



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

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National Safety Council Awards Adele L. Abrams with Distinguished Service to Safety Award

NSC annually presents the Distinguished Service to Safety Award to those who have dedicated their careers to improving safety and health at work, on the roads, and in homes and communities. NSC Division members, the NSC Board of Directors and executive staff can nominate safety professionals for this award.

The award was first presented in 1942 to recognize individuals and companies that worked to reduce occupational injuries during World War II. President of the Law Office of Adele L. Abrams, Adele Abrams received the award with 5 other honorees during the 2017 NSC Congress & Expo Opening Session, September 26, 2017.

“This year’s winners have redefined success for everyone in the safety world,” Deborah A.P. Hersman, president and CEO of NSC, said in a Sept. 25 press release. “Their commitment to safety is truly remarkable and we are honored to shine a spotlight on their achievements.”



Adele Abrams (far left), Photo and announcement credit to NSC 09/2017

New OSHA Enforcement Guidance for Crystalline Silica Rule

An internal OSHA memo states, in relevant part: "During the first 30 days of enforcement, OSHA will carefully evaluate good faith efforts taken by employers in their attempts to meet the new construction silica standard. OSHA will render compliance assistance and outreach to assure that covered employers are fully and properly complying with its requirements. Given the novelty of the Table 1 approach, OSHA will pay particular attention to assisting employers in fully and properly implementing the controls in the table. OSHA will assist employers who are making good faith efforts to meet the new requirements to assure understanding and compliance.

"If, upon inspection, it appears an employer is not making any efforts to comply, OSHA's inspection will not only include collection of exposure air monitoring performed in accordance with Agency procedures, but those employers may also be considered for citation. Any proposed citations related to inspections conducted in this time period will require National Office review."

For assistance nationwide in compliance with the standard's requirements, competent person training, or citation defense, contact Adele Abrams or Michael Peelish at the Law Office: 301-595-3520.

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Beryllium Rule- Proposed Changes for Shipyards & Construction

By Brian S. Yellin, Esq., MS, CIH

The compliance dates for the beryllium standard in general industry are not affected by OSHA's deliberations over the revocation of the beryllium final rule's "ancillary" provisions" for the construction and shipyard sectors.

OSHA's January 9, 2017 beryllium final rule covers a wide range of industrial process that use metallic beryllium, beryllium-containing alloys, and various beryllium compounds. However, the beryllium standard's scope excludes materials containing less than 0.1% beryllium by weight, only where the employer demonstrates with objective data, that employee exposure to beryllium will remain below the action level of 0.1 µg/m³ as an 8-hour TWA under foreseeable conditions.

The beryllium final rule reduces OSHA's long-standing beryllium exposure limits under 29 CFR 1910.1000 (OSHA's general air contaminants standard) from 2.0 micrograms per cubic meter (µg/m³) to 0.2 (micrograms per cubic meter) µg/m³ as an 8-hour time weighted average (TWA) and established an action level (AL) of 0.1 µg/m³ as an 8-hour TWA and a short-term exposure limit (STEL) of 2.0 µg/m³ as determined over a 15-minute sampling period.

The beryllium final rule was structured as an expanded health standard (codified as 29 CFR 1910.1024 for general industry, 29 CFR 1926.1124 for construction, and 29 CFR 1915.1024 for shipyards) that includes comprehensive protective measures, including requirements for conducting an exposure assessment, personal protective equipment and clothing, establishment of a beryllium work area, housekeeping, medical surveillance and medical removal, hazard communication, and recordkeeping.

In its proposed rulemaking, OSHA refers to medical surveillance, personal protective clothing and equipment, and beryllium-specific training as "ancillary provisions" to the new exposure limits, i.e. AL of 0.1 µg/m³, PEL of 0.2 µg/m³ and STEL of 2.0 µg/m³.

Thus, the beryllium final rule contains the same structure and decision-making logic as other general industry health standards including Lead (1910.1025) and Formaldehyde (1910.1047).

However, OSHA has proposed to remove the "ancillary provisions" of the beryllium final rule from the construction and shipyard standards (codified as 1926.1104 and 1915.1024).

