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Acronyms

EEOC and DOJ Issue Warnings to Employers on AI which may Violate the ADA

By Diana Schroeher, Esq.

The federal Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Justice (DOJ) have each issued guidance to employers on the use of Artificial Intelligence (AI), software, and algorithms for hiring and employee performance criteria. The agencies want to ensure that employer use of these decision-making technologies will not cause employers to run afoul of the Americans with Disabilities Act (ADA) and other Civil Rights laws enforced by the EEOC. Employers may inadvertently discriminate against applicants and employees when using AI technologies, by unfairly screening out qualified individuals with disabilities, and/or failing to offer reasonable accommodations. The ADA prohibits discrimination against qualified individuals with disabilities, and requires employers to offer reasonable accommodations to applicants or employees with disabilities, unless doing so would be an undue hardship for the employer.

As part of the EEOC's ongoing Artificial Intelligence and Algorithmic Fairness Initiative, on May12, 2022, both the EEOC and DOJ issued their respective guidance documents indicating their concerns that the use of AI technology by employers may violate the ADA. The DOJ issued "Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring." The EEOC issued "The ADA and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees" and includes an extensive Q&A, which explains how employers' use of software that relies on algorithmic decision-making may violate the ADA. The EEOC defines "software" as including

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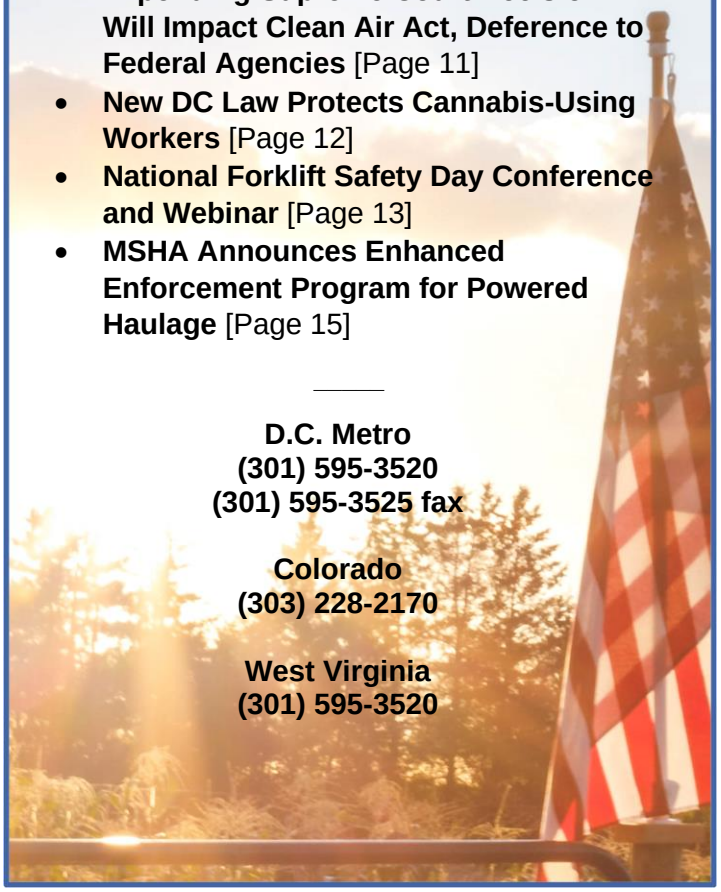

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automatic resume-screening software, hiring software, chatbot software for hiring and workflow analysis, video interviewing software, analytics, employee monitoring and worker management software. "Algorithms" are defined as a "set of instructions that can be followed by a computer to accomplish some end", including to evaluate and rate individuals at various stages of employment, including hiring, performance evaluation, promotion, and termination. The EEOC adopted Congress' definition of Artificial Intelligence (AI) - "a machine-based system that can, for a set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments." AI can include machine learning, computer vision, natural language processing and understanding, intelligent decision support systems, and autonomous systems.

One example of how an employer's AI decision-making tools may violate the ADA's restrictions on making disability-related inquiries and medical examinations is when the information requested reveals a disability or medical condition, or qualifies as a "medical examination", which are prohibited before making a conditional offer of employment to the applicant.

The EEOC discourages the indiscriminate use of Artificial Intelligence (AI), software, and algorithms for hiring and employee performance-related decisions. The EEOC's guidance document suggests that employers minimize the chances that these tools will violate the ADA and disadvantage individuals with disabilities by conducting management training; ensuring that the tools used have been designed to be accessible to individuals with as many different disabilities as possible; making sure the tools only measure abilities or qualifications that are truly necessary for the job; ensuring the necessary abilities or qualifications are measured directly (rather than indirectly); and consulting with software vendor to ensure that their product was designed to comply with the ADA to the extent possible.

Occupational Safety and Health Administration

Commission Split Means Flexibility to Statute of Limitations

By Gary Visscher, Esq.

The Bible's Old Testament tells the story of a time when the sun stood still and a day lasted two days, in order for the Israelites to prevail in battle. In a case recently before the Occupational Safety and Health Review Commission, OSHA found another way for a day to last more than 24 hours, in order to avoid dismissal of a citation.

