s recent decisions. The confirmation of Kaplan and Emanuel would give the NLRB its first Republican majority since 2008.

Some of the areas ripe for reversal or revision are how the Board scrutinizes employee handbooks and similar written policies, expansion of liability as a “joint employer,” and changes in procedures designed to speed up union elections.

A recent example of a current policy that may be revisited with a new majority is the Board’s decision in *Cellco Partnerships d/b/a Verizon Wireless* (Feb. 24, 2017). The majority of the current Board found that certain rules in Verizon’s Code of Conduct were “facially unlawful because employees would reasonably construe them to prohibit protected activity,” even though the provisions themselves were neutral and revealed no intent to target or restrict concerted activity protected by section 7 of the NLRA.

The specific provisions in the Verizon Code of Conduct that were found to be unlawful:

*(1) prohibited employees from disclosing employees’ personal information, including social security numbers, identification numbers, passwords, financial information, and residential telephone numbers and addresses, to persons inside or outside of the company,*

*(2) cautioned employees about conflicts of interest when serving on the board of an outside organization, particularly when the organization was making decisions regarding Verizon products or services or its competitors, and*

*(3) prohibited use of company email and other company systems for “activities that are unlawful, violate company policies, or result in Verizon Wireless liability or embarrassment.”*

The majority found these provisions unlawful because employees would “reasonably construe” them to prohibit concerted activity protected under section 7 of the National Labor Relations Act. In dissent, Chairman Miscimarra advocated for a more balanced analysis in reviewing such employer policies. Instead of looking only at how employees could construe such provisions, Chairman Miscimarra advocated a “proper balance” test that takes into account both the legitimate justifications for the workplace rule along with any adverse impact it might have on NLRA-protected activity. He would allow “facially neutral” policies, rules, and handbook provisions, such as the ones in Verizon’s Code of Conduct, unless it was shown that the employer’s legitimate justifications for the rule or policy are outweighed by the potential adverse impact on employees’ section 7 rights.

Even after new members are confirmed, it may take some time for Board policies to be revised or reversed, since the Board must await a case which presents the particular issue or issues to come before it.

## Legislation to Reverse Rescission of OSHA’s “Continuing Violation” Rule Introduced

By: Adele L. Abrams, Esq., CMSP

On May 15 (Senate) and May 16 (House), federal legislation was introduced in Congress by key Democrats to require OSHA to conduct new rulemaking to reinstate its “continuing violation” rule. That rule, which took effect in the waning days of the Obama Administration, was thrown out by Congress via H. Res. 83, using the Congressional Review Act (CRA). Under the CRA, OSHA would be expressly barred from re-promulgating another “substantially similar” rule. However, if it did so at the direction of Congress, that would negate the inherent rulemaking bar under the CRA.

The legislation, H.R. 2428 & S. 1122, had 20 co-sponsors in the House and 7 co-sponsors in the Senate upon introduction. Specifically, it would require a new OSHA rule to clarify that an employer’s duty to make and maintain accurate records of work-related injuries and illnesses is an ongoing obligation. The rule would have to provide that: (1) the duty to make and maintain accurate records of work-related injuries and illnesses is an ongoing obligation; (2) the duty to make and maintain such records continues for as long as the employer is required to keep records of the recordable injury or illness; and (3) such duty does not expire solely because the employer fails to create the necessary

## “Continuing Violation” Rule, cont.

records when first required to do so.

In addition to the mandated OSHA rulemaking component, it would amend the 1970 Occupational Safety & Health Act to clarify when the time period for the issuance of citations under such Act begins. The measures state: “For purposes of this subsection, a violation continues to occur for as long as an employer has not satisfied the requirements, rules, standards, orders, and regulations referenced [In Sec. 9(a) of the OSH Act].”

As a practical matter, while both the U.S. Court of Appeals and Congress have now held that OSHA cannot issue citations to employers for injury/illness paperwork infractions more than six months after the record was required to be created, it is unclear how this will affect other OSHA paperwork requirements that must be retained for extended periods of time (e.g., training records, exposure monitoring records, medical surveillance and evaluation forms, lockout/tagout certifications, confined space permits). If an employer disposes of these mandatory documents once six months has elapsed, while OSHA might not be able to issue citations (unless this legislation is someday enacted), there could be claims of spoliation of evidence if the records are needed for non-OSHA litigation. Therefore, it is a best practice to retain all records for their mandated period, regardless of whether OSHA can issue citations related to those documents.