The final rule became effective March 21, 2017 and

established the following compliance dates for general industry:

- March 12, 2018 – each of the standard's obligations become enforceable, except for paragraphs (i) and (f);
- March 11, 2019 – requirement to provide changing rooms and showers under paragraph (i) becomes enforceable; and
- March 10, 2020 – requirement to fully implement engineering controls under paragraph (f) becomes enforceable.

However, on March 2, 2017, OSHA issued a proposed rule to delay the beryllium standard's effective date until May 20, 2017 pursuant to Presidential directive, "Regulatory Freeze Pending Review."

The claimed purpose of the beryllium standard's effective date from March 21, 2017 to May 20, 2017 was to "allow OSHA officials the opportunity to further review and [consider] the new regulation.

OSHA later stated in its proposed delay of the beryllium standard, "OSHA has preliminarily determined that it is appropriate to further delay the effective date of this rule, for the purpose of further reviewing questions of fact, law, and policy raised therein."

OSHA reports that it received twenty-five (25) comments to its proposal to extend the beryllium standard's effective date to May 20, 2017, including Congressional and industry concerns regarding the beryllium standard's application to abrasive blasting operations under the construction and shipyard standards. These concerns appear to be related to the presence of beryllium in mineral slag abrasives, including coal slag.

Ultimately, OSHA announced in its June 6, 2017 proposed rule, "Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors," that the agency is seeking to revoke the "ancillary provisions" for the construction and shipyard sectors while retaining the lower PEL and STEL.

The June 6, 2017 proposed rule does not affect compliance dates for the general industry beryllium standard, 29 CFR 1910.1024, described earlier in this regulatory update.

MSHA Reopens, Delays Workplace Exam Rule

By Adele L. Abrams, Esq., CMSP

On September 12, 2017, the Mine Safety and Health Administration (MSHA) published proposals in the Federal Register delaying for the second time the effective date of its final rule on examinations of working places in metal and nonmetal mines, and seeking comment on modification of the Obama-era rule. The final rule, codified at 30 CFR 56.18002 (surface) and 57.18002 (underground), modifies and strengthens an existing metal/nonmetal standard that remains in effect in the interim.

The original effective date had initially been pushed from March 2017 until October 2017, but will be extended until March 2, 2018, to allow more time for outreach to the affected community and for more training of inspectors. Comments on the extension are due on September 26th but as a practical matter, the final rule is on hold.

A second, concurrent, proposal would make changes to two substantive provisions of the 2017 workplace examination final rule. The first change would require that an examination of the working place be conducted at least once each shift, either before work begins or as miners begin work in the place. The addition of the latter phrase is new, even though MSHA had stated upon the final rule's initial publication in January 2017 that this was their intent. The goal of the rule is for examinations to be conducted in a time frame sufficient to assure any adverse conditions would be identified before miners are exposed. The current rule requires examinations of active workplaces each shift, but the inspections can be done anytime during that shift.

The second key change would permit mine operators to omit recording of hazardous conditions that are corrected promptly. "Promptly" means before miners are potentially exposed to adverse conditions. It is unclear whether temporary fixes, such as caution tape, would satisfy this requirement or whether it would only allow an exemption for hazards that are completely and permanently abated. The current rule requires mine operators and contractors at mines to document that they had completed an exam, but the record does not need to include a list of any hazardous conditions identified. The new rule would also require documentation of the date that corrective action is completed.

Both the existing and revised rules also require affected employers to maintain the examination reports for 12 months and make them available to MSHA for review

upon request. Listed hazards can form the basis for citations, even if corrected, because MSHA has no statute of limitations and the Mine Act is a strict liability statute. All examinations must be performed by a competent person who is authorized to implement corrective action, withdraw miners if an imminent danger is identified, and who has task training on how to perform examinations. The new final rule also requires the competent person to notify miners of any hazards identified during the exam.

Comments on the proposal to modify the final rule must be received by MSHA on or before November 13, 2017. MSHA also will hold a series of four public hearings on the proposed rule, in Arlington, VA, at MSHA headquarters on October 24, with additional hearings set in Salt Lake City, UT; Birmingham, AL; and Pittsburgh, PA.

The Regulated, Now Regulating: Trump Appoints Former Coal CEO to Head MSHA

By Sarah Ghiz Korwan, Esq.