OSHA is required to issue a citation within 6 months of the occurrence of a violation. Section 9 (c) of the OSH Act states that "[n]o citation may be issued under this section after the expiration of six months following the occurrence of any violation." The six months to issue the citation is a statute of limitations on OSHA's authority to issue the citation.

Employers who receive a citation should always check the dates on the citation and on the certified mail receipt, to assure that in fact OSHA sent the citation within six months of the date of the alleged violation. OSHA area offices not infrequently wait right up to the deadline before issuing a citation. Sometimes events or confusion about dates causes OSHA to miss the deadline.

In the case before the Review Commission, *R+L Carriers* (June 1, 2022), OSHA issued a citation to the employer on December 8, 2021. The six-month statute of limitations thus extended back to violations which occurred on June 8, 2021. However, according to the citation, the alleged violation (of 1910.178(p)(1)) occurred "on or about June 7, 2021." OSHA missed the deadline.

OSHA nonetheless issued the citation. The company timely contested, and OSHA subsequently filed a

complaint with the Commission. With the complaint, the attorney for the Secretary, obviously noticing the statute of limitations problem with the citation as issued, included an amended citation which alleged that the violation occurred "on or about June 8, 2021."

Employers who receive a citation should always check the dates on the citation and on the certified mail receipt, to assure that in fact OSHA sent the citation within six months of the date of the alleged violation.

One would have expected that the Commission would make quick work of dismissing the case because the citation as issued was outside of the time allowed by the statute of limitations. Surprisingly that was not the case. The company filed a motion to dismiss the citation, but the administrative law judge dismissed the motion without explanation. The company then petitioned the Commission for interlocutory review. The two-member Commission split on whether to grant the petition, and the effect of the split was that the petition was denied. Thus, the case goes back to the ALJ for further proceedings, including a hearing on the citation.

In justifying her vote to deny R+L Carrier's petition, Chairman Attwood asserts that the citation's allegation that the violation occurred "on or about June 7, 2021" meant that it occurred "approximately" on June 7 and that could include June 8, 2021. Therefore, the citation was timely. As dissenting commissioner Laihow wrote, "[o]ne day here, three weeks the next – at what point does this sort of 'deadline creep' violate the statute?"

The two commissioners did agree on one point, that in order to prove a violation occurred, OSHA will have to rely on evidence of violative conduct which occurred within the six-month statute of limitations. If OSHA's on-site inspection concluded prior to June 8, it may be difficult for OSHA to prove the violation.

Department of Labor

Spring Regulatory Agenda Blooms with Initiatives

By Adele L. Abrams, Esq., CMSP

It may be summer now, but the federal government published its "Spring 2022" Regulatory Agenda just before the Summer Solstice. It is full of NLRB, OSHA/MSHA initiatives moving forward after languishing for years, and in some cases restoring rules that had been weakened during the prior administration.

For example, the National Labor Relations Board includes on its new agenda a Notice of Proposed Rulemaking (NPRM), due next month, to revise the "Joint Employer" standard used to determine whether two employers (as defined in Section 2(2) of the National Labor Relations Act) are a "joint employer" under the Act. The Trump administration had issued a final rule making it tougher to "connect the dots" between franchiser/franchisee, chain operations, parent/subsidiary/affiliates and even temporary agency/host employers. The Trump rule was invalidated in 2020, prior to the elections, by a U.S. District Court, and was subsequently rescinded under Biden. This leaves a regulatory void, however, which this rulemaking will fill.

Given the Memorandum of Understanding between the US Department of Labor (DOL) and the NLRB (signed in January 2022 to facilitate cooperation in protecting worker safety and rights), any definitional changes adopted by NLRB will likely be used by OSHA/MSHA as well. This may impact which companies are considered when a corporate history is reviewed for "repeat violation" purposes (same or similar violation at the same or other company location within previous five years), and those violations now carry a penalty of up to $145,027. It also could impact the scope of any future corporate-wide settlement

agreements, including adoption of abatement requirements. Another NLRB agenda item calls for a NPRM on the issue of representation election procedures under 29 CFR Part 103, due in September 2022.

Over at the DOL, MSHA's regulatory agenda primarily focuses on two significant items: a final rule requiring Safety Programs for Surface Mobile Equipment (due October 2022), and a NPRM for Respirable Crystalline Silica (due September 2022). The silica rule is a wild card in that MSHA currently does not credit PPE such as respirators as a control, making adoption of OSHA's "Table One" in its analogous construction rule difficult. The current MSHA permissible exposure limit is the equivalent of 100 ug/m3, twice the level allowed by OSHA under its 2016 rule.