### MSHA DELAYS WORKPLACE EXAM RULE

MSHA has delayed the effective date of the Workplace Examination final rule until October 2, 2017. The new notice was published in the Federal Register on Monday, May 22, 2017. On January 23, 2017, MSHA published a final rule amending the Agency’s standards for the Examination of Working Places in Metal and Nonmetal Mines. The final rule was scheduled to become effective on May 23, 2017, and then July 24, 2017, and now will be effective on October 2, 2017. According to MSHA, this extension gives MSHA additional time to provide training and compliance assistance to stakeholders, hold informational meetings around the country, conduct compliance assistance visits, and provide the mining community more time to implement the recordkeeping systems needed to comply with the final rule.

## President Trump Announces 10 Judicial Nominees for Federal Courts

By: Joshua Schultz, Esq., MSP

On May 9, 2017, President Trump announced 10 nominees for open seats in federal courts. This is the President’s first step towards filling more than 120 vacancies on the federal bench.

Conservative think tanks and commentators have praised the nominations. The Cato Institute’s Ilya Shapiro called the group of potential judges an “excellent slate.” White House press secretary Sean Spicer said the nominees were “chosen for their deep knowledge of the law and their commitment to upholding constitutional principles.”

Each judicial nominee will require 51 votes to pass through the Senate confirmation process.

The nominees are: Amy Coney Barrett, a Notre Dame law professor, nominated to the 7th Circuit Court of Appeals; John Bush, a litigation attorney from Louisville, nominated to the 6th Circuit; Justice Joan Larsen of the Michigan Supreme Court, nominated to the 6th Circuit Court of Appeals; Kevin C. Newsom, the former Solicitor General of Alabama who was nominated to the 11th Circuit Court of Appeals; Justice David Stras of the Minnesota Supreme Court, nominated to the 8th Circuit Court of Appeals; Judge David C. Nye, an Idaho trial court judge nominated to the U.S. District Court for Idaho; Scott L. Palk, Assistant Dean for Students and Assistant General Counsel at the University of Oklahoma College of Law, nominated to the U.S. District Court for the Western District of Oklahoma; Damien Schiff, a Senior Attorney at the conservative Pacific Legal Foundation, nominated to federal claims court; Dabney L. Friedrich, a former Commissioner on the United States Sentencing Commission, nominated to U.S. District Court for the District of Columbia; and Judge Terry Moorner, an Alabama Magistrate Judge, nominated to the U.S. District Court for the Middle District of Alabama.

The Trump Administration has previously appointed two judges to the Federal Judiciary: Justice Neil M. Gorsuch to the Supreme Court of the United States and the nomination of Judge Amul R. Thapar of Kentucky to serve as a Circuit Judge on the U.S. Court of Appeals for the Sixth Circuit.

## OSHA E-Recordkeeping Delayed ... Indefinitely?

By: Adele L. Abrams, Esq., CMSP

In a somewhat stealthy action, OSHA has published on its e-Recordkeeping page a notation that the July 1, 2017 deadline for electronic submission of injury/illness data is delayed, and a new effective date will be announced. The final rule, which is currently in litigation, requires all establishments with 250 or more workers, and specified high hazard industries with 20-249 employees, to submit their OSHA 300A logs in 2017. After that, the larger employers would need to electronically file their OSHA 300, 300A and 301 logs, on July 1, 2018, and on March 2, 2019 and thereafter. The smaller employers need only file 300A logs in subsequent years.

OSHA had previously announced its intention to publicly link the establishments' submissions with the employers on-line, so the public could easily see what a business' injury/illness track records have been, and this also would ease prequalification of contractors. The industry litigants oppose what they deem "public shaming" of businesses, and claim that the data should be confidential. While they have expressed concerns about worker confidentiality, OSHA had stressed that personal identifiers of the injured workers would be redacted to protect their identities.