On September 5, 2017, President Trump appointed David G. Zatezalo as the assistant secretary of labor for the federal Mine Safety and Health Administration. Zatezalo started his mining career in 1974 as a member of United Mine Workers of America, working as a laborer with Consolidation Coal. In 1977, Mr. Zatezalo earned a degree in mining engineering from West Virginia University and obtained a masters of business administration at Ohio University in 1994.

Later, he became general superintendent for Southern Ohio Coal Co. and general manager of Appalachian Electric Power's Windsor Coal Co (AEP), where he rose to be vice president of operations of AEP's Appalachian mining operations. Zatezalo also worked as a general mine manager for Broken Hill Proprietary in Australia.

According to a corporate biography, Mr. Zatezalo joined Rhino Resources in March 2007, where, at one time, he served as Chief Operating Officer (COO) and later became the CEO and president. During his time at Rhino, the company had its share of unwanted experience with MSHA. Notably, Rhino Eastern Eagle No. 1, in Raleigh County, WV, received "pattern of violations" warning letters in 2010 and 2011. Then, at another Rhino Mine in Kentucky, MSHA sought and received an injunction against the company when it discovered mine employees giving advance notice of an agency inspection to miners working underground. He retired from Rhino Resources in 2014.

Assuming Mr. Zatezalo is confirmed by the United States Senate, he takes the reins of an agency at a transitional time. Although coal mine deaths are up

The Regulated, Now Regulating, cont.

slightly this year, with 12 to date, compared to a total of 9 in all of 2016, coal production and sales are down considerably. There have been 8 fatalities in metal/non-metal so far this year, while there were 11 at this time last year and 17 in all of 2016. Even with the slight bump that metallurgical coal has seen this year, it's unlikely that coal will recover to any significant degree. Yet, MSHA's enforcement resources have not been adjusted to meet the industry contraction, despite a recent bill in the U.S. House of delegates to make cuts. In light of this industry shift, MSHA has been sending coal inspectors and supervisors to metal/non-metal mines, in an effort to keep them active on the job, which has been a small catastrophe for the metal/non-metal industry. Many in the industry have voiced complaints over coal inspectors not understanding the core differences at metal/non-metal mines. Consequently, the challenge may be to align MSHA's staff resources with the current makeup of the active mines. As always, the goal remains to maintain, if not improve safety.

Other issues awaiting action from MSHA include what to do about proposed changes to the Workplace Exam Rule and whether and when to restart the crystalline silica rulemaking process. How, or even if, the new assistant secretary of labor moves the ship on these matters remains to be seen.

US District Court Rules For Job Applicant Who Fails Drug Test

By Adele L. Abrams, Esq., CMSP

Although employers have traditionally prevailed in litigation where a job applicant or employee is rejected or terminated due to medical marijuana use, this trend may be changing. In May 2017, the American Civil Liberties Union (ACLU) won a victory in Rhode Island against Darlington Industries, where the employer refused to consider a job candidate who disclosed that she used medical marijuana legally for treatment of migraine headaches (but offered to refrain from use during work), and the court denied the employer's motion to dismiss the case. In July 2017, a Massachusetts state court also held that a lawful medical marijuana user could sue her former employer for disability discrimination.

The latest ruling, which is the first of its kind in a federal court, involves Connecticut's medical marijuana law. In *Noffsinger v. SSC Niantic Operating Company* (August 2017), the US District Court held that the federal Controlled Substances Act (CSA) does not make it illegal to employ a medical marijuana user, nor does it regulate

employment practices in any way. The court held that the CSA does not preempt state medical marijuana laws unless there is a direct conflict, and there is nothing in the federal law precluding an employer from hiring applicants who use drugs.

The case involved Connecticut's Palliative Use of Marijuana Act, which allows medical marijuana use for qualifying patients with specified medical conditions. The Plaintiff, Ms. Noffsinger, had been diagnosed with Post Traumatic Stress Disorder (PTSD) and her doctor recommended medical marijuana treatment, and she then registered with the state. She was subsequently offered a job at a nursing facility involving recreational therapy, but after accepting the position, she disclosed that she took medical marijuana tablets at bedtime, but that she was never impaired during the day. She failed her pre-employment drug test, and the employer rescinded their offer. By then, her former employer had filled her previous position and she was left unemployed. It is not clear at this time whether the employer will appeal to the US Court of Appeals to seek further clarification on this matter. Stay tuned!