MSHA has concurrently launched two enforcement initiatives associated with these regulatory actions. The "Enhanced Enforcement Program" targets task training, site-specific hazard training for contractors and customer truck drivers, as well as five equipment standards (failure to maintain control, seatbelts, brakes, chocking of mobile equipment parked on a grade, and pre-operational inspection of mobile equipment). Any citations issued under this initiative will be considered for special assessment of up to $291,234 per violation. In early June, MSHA also announced a silica enforcement program, targeting mines with histories of overexposures or MSHA citations for silica violations. The agency added that Section 104(b) withdrawal orders will be issued if silica citations are not timely abated.

OSHA's regulatory agenda is quite robust, with the updated items of most interest summarized below:

There are 5 measures at the "prerule" stage:

- Process safety management and prevention of major chemical accidents (stakeholder meeting planned 7/22)
- Mechanical Power Presses Update (no date for further action – analyzing comments from RFI)
- Prevention of Workplace Violence (health care and social assistance sectors only at this time; SBREFA to be initiated 9/22)
- Blood Lead Level for Medical Removal Update (scheduled to be released in June 2022)
- Heat Illness Prevention in Outdoor and Indoor Work Settings (comments closed 1/26/22 – no date for NRPM)

There are 15 initiatives at the proposed rule (NPRM) stage:

- Infectious Diseases (NPRM due 5/23; would cover health care and "other high-risk environments" including laboratories; addresses all types of non-bloodborne infectious diseases, including COVID-19, MRSA, TB, shingles)
- Amendments to Crane/Derricks Standard (NPRM 1/23; proposed amendments would: correct references to power line voltage for direct current (DC) voltages as well as alternating current (AC) voltages; broaden the exclusion for forklifts carrying loads under the forks from "winch or hook" to a "winch and boom"; clarify an exclusion for work activities by articulating cranes; provide four definitions inadvertently omitted in the final standard; replace "minimum approach distance" with "minimum clearance distance" throughout to remove ambiguity; clarify the use of demarcated boundaries for work near power lines; correct an error permitting body belts to be used as a personal fall arrest system rather than a personal fall restraint system; replace the verb "must" with "may" used in error in several provisions; correct an error in a caption on standard hand signals; and resolve an issue of "NRTL-approved" safety equipment)
- Shipyard Fall Protection – Scaffolds, Ladders & Other Working Surfaces (NPRM 12/22)
- Communication Tower Safety (NPRM 3/23)

- Emergency Response (NPRM 5/23)
- Lockout/Tag-Out Update (NPRM due 3/23, to allow for new LOTO technology)
- Tree Care Standard (NPRM due 12/22)
- Welding in Construction Confined Spaces (NPRM due 2/23; rule will eliminate ambiguity about the definition of confined space that applies to welding activities in construction)
- PPE in Construction (NPRM due 9/22; would clarify issues of PPE fit for construction workers)
- Powered Industrial Truck Design Standard Update (would incorporate most recent editions of B56.1, B56.5 and B56.6, updating from outdated version of B56.1; comments closed 5/17/22)
- Walking Working Surfaces (technical corrections – will reopen rulemaking record 10/22)
- Occupational Exposure to Crystalline Silica (NPRM due 5/23 to address court-ordered review of whether to include medical removal protection)
- Improve Tracking of Workplace Injuries & Illnesses (update to e-Recordkeeping rule to expand data submission requirements – comments close 6/30/22 and final rule due 12/22)
- Massachusetts State and Local Government Only State Plan (to cover public sector workers using state resources – private sector remains under federal OSHA)
- Arizona State Plan for OSH (federal OSHA is considering revoking AZ's state plan status)

The following are at the final rule stage:

- Update to the Hazard Communication Standard (due 12/22; adopting 7th Rev. to GHS)
- Procedures for handing retaliation complaints under Taxpayer First Act, the Anti-Money Laundering Act, and the Criminal Antitrust Anti-retaliation Act (all enforced by OSHA)
- Procedures for handling retaliation complaints under the Whistleblower Protection Statutes
- Subpart U- Emergency Temporary Standard – COVID-19

For assistance with comments or analysis of these proposals, or general help with regulatory compliance, contact Adele Abrams at Safetylawyer@gmail.com.

Mine Safety and Health Administration

MSHA is Not Waiting Around on Silica

By Michael Peelish, Esq.

MSHA has clearly staked out its ground on respirable crystalline silica or RCS with the latest enforcement initiative. With all the recent initiatives (surface haulage, silica, enhanced enforcement), operators are perplexed as to what to expect next from MSHA. Dealing with MSHA is like a roller-coaster for operators because they are continually confused on the "enhanced enforcement subjectiveness" with which MSHA applies its existing standards somehow transformed by using the words "initiative" in its introduction.

Well, the silica enforcement initiative is no different. The last administration for MSHA was focused on silica and its actions did get the operators' attention. However, it does not appear MSHA was satisfied with that approach and, without a stated justification in fact or data in its press release, MSHA has decided it wants to ramp up the enforcement on silica exposure based on the scriptures contained in the Mine Act.