The e-Recordkeeping rule had two components, the data submission and another section barring retaliation against injured/ill workers and declaring that reporting an injury is protected activity under the rule and Section 11(c) of the OSH Act. The anti-retaliation provisions took effect on December 1, 2016, and so are enforceable already. In addition, the protections of Section 11(c) allow OSHA to prosecute employers who violate workers' rights.

OSHA has deemed incentive programs that deprive a worker of a benefit because they (or a team member) were injured to be retaliation against injured workers. The new law also has been interpreted by OSHA as barring disciplinary actions against injured workers that treat them in a harsher manner than a non-injured worker would be for the same infraction of safety rules or injury reporting procedures. Finally, OSHA has declared drug testing of injured workers to be retaliatory if the policy requires testing just because of injury (without regard for whether impairment was suspected as a causal factor) unless drug testing is required by another law, such as DOT requirements for commercial drivers. So, while employers may be able to hold up on the data submission portion of the final rule

indefinitely, the worker protection provisions remain intact and have not been stayed by the U.S. Court of Appeals to date, even though OSHA's attorneys filed a brief with the court indicating that the agency's previous pleadings in support of the rule should now be disregarded as "moot." Stay tuned!

### Litigation Updates:

#### **Courts to Decide Scope of OSHA's Authority to Conduct Injury Investigations and Walk-Around Rights for Non-Employers**

By: Gary Visscher, Esq.

#### **OSHA's Authority to Expand Inspection**

Previous newsletter articles (October and December 2016) reported on *U.S. v. Mar-Jac Poultry*, a case involving OSHA's legal authority to use an injury report to inspect a much broader area and hazards at the poultry processing facility where the injury occurred.

The case began in February 2016, when OSHA sent inspectors to inspect Mar-Jac's poultry processing plant in response to Mar-Jac's report to OSHA of an arc-flash injury suffered during electrical maintenance work. When OSHA sought to expand the inspection to other parts of the plant and to other potential hazards, Mar-Jac demanded that it obtain a warrant. OSHA did so, and Mar-Jac filed a motion to quash in federal district court. After a hearing, a magistrate judge agreed with Mar-Jac that OSHA's attempted expansion of the inspection was not consistent with "probable cause" requirements under the Fourth Amendment. The magistrate's recommendation was upheld by Federal Judge William O'Kelley. OSHA then appealed to the U.S. Court of Appeals for the 11<sup>th</sup> Circuit.

On appeal, the Department of Justice, representing OSHA, has argued for a more limited expansion of the inspection than was initially sought. At the district court, DOJ argued that OSHA should be allowed to expand the inspection to hazards which are common in poultry processing plants, based a Region 5 Emphasis Program on poultry processing facilities as well as other industrial historical data. The district court did not find that to be sufficient basis upon which to expand the inspection. Before the Court of Appeals, DOJ has argued that OSHA should be allowed to expand the inspection to inspect other areas and activities at the plant for five broadly defined hazards, based on Mar-Jac's own injury records (300 logs) showing that injuries that had occurred in the past at the plant.

## Litigation Updates, cont.

Although the Fourth Amendment applies to OSHA's authority to inspect, the courts have also held that "probable cause" for an administrative inspection warrant is satisfied if the inspecting agency has only a "reasonable suspicion" of a violation. The issue in Mar-Jac is what evidence may be necessary to support a "reasonable suspicion" of a violation, and particularly, whether past injuries (as shown on OSHA 300 logs) are sufficient to establish "reasonable suspicion" of current violations.

Mar-Jac Poultry argues that injury reports on the OSHA 300 logs are not sufficient evidence of OSHA violations. Mar-Jac also argues that injury reports on items in the 300 logs "become stale after 6 months and cannot support a citation," and therefore may also not support probable cause of a violative condition.

Briefing in the case was completed at the end of April. The Court of Appeals may issue a decision in the case this summer.

### Walk-Around Rights for Non-Employees

The December 2016 and March 2017 newsletters also reported on litigation over OSHA's 2013 Standard Interpretation Letter which allowed union representatives to serve as employee representatives at non-union worksites for purposes of "walk around" rights during OSHA inspections.