Fair Labor Standards Act- Hot Topics Facing Employers By Gary L. Visscher, Esq.

Three important issues that employers should know about are the 1) worker's compensation exemption changes, 2) use of offsets for breaks, and 3) paid meal breaks.

"White collar" exemption

The July 2017 newsletter reported on the status of the Department of Labor's 2016 rule which revised the exemption from overtime for "executive," "administrative," and "professional" employees. At the time that article was written, a preliminary injunction against the rule had been issued by a Texas federal district court, the Department of Labor had appealed the district court's injunction to the Fifth Circuit Court of Appeals, and the Department of Labor had initiated a new rulemaking by publishing a Request for Information with a variety of questions regarding the exemption.

Since then, the Texas federal district court issued a final decision re-affirming the preliminary injunction's conclusion that the rule was invalid. Subsequently the Department of Labor asked the Fifth Circuit Court of Appeals for permission to withdraw its appeal, which was granted. Thus the 2016 rule on the exemption for executive, administrative, and professional employees will not go into effect, and the "white collar" exemption remains in effect as it was prior to the 2016

FLSA Hot Topics, cont.

final rule. Meanwhile the Department of Labor is proceeding with the Request for Information as a preliminary step to a new rulemaking on the exemption. The timing as well as the details of what will be proposed is not known at this time.

Using paid meal times to off-set time for “donning and doffing”

A case currently on appeal to the Supreme Court considers another wage and hour issue under the federal Fair Labor Standards Act (FLSA)- whether an employer who provides paid meal breaks, even though not required to do so, may use that paid time to off-set other unpaid time for which compensation is required.

In *Smiley v. E.I. DuPont De Nemours*, DuPont employees brought suit over the company’s failure to pay wages for time employees spent before and after their regular shifts “donning and doffing” uniforms and safety gear. DuPont acknowledged not paying for donning and doffing time, but presented evidence that employees were paid for meal breaks, even though the breaks were not “work time,” and DuPont was not required to pay compensation for them under the Fair Labor Standards Act. The length of the paid meal break generally exceeded the time spent donning and doffing protective gear. The company argued that the paid meal time should be allowed to off-set the unpaid donning and doffing time.

The federal district court ruled in favor of DuPont. On appeal, the Third Circuit Court of Appeals reversed and held that an offset is not allowed. The Third Circuit said that it declined to follow decisions by the Seventh and Eleventh Circuits which allowed a similar off-set, in part on the basis of an amicus brief filed by the U.S. Department of Labor, in which DOL argued that the FLSA does not allow the employer to off-set the unpaid time, even though DOL had never issued regulations (or published a position prior to this litigation) on that issue.

DuPont appealed to the Supreme Court, and the case is one of many currently waiting the Court’s decision whether to grant review. The appeal to the Supreme Court involves two important issues – whether the FLSA allows employers to off-set unpaid work time with paid break time, and the administrative law question, whether DOL’s position was entitled to the deference accorded it by the Court of Appeals.

When must meal breaks be paid?

The question in the *Smiley v. DuPont De Nemours* case regarding off-set may prompt another question- when does the federal wage and hour law require employees to

be paid for their lunch breaks?

The FLSA does not explicitly address that question either, but in this case there are long-standing Department of Labor regulations which state that “bona fide meal periods are not worktime.” The regulations state that in order for it to be a bona fide meal period, “the employee must be completely relieved from duty for the purposes of eating regular meals.” The regulations go on to state that ordinarily, to be considered non-worktime, the meal period must be at least 30 minutes, and the employee must not be required to perform any duties, whether active or inactive, while eating. The regulations also state that “an employee who is required to eat at his desk or a factory worker who is required to eat at his machine is working while eating,” but that “it is not necessary that an employee be permitted to leave the premises if his is otherwise completely freed from duties during the meal period.”