MSHA's press release has set forth how MSHA plans on implementing this latest enforcement initiative and operators should take note:

- Spot inspections at coal and MNM mines with a history of repeat silica overexposures. (Action: Operators know their history for overexposures so review these and define the corrective actions that were present when sampling revealed a "pass" on the exposure monitoring. Also, take a mental photograph of what the "pass" conditions look like and remind management and the miners that that is what the workplace needs to look like all the time.)
- Increased oversight and enforcement for known silica hazards at mines. For MNM where the operator has not timely abated hazards, MSHA will issue a section 104(b) withdrawal order until the overexposure hazard has been abated. For coal, MSHA will encourage operators to make changes to the ventilation and dust control plan which MSHA approves. (Action: For MNM mines that have an outstanding overexposure citation(s), special focus on corrective actions needs to be taken. Operators need to record in the workplace examination (WPE) books the actions taken to fix leaks, accumulations, transfer points, etc., so that they can show MSHA that actions are being taken. The goal is for MSHA to accept these actions and extend time to abate if needed.)
- Expanded silica sampling at MNM mines. MSHA's unspoken metric for identifying mines for enhanced sampling is the respirable silica/quartz content. I have heard that over 30% quartz rings MSHA's sampling bell. (Action: Operators need to know the respirable quartz content of its samples, because MSHA does. It makes sense that a higher respirable quartz content will make exposure time less before an overexposure occurs.)
- MSHA will focus its sampling on tasks that have the highest risk of silica overexposure. For MNM, MSHA will focus on overburden removal, and for coal, MSHA will focus on shaft and slope sinking, extended cuts, and developing crosscuts. (Action: Operators should identify these highest exposed occupations and sample them before MSHA does to know what you have and what corrective actions may be needed before MSHA shows up.)

Having been in the business of controlling dust in coal and MNM mining operations for several decades, I can assure operators that MSHA has a lot of tools in their tool bag to force compliance by shutting down an operation until they get what they want. And what MSHA wants is compliance with the current 100µg/m3 RCS standard. Typically, in MNM mines, MSHA does this by issuing a citation and requiring a "dust or silica exposure control plan" and a compliant sample to terminate the citation. So, what MSHA does not get through the regulation (i.e., no plan approval as in coal), it achieves through abatement terms. And while an operator achieves compliance, MSHA will not allow the operator to produce product except to identify leaks and to see how the corrective actions are working. Thus, the operator must shut down and perform corrective actions before it can "run" again to test the system. This is repeated until the operator has taken its own samples or asks MSHA to re-take compliance samples and the samples "pass". In coal, it becomes a plan approval nightmare where MSHA calls it the operator's plan, however it insists on what terms it will accept while maintaining that it always knows better than the operator.

However, MSHA has other ways of forcing compliance which are more subjective than sampling and which will cause operators to go apoplectic. MSHA will resort to its "subjective" tools by using the housekeeping standard, the WPE standard, and maybe the defective equipment standard to get operator's attention without knowing if an RCS overexposure exists. Now, this is when operators will want to have conversations above the local inspector because that is a clear directive from MSHA superiors to change how the standard is being applied, and that my friends is wrong, wrong, wrong.

So, what is an operator to do?

- If you don't have any sampling results except for MSHA samples, then begin conducting more sampling to gather data. For one thing, the operator needs to know the RCS (quartz) content of its material. Also, remember if an operator takes a sample, then this is a record that MSHA will have a right to review under the Mine Act. So, if an operator's sample(s) show an overexposure, make certain that corrective actions are taken and recorded in the WPE book. This could be that leaks were fixed, accumulations were cleaned, or something else. The operator needs to show MSHA that it is doing something to correct the overexposure. Also, an operator can take an area sample to gain information which is not a result that should be provided to MSHA because it was not done for compliance purposes.
- Review any operator sample results and begin thinking towards 2023 when the standard will most likely be 50µg/m3, which is half of where it is today. How would existing sampling results compare to the expected new standard? Begin to make plans to improve the operations to achieve the lower standard.
- Make certain sand accumulations and leaks are identified as hazards in the WPE book and note that any corrective actions taken are also recorded in the WPE book. I know operators don't like to make a record, but this is one record that can aid the operator if done correctly.

These are not simple steps because it may require an operator to take proactive steps and perhaps incur repair and maintenance costs or capital costs. Also, it is not simple because of the "subjectiveness" with which MSHA is already implementing this silica enhanced enforcement program. Operators have their work cutout for them just as OSHA employers did under the OSHA rule. However, the one big difference between the two agencies is that OSHA allows respiratory protection for compliance purposes, however MSHA currently does not. Let's hope MSHA does the right thing in its rulemaking by allowing operators to use respiratory protection for compliance

purposes under the right circumstances or else operators will have an even harder row to hoe.

As you may know, our firm has conducted over 80 RCS exposure assessments at mines and under the OSHA RCS standard to determine RCS levels and to make recommendations on engineering controls and administrative controls. We also draft exposure control plans for mine operators and employers and have trained several thousand persons under the "competent person" standard contained in the OSHA RCS standard.

Mine Safety and Health Administration

Sixth Circuit Finds "Coded Language" Violates Advance Notice Standard, Not Protected as Free Speech

By Sarah Ghiz Korwan, Esq.