The Letter was challenged by the National Federation of Independent Business, and Texas employers in a lawsuit filed in District Court in Texas. Earlier this year the District Court granted OSHA's motion to dismiss the complaint's allegations that the Letter violated section 8 (e) of the OSH Act. The Court declined to dismiss the complaint's claim that the Letter violated the Administrative Procedures Act because it in effect amended OSHA's long-standing regulation, 29 C.F.R. § 1903.8 (c), and therefore was a "legislative rule" issued without notice-and-comment rulemaking.

Late last month OSHA rescinded the 2013 Standard Interpretation Letter. NFIB and the other plaintiffs then withdrew their lawsuit in the district court.

## Litigation Continuous over President's 2-for-1 Order

By: Gary Visscher, Esq.

One of the early executive orders issued by President Trump designed to reduce regulations and the burden of regulations was the so-called "two-for-one" order - requiring that before a new regulation is issued, two regulations should be identified for repeal, and new incremental costs associated with new regulations off-set by elimination of costs from existing regulations.

The executive order, E.O. 13771, was issued on January 30, and in February the Office of Management and Budget published more extensive guidance on how the executive order would be implemented. For example, the OMB guidance clarified that the executive order only applies to new "significant regulatory actions" (generally, regulations with annual effect of \$100 million or more), and that the off-setting "savings" to new regulations need not be in the form of repeal of an existing regulation, in whole or in part, but may include other "regulatory actions" such as agency policies, guidelines, or interpretations.

Shortly after it was issued, the executive order was challenged in U.S. District Court by three organizations, Public Citizen, Natural Resources Defense Council, and the Communications Workers of America. The suit asks for "declaratory and injunctive relief," and alleges that the executive order is unconstitutional and in violation of the Administrative Procedures Act. The executive order is alleged to be unconstitutional in that it allegedly violates the separation of powers by requiring agencies to take or withhold final action based on factors which are not included in laws authorizing the regulations. The lawsuit also alleges that the executive order violates the "take care" clause in Article II, section 3 of the Constitution (duties of the President include: "he shall take care that the Laws be faithfully executed.")

Since the initial filings, both the plaintiffs and the Department of Justice, defending the executive order, have filed motions for an early disposition of the case. The Justice Department has sought to dismiss the suit on the basis that it is not "ripe" for judicial ruling until the executive order actually results in a delay or revision of a rule.

## President's 2-for-1 Order, cont.

The plaintiffs have filed a motion for summary judgment. Both motions are pending.

OSHA and MSHA proposals which were on the regulatory agenda in the Obama Administration are alleged in the complaint as amongst those that would be affected by the executive order. The complaint lists OSHA's consideration of a new health standards on styrene and infectious diseases as standards that would be affected by the executive order. MSHA's proposed rule on proximity detection devices in underground coal mines is also cited in the complaint as an occupational safety and health standard affected by the executive order. A supporting declaration for the plaintiffs' motion for summary judgment provided by former OSHA administrator David Michaels also cites an infectious disease standard as one that is unlawfully interfered with by the executive order.

While the district court has not ruled on the motions to dismiss and for summary judgment, a decision is likely to be made soon, and then, likely, an appeal by whichever side does not prevail. We will continue to follow and report on it as the case proceeds.

## SPEAKING SCHEDULE

### ADELE ABRAMS

5/24/17 National Safety Council, Mid-Year Division Conference, present on Safety Considerations for Unique Populations, Coronado, CA

5/31/17 BLR Webinar on PPE and Hazard Assessment

6/1/17 BLR Webinar on Substance Abuse Programs, Medical & Recreational Marijuana

6/6/17 SafePro Mine Safety Institute, present on MSHA enforcement and requirements, Savannah, GA

6/8/17 BLR Webinar on OSHA Inspection Management and Defense

6/20/17 ASSE PDC, present on Management of Safety & Health Documents

6/22/17 ASSE PDC, present on OSHA walking-working surfaces rule (panel)

### DIANA SCHROEHER

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

### TINA STANCZEWSKI

05/24/17 North Carolina Department of Labor, NC Mine Safety & Health Law School, Morganton, NC

09/19/17 North Carolina Law Seminar, NC Mine Safety & Health Law School, Castle Hayne, NC

10/18/17 California Joint Technical Symposium, The Carson Center, Carson, CA

### MICHAEL PEELISH

06/14/17 - BLR Webinar, Countdown to Compliance Under OSHA's Final Silica Rule