Despite this language in the regulations, the courts have generally allowed a more flexible approach. A recent case, also by the Third Circuit Court of Appeals, illustrated this. The case, *Babcock et.al. v. Butler County*, involved a claim by corrections officers at county prison facility. The guards were given a one-hour meal break, and under a collective bargaining agreement in effect, 45 minutes of the break was considered worktime and compensated, and 15 minutes were unpaid. The corrections officers were not allowed to leave the prison during the meal period, and were required to stay in close proximity to emergency equipment, so that they could respond immediately if an emergency occurred. If an officer did have to respond or take action during the meal break, the time was compensated.

The Court of Appeals upheld the County’s policy regarding the 15 minutes of uncompensated time. The applicable test in the Third Circuit, the Court said, is not whether employees are “completely relieved of all duties,” but who (the employer or employee) receives the “predominant benefit” of the meal break. The “predominant benefit test asks ‘whether the officer is primarily engaged in work-related duties during meal periods.’” The Third Circuit noted that the “predominant benefit” test had been adopted by nearly all of the other courts of appeals.

The Court of Appeals in *Babcock* said that the predominant benefit test is “necessarily a fact intensive inquiry” that would consider such things as how frequently the employee is interrupted with work during the meal break, the nature of the restrictions on the employee during the meal break, whether the employee was ever

FLSA Hot Topics, cont.

allowed to go off-site during meal breaks, whether meal breaks were taken at the employee's desk or in a lunch room, and other factors. Judge Greenaway wrote a vigorous dissent, stating that while he agreed with the applicability of the "predominant benefit" test, he disagreed with the Majority on the application of the test to the facts in this case.

Whether meal breaks are compensable work time must therefore be analyzed in terms of the specific facts of the situation. Some state laws may also affect whether meal breaks must be compensated. If you have any questions or concerns about whether meal or break time must be compensated, please contact us at (301) 595-3520.

The Dream is Over...Now What?

By Adele L. Abrams, Esq., CMSP

In early September, President Trump rescinded the Deterred Action for Childhood Arrivals (DACA) program, and US Attorney General Jeff Sessions announced that nearly 800,000 young persons in the United States will lose their temporary protection – and legal work authorizations -- under President Obama's DACA executive order and could become subject to deportation to their birth countries in the near future. While the president challenged Congress to enact legislation to protect the so-called "DREAMERS" before the grace period prior to deportation (March 5, 2018) expires, it is unclear whether this will be achievable. What does this mean for employers ... and for the currently-legal DACA workers they employ?

DACA was signed by President Obama in 2012, and allowed relief from deportation and the ability to work legally for persons brought to the United States prior to age 16 and who had been in the country for at least 5 years prior to June 16, 2012. Applicants needed to be age 30 or younger, without a criminal record, and were required to have graduated school or be currently enrolled in school. While DACA did not make the DREAMERS citizens, nor did it technically give them legal status, it allowed the federal government to exercise prosecutorial discretion against removal of these individuals from the US. Covered persons could apply for work and enroll in school without fear of deportation.

The latest action taken was in response to threatened litigation by state attorneys general from several states that asserted DACA was unlawful and needed to be rescinded. Attorney General Sessions agreed, and noted that Congress has repeatedly rejected bipartisan

legislation – the DREAM Act – that would have provided the "DREAMERS" with secure legal status. While DACA was rescinded, the Justice Department called for a six-month "wind down" period rather than immediate deportation.

What is the practical effect of DACA rescission? No new applications can be submitted for DACA status but any currently pending applications will be normally processed and could extend DACA protection for those individuals for an additional two years. Those whose DACA applications were previously approved can remain in the US until their benefits expire (generally two years from the date of issuance). For persons whose DACA cards expire between September 5, 2017 and March 5, 2018, the federal government will accept renewal requests if they are received by October 5, 2017.

Any applications to renew DACA status filed after that will be rejected. In addition, DACA recipients will be denied authorization to travel outside the US after September 5, 2017, unless advance authorization was already granted, but even those persons may need to speak to immigration counsel prior to departing as there may be difficulties in reentering the country. Therefore, employers who have employed DACA recipients and require them to travel internationally may need to make other arrangements so as not to put those workers' in jeopardy.