After ten years, the Sixth Circuit (finally) resolved a matter involving a citation alleging advance notice at an underground mine. The Sixth Circuit affirmed a decision by the Federal Mine Safety Health Review Commission ("Commission"), finding that a mine operator provided advance notice of an unscheduled MSHA inspection in April 2012. *KenAmerican Res., Inc. v. Sec'y of Labor*, 2022 WL 1483988 (May 11, 2022)

In this case, MSHA inspectors were visiting Paradise No. 9, a large underground mine in Mullenberg County, Kentucky, owned by KenAmerican Resources, Inc., on an anonymous complaint regarding potentially hazardous conditions. The mine has two portals, an "old" portal and a "new" portal, so the MSHA team of five inspectors split into two groups, with inspectors going to each portal. Because the inspectors arrived in the middle of a shift, the mine dispatcher at the "old" portal called for a miner to return to the surface with a mantrip. An unidentified miner underground picked up the call from the dispatcher and asked, "do we have any company outside?" The dispatcher responded, "I think there is." Unbeknownst to the dispatcher, one of the MSHA inspectors at the "new" portal was monitoring a mine phone and could hear the conversation. The inspector asked miner who inquired about "company" to identify himself but received no response. Believing that the exchange between the miner and the dispatcher was an illegal attempt to tip the miner off about MSHA's impending inspection, MSHA issued a citation under Section 103(a) of the Mine Act for providing advance notice of an inspection and assessed a civil penalty.

An unidentified miner underground picked up the call from the dispatcher and asked, "do we have any company outside?" The dispatcher responded, "I think there is."

The operator contested the citation and the associated penalty. The ALJ granted summary judgment to KenAmerican, finding that the conversation between the dispatcher and the unidentified miner did not establish a violation because the conversation was ambiguous and the dispatcher's response did not clearly constitute advance notice. The Secretary filed a petition for review and the Commission reversed the ALJ and remanded with instructions to hold a hearing.

At the hearing on remand, the inspector testified regarding the conversation he heard between the dispatcher and unidentified miner, and that dispatcher responded, "yeah, I think there is," when asked if there was "company outside". He further testified that he believed the dispatcher and miner were using a coded language which provided the miner advance notice of an MSHA inspection. The dispatcher testified that his response to the query regarding the presence of "company" was, "I don't know," but he also confirmed

that “it’s possible” he said something else. Based on the testimony of the dispatcher, the ALJ vacated the citation. On appeal to the Secretary, the Commission again reversed the ALJ’s decision vacating the citation, finding that the ALJ abused his discretion in crediting the dispatcher’s testimony over the inspector’s. The Commission remanded the case to the ALJ to assess a civil penalty. After the ALJ assessed a penalty of $18,742, the operator sought discretionary review by the Commission, which was denied. The operator then appealed to the Sixth Circuit.

On appeal, the operator first argued that Section 103(a)’s ban of providing notice did not apply to mine operators and only applied to representatives of the Secretary. The operator also asserted that mine operators are “sufficiently deterred” from providing advance notice of inspections by section 110(e)’s criminal penalties and that Congress did not intend for mine operator’s to be subject civil citations for violating section 103(a). The Court rejected these arguments. First, the Commission noted that an interpretation that Section 103(a) did not apply to miner operators essentially required linguistical gymnastics and is “flatly inconsistent” with the plain language of the statute. In addition, such finding would lead to a non-sensical outcome for potential criminal penalties to be imposed for advance notice under Section 110(e), but not civil penalties under Section 103(a).

The operator also argued that Section 103(a)’s prohibition against providing advance notice violation First Amendment free speech rights because it is a content-based restriction on speech. However, the Court found that 103(a) survived strict scrutiny because it was narrowly tailored to serve a compelling government interest to protect the nation’s miners.

In light of this decision, we caution mine operators to avoid any communication which might be interpreted or perceived as alerting miners that MSHA is at the mine site for purpose of conducting a mine inspection. As always, feel free to contact us if you have any questions.

Occupational Safety and Health Administration

Jury Awards $650,000 in OSHA Retaliation Case

By Josh Schultz, Esq.

A jury in a Massachusetts federal court found that a contracting company retaliated against an employee who reported an on-the-job injury, awarding $650,000 in damages – $600,000 in punitive damages and $50,000 in compensatory damages. The case was initiated by the Department of Labor under Section 11(c) of the Occupational Safety and Health Act (OSH Act), which prohibits retaliation against employees who engage in protected activities.

In this case, OSHA alleged that the company, Tara Construction Inc., initiated a law enforcement investigation and facilitated an employee’s detainment by U.S. Immigration and Customs Enforcement after the employee reported an injury to the company. The employee sustained a serious injury when he fell from a ladder on March 29, 2017. After he reported his injury to the company, OSHA made an inquiry into the employer and began investigating the employee’s fall. OSHA alleges that the company CEO arranged for the employee to meet him at the company's office and the employee was arrested immediately after leaving the building. OSHA presented text messages and records of approximately 14 telephone calls between the CEO and law enforcement in the days surrounding the arrest.

Section 11(c) of the OSH Act prohibits employers from retaliating against employees for engaging in "protected activities" - exercising a variety of rights guaranteed under the OSH Act, such as filing a safety or health complaint with OSHA, raising a health and safety concern with their employers, participating in an OSHA inspection, or reporting a work-related injury or illness. Employers are prohibited from taking any type of unfavorable employment actions in response to a protected activity. Courts have found that unfavorable employment actions may include: firing or laying off;

blacklisting; demoting; denying overtime or promotion; disciplining; denying benefits; failure to hire or rehire; intimidation; making threats; reassignment affecting prospects for promotion; and reducing pay or hours. If an employee or OSHA can show that any of these unfavorable employment actions were motivated by such protected activity, a court can require relief including reinstatement; payment of back pay with interest; compensation for expenses the employee may have incurred as a result of the retaliation with interest and for emotional distress; punitive damages; and non-monetary relief.

Safety Culture

MSHA Develops Set of Health Hazard Pocket Cards

By Michael Peelish, Esq.

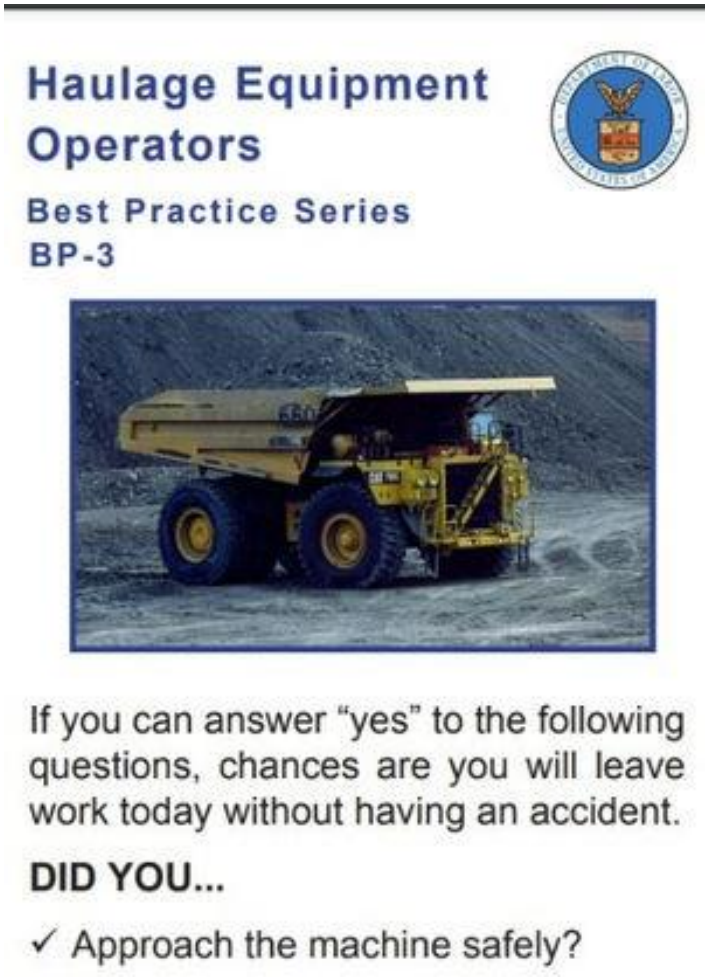
How many times have miners attended a training class and were frankly bored out of their minds or did not want to be there because they know it all or you know the rest of the excuses which gives MSHA training a bad name. Well, what if you reviewed and/or developed useful cards during training to address the different safety and health hazards associated with their jobs? What if you got the miners involved in developing a surface mobile equipment program? What if you provided the work developed during training to the miners in the form of a pocket card to remind them of what they learned or already know. The opportunities to get the most out of training only requires a willingness on the party of management to engage their employees in a different way.

Well, MSHA has developed an extensive set of pocket cards with safety and health in mind to assist operators. Nice job MSHA! These Best Practice cards provide DOs and DON'Ts established to keep miners and their co-workers out of harm's way, and provide important information operators and miners need to know to prevent occupational injuries and illnesses. MSHA has posted several dozens of these cards regarding coal and MNM on its webpage (see https://www.msha.gov/msha-best-practice-and-health-hazard-cards) for operators and miners to use. These cards provide a good starting point for operators to begin the process of customizing their own cards to address safety and health topics just as they address production issues. The best part about these cards is that the miners can have this information at their fingertips inside the cab or attached to a pole in plant or in the maintenance shop or wherever the work is being performed.

The reality is that if miners are involved in creating the work product that drives their daily work activities, they are more likely to remember the DOs and the DON'Ts of performing the work. Try this approach at your next training session. Have the miners pick a safety and health topic that concerns them, or you could suggest developing a surface mobile equipment safety plan, since a final rule will be forthcoming soon. Then facilitate an exercise where the miners develop the content of the program. Use this discussion to finalize a draft program with management and share with miners. The final step is to gather all comments and rollout the new program with the miners. And then watch the enthusiasm, and thus compliance, take over.