Employers will also need to review carefully their employees' work authorizations to make sure that any DACA cards due to expire have been timely renewed before the October 5th deadline. Once the cards expire, those workers cannot legally be employed. Employers also should be cautious not to assume that any non-US born workers or applicants are subject to deportation, nor should employers refuse to hire individuals based on national origin alone, as this violates the Civil Rights Act and most analogous state laws. A case-by-case analysis is required to determine each person's actual legal status.

Employees who are DACA beneficiaries must work quickly to file for renewals, if they are eligible, and should apprise their employers of any status revisions. While the government said that information included on renewal applications will not automatically be shared with Immigration and Customs Enforcement (ICE), that remains possible if the applicants meets the criteria for the issuance of an ICE "Notice to Appear" (which could lead to more scrutiny and possible deportation).

The Dream is Over, cont.

For more compliance information, contact the Law Office's lead employment attorneys, Adele Abrams and Diana Schroeder, at 301-595-3520.

OSHA Extends Deadline for Crane Operator Certification

By Tina M. Stanczewski, Esq., MSP

OSHA issued a Notice of Proposed Rulemaking to extend the deadline for compliance with the crane operator certification and competency requirements. The proposed compliance deadline is November 10, 2018. This is the second extension. The Cranes and Derricks standard was issued in August 2010, but concerns over the certification and competency aspects of the rule have created multiple extensions to enforcement. According to OSHA, the extension will allow the agency to respond to stakeholder concerns that have not been finalized during the past three years of the extension. OSHA stated "The primary rationale for this proposal is to maintain the status quo—including preservation of the employer duty to ensure that crane operators are competent—while providing OSHA additional time to conduct rulemaking on the crane operator requirements in response to stakeholder concerns."

Originally, the certification and compliance parts were extended until November 2014 but prior to the effective date, OSHA extended the provisions until November 2017. The new proposal extends compliance once again with a projected net savings of \$4.4 million for employers. The current standard requires employers to: 1) execute training of crane operators to ensure they have the knowledge and ability to operate a crane safely, 2) evaluate a crane operator's abilities after training, and 3) ensure crane operators can safely operate the equipment.

The Cranes and Derrick rule imposed significant changes by requiring certification expanding an employer's duty to confirm operators are competent. The certification process, not yet in effect, can be obtained through various means, including state and local licensing requirements, third-party audited training, or an accredited service. It requires a written exam and practical test. Industry still has concerns over the execution of this process and the assessment of competency.

The Cranes and Derricks rule was initially developed through the Cranes and Derricks Negotiated

Rulemaking Advisory Committee (C-DAC) with the rule being issued in August 2010 and the certification requirements taking effect in November 2014. The C-DAC committee voiced concern over OSHA's interpretation of the rule it developed from the beginning. The rule required the following:

- Competence: Operators must have the training and experience to operate the equipment safely.
- Training: Employees who are not "competent" meaning having the required knowledge or ability to operate the equipment safely, must be trained before operating the equipment.
- Evaluation: Employees who are not "competent" must be evaluated to confirm that he/she understands the information provided in the training. Evaluation must occur on same make and model that the operator will be assigned to use.
- Certification: Until certified for the type of equipment, an operator is an "operator-in-training" and must be under constant supervision.
- Documentation: Operator must carry documentation about their assessment.
- Reevaluation: Annual reevaluation is necessary as well as needed if the situation warrants.

Since before first extension in 2014, there had been much activity concerning the enforcement of the rule. Industry, including the C-DAC committee that developed the rule stated: "It was never the intent of C-DAC that crane operator certification should be according to the capacity of the crane . . . nor . . . to imply that crane operator certification was equal to qualification." As a result, OSHA extended the compliance deadline to November 10, 2017. In 2014, OSHA notified industry that they were still required to train and ensure competency of operators, CCO certifications remained in effect, and the capacity did not have to be listed on the certification card.

During 2015 both Advisory Committee on Construction Safety and Health (ACCSH) and the House of Representatives weighed in on the crane rule by holding meetings, specifically concerning the capacity requirement. ACCSH advised that OSHA should only focus on the qualification of the operator as a "qualified person". The House of Representatives' Committee on Education and the Workforce focused on state regulations that do not use capacity as a factor. As a result, OSHA advised that certification "will only be by type of crane—not by capacity. Many states impose similar or stricter standards for crane

OSHA Extends Crane Deadline, cont.

operators than the delayed rule. These include California, Connecticut, Hawaii, Maryland, Massachusetts, Montana, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Utah, Washington, and West Virginia.

Comments may be submitted at <https://www.regulations.gov> through September 29, 2017.

Safety Agency Appropriations Will Affect FY 2018 Enforcement

By Adele L. Abrams, Esq., CMSP

On September 7, 2017, the Senate Committee on Appropriations approved its version of the FY Labor-HHS Appropriations package, by a bipartisan vote of 29-2. Overall, the Senate bill funds the U.S. Department of Labor at \$12 billion, \$61.5 million below FY 2017. At this point, no riders affecting any Occupational Safety and Health Administration (OSHA) standards have been included and it is unlikely that they would be successfully added on the Senate floor.

While the Senate bill has been cleared for floor action, it is questionable whether it could be considered quickly, much less reconciled with the House bill, approved by a majority, and signed by the President prior to the September 30th end of the current fiscal year. In recent years, OSHA and Mine Safety and Health Administration (MSHA) have ended up being funded through a continuing resolution, and that is likely to be the case for at least the first quarter of FY 2018 (end of calendar 2017).

The Senate committee report, which relates what has been approved and will be voted upon by the Senate (subject to amendments on the floor), reveals that the funding levels for safety agencies are exactly the same as in FY 2017 for OSHA (\$552,787,000), MSHA (\$373,816,000) and National Institute for Occupational Safety and Health (NIOSH) (\$335,200,000). This reflects the Senate's complete rejection of President Trump's proposed budget reductions, which could have reduced funding for OSHA by more than 25 percent.

Compared to the House version, there are other changes as well. The Senate version fully restores OSHA's Harwood grants (at a level of \$10.5 million) with a "capacity building set aside" and a minimum of \$3.5 million for the Voluntary Protection Program, with direction that personnel for VPP and Safety and Health

Achievement Recognition Program (SHARP) shall not be reduced. Unlike the version now pending in the House, it omits any riders to bar enforcement of the OSHA electronic recordkeeping rule, which is now set to require many employers to submit their injury/illness data electronically to OSHA by December 1, 2017. If this remains in the House version, the issue would need to be reconciled in conference.

Silica Rule in Effect; Enforceability Depends on "Good Faith" Efforts

By Michael R. Peelish, Esq.

Are you ready for silica enforcement? If you are not, you will have another 30 days (10/23/2017) provided you have made good faith efforts to become ready. What exactly does "good faith effort" mean? Here are some points to consider:

- Have you trained your employees in the content of 29 CFR 1926.1153?
- Have you started drafting a written exposure control plan(s)?
- Have you designated your competent person(s) and provided training?
- Have you determined if you are in Table 1 or not, and if not, then have you perform exposure monitoring?
- Have you purchased any engineering controls (tools)?

The quickest way for a compliance officer to determine "good faith" is to ask your employees questions, such as:

1. What are the adverse health hazards associated with crystalline silica?
2. How do you perform housekeeping?
3. Who is your competent person?

If your employee's response is "I don't know" or grabs a broom to perform dry sweeping, good faith is out the door. The approach taken by OSHA seems fair in light of the difficulties with implementing this rule and the vast requirements of the silica rule. It is expected that OSHA will continue to provide compliance assistance beyond the next enforcement date.

SPEAKING SCHEDULE**ADELE ABRAMS**

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

11/06/17: Progressive Business Conferences webinar on Disciplining Unsafe Workers

11/15/17 SafePro Inc. Mine Safety Institute, MSHA legal issues, Savannah, GA

TINA STANCZEWSKI

10/18/17 California Joint Technical Symposium, "Environmental Law Update" The Carson Center, Carson, CA

MICHAEL PEELISH

10/06/17 Chesapeake Regional Safety Council, Competent Person Training, Baltimore, MD

JOSHUA SCHULTZ

10/10/17 BLR Cal/OSHA Summit, "Multi-State Worksites: Mastering Safety Compliance Across State Lines,"

Costa Mesa, CA