Having had oversight for global safety and health operations for over 19 years in both coal and MNM mines, this process was the one way to gain buy in from the folks who are impacted the most by what management does – the miners.

As you may know, our firm has competencies in drafting safety and health programs and in facilitating operators and employers in developing their own safety and health programs.



An excerpt from MSHA's Health Hazard Pocket Cards

U.S. Supreme Court

Impending Supreme Court Decision Will Impact Clean Air Act, Deference to Federal Agencies

By Josh Schultz, Esq.

The U.S. Supreme Court is expected to announce a decision soon in *West Virginia v. Environmental Protection Agency*, a case which has implications far beyond the EPA. In this case, the Attorney General of West Virginia, in conjunction with other states, is challenging the scope of the EPA's authority to regulate greenhouse gas emissions from power plants under Section 111 of the Clean Air Act. The case involves a number of legal issues, but most notably it could impact courts' deference to administrative agencies such as OSHA and MSHA.

The case originates with an Obama administration rule issued in 2014 called the Clean Power Plan ("CPP"), requiring a 32 % reduction in carbon dioxide emissions from electricity generation by 2030. States would have been required to submit implementation plans by 2018 with enforcement to start by 2022. Twenty-eight states and multiple companies immediately challenged the Clean Power Plan in the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"). The rule never took effect, as the Trump administration paused and eventually repealed the rule before D.C. Circuit ruled on the challenge to the CPP.

In repealing the CPP, the Trump administration issued a new rule, the Affordable Clean Energy rule, which targeted a lesser reduction of of carbon dioxide emissions by 2030 (between 0.7% and 1.5%). This rule was challenged by the American Lung Association and the American Public Health Association and over 170 other groups, including twenty three states, in the

D.C. Circuit, which vacated the Trump ACE rule and its repeal of the CPP. West Virginia and 19 other states appealed the D.C. Circuit's ruling to the Supreme Court, who is expected to issue a decision on the case in the coming weeks.

There a number of important legal issues which may determine the outcome of this case, including whether EPA has the statutory authority to regulate greenhouse gasses and whether West Virginia and other states have standing to sue when there is not an active rule in place. But perhaps most pertinent for businesses regulated by multiple federal agencies is whether the Court will overturn or modify "*Chevron* deference", the doctrine of judicial deference given to actions taken by federal agencies. This doctrine was created by a 1984 Supreme Court case, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, in which the Court created a legal test to determine when courts should defer to an agency's interpretation of a statute or rule. This test prescribes that that such deference to an administrative action is appropriate where the agency's answer was not unreasonable, so long as the Congress had not spoken directly to the precise issue at question.

Conservative think tanks have been increasingly vocal about their disapproval of the power of administrative agencies and have particularly targeted *Chevron* deference. An amicus brief filed in support of the West Virginia's challenge urges the court to overturn *Chevron deference*. A brief filed by the Claremont Institute's Center for Constitutional Jurisprudence argues that "deference to an agency's interpretation of a statute has administrative agencies usurping the judicial role of interpreting legal texts and the congressional role of enacting legislation. If the legislation is so vague as to have multiple or no discernable meaning, the agency is effectively exercising Congress' lawmaking power when it 'interprets' the legislation."

Groups in favor upholding *Chevron* deference argue that overturning the doctrine would substitute federal agencies' expertise in the areas where they regulate with the opinions of less-informed judges. Court observers predict a low likelihood of the Court overturning *Chevron*, but it will remain a target with a conservative majority on the bench for years to come.

Employment Law

New DC Law Protects Cannabis-Using Workers

By Adele L. Abrams, Esq., CMSP

In June, the D.C. City Council unanimously passed legislation that would prevent employers from firing employees who fail tests for cannabis. The Cannabis Employment Protections Amendment Act of 2022 would also ban employers from firing or refusing to hire workers because of recreational or medical marijuana use. There would be exceptions where employers must follow federal guidelines, and workers would still be barred from using cannabis at work or while performing work-related activities.

The bill prohibits possession, storage, delivery, transfer, display, transportation, sale, purchase or growing of cannabis at the workplace. The legislation also requires employers to evaluate medical marijuana for treatment of a disability in the same way as it would

treat any legal use of a controlled substance, such as opiates, taken under the supervision of a health care professional. There are also exceptions for safety-sensitive jobs, including police, security guards, construction workers, those operating heavy machinery, health care workers and gas and power industry workers. The bill also excludes federal government employees and those of the DC courts from the protections. Employers have 60 days to notify workers of their new rights, and also to let them know if they fall within the safety-sensitive exemption. The notice must be renewed annually and also provided to new hires.

Cannabis Associated with 50% Pain Reduction

A study by researchers at Hosftra University indicates that chronic pain patients report significant reductions in pain scores, following use of cannabis. The study, published in the Open Journal of Anesthesiology, found that the average pain score dropped from 8.4 prior to use to 4.3 after using cannabis medically. The study authors concluded that patients showed a 50 percent reduction in pain levels, with other benefits including decreased anxiety levels, increased appetite, decreased migraines, reduced swelling, improved mood and increased quality of life. They advocate further studies and improved access to the medication. This study supports the findings of other research which found that cannabis pain patients can reduce or even eliminate their use of opioids.

Employers who violate the law could be fined up to $5,000 and would also have to pay the worker's lost wages and attorney fees if a worker files a complaint with the DC Office of Human Rights. The legislation must still be signed by Mayor Bowser, and would take effect after a 60-day congressional review and publication in the DC Register. Cannabis has been legal recreationally in DC since 2015, but Congress has blocked establishment of retail recreational sales outlets.

Employment Law

National Forklift Safety Day Conference and Webinar

By Sarah Ghiz Korwan, Esq.

On June 14, 2022, National Forklift Safety Day was marked by an in-person conference at the National Press Club in Washington, D.C., which was also available through a live-streamed webinar. The conference was moderated by Chuck Pascarelli, President, Americas, Hyster-Yale Group. The speakers included Doug Parker, Assistant Secretary of Labor for Occupational Safety and Health (OSHA), Jonathan Dawley, President & CEO, KION North America; Lorne Weeter, Vice President of Sales, Mobile Automation, Dematic; and Brian Duffy, Director of Corporate Environmental and Manufacturing Safety, Crown Equipment Corporation.

First on the agenda Doug Parker, Assistant Secretary of Labor for OSHA, started his discussion by noting that the mission of OSHA is not simply advancing worker safety, but to make safety a core value of business and employers. He stressed the need for business and industry to think and operate holistically, an approach which means incorporating worker safety at various levels, such as in design and manufacturing in trucks. To support this holistic approach on another level, OSHA plans to roll out a "Safe and Sound Campaign" later this summer, which provides companies with tools to make incremental steps toward safety. The program sets up simple goals to make it more accessible for small and medium sized employers to improve the health and safety culture of

a business. He noted that this program offers on safety training for trucks and forklifts as well.

Secretary Parker included OSHA's Heat Initiative in his remarks, noting that the dangers of heat exposure may be getting worse due to climate change. He noted that heat stress can be especially bad where industrial powered vehicles are used outdoors, but can also impact jobs indoors where forklifts are in operation. He stated that heat is the leading cause of weather-related deaths. As part of it the Heat Initiative, OSHA is planning on engaging in significant outreach this summer by distributing information and providing education to companies when the temperature is expected to reach eighty degrees and, for the first time in the history of OSHA, they will be doing proactive inspections when national weather service issues heat advisory warnings.

Secretary Parker concluded his remarks by discussing OSHA's work updating regulations related to powered industrial trucks and national consensus standards. OSHA received twenty-three comments during the comment period, which ended in May, and most of which were supportive of OSHA's scope. This particular rulemaking is especially challenging since the current rules are outdated and the original powered industrial truck standard dates to 1969. He hopes that in the future there will be more time and resources to update national consensus standards and outdated rules. There is no projected date for when the new standards will be released.

Jonathan Dawley, President & CEO, KION North America, and this year's chairman of National Forklift Safety Day next presented on why forklift safety makes good business sense. First, Dawley noted that since the pandemic, the labor market is tighter than ever before, with high turnover of employees, a culture of safety is critical for better employee retention. To promote better safety, training must include pedestrian awareness, new worker training as well as equipment operation. Dawley also discussed the importance of communication at all levels, including the most basic facility signage which provides traffic patterns. The next level of communication includes town hall meetings with management.

Next, Dawley discussed automation in vehicles, forklifts, telematics (including wireless and systems which can be deployed to lock/tag out if there's a problem), and technology in forklift safety. He noted that technology is quickly developing to enhance safety, including areas such as collision avoidance technology and operator awareness technology. He also noted that leveraging on technology is not a substitute for a culture of safety, but certainly enhances it. He emphasized that a culture of safety starts at the top, including key performance indicators, safety reviews and engagement of workers at all levels of management stream. He encouraged leadership which encompasses learning, action and accountability with follow up along the management and worker ladder.

Lorne Weeter, Vice President of Sales, Mobile Automation, Dematic discussed the different types of automation and related safety issues related to each. Specifically, the different types of automated equipment include traditional equipment, such as powered industrial trucks, which require manual operation, automated-guided forks (AGF), and automated-guided vehicles (AGV), which only operate on defined path. He further discussed that automated mobile robots (AMR) are also now commonly used in industry, and these operate on real-time path planning. They engage with the use camera systems, analogous to self-driving cars, using Smart manufacturing, cameras and artificial intelligence.

AGFs and AGVs require navigation scanners which look at targets and QR codes on floor. These also require a computerized integration with user interface. They must have emergency stop bottoms accessible on all sides and laser safety scanners. As automation develops, key safety measures must also be considered with automation and robotics. First, there must be site safety assessment, which includes identification of hazards and who is at risk, must be performed. This also includes safety training of people and periodic checks to maintain safety. He also

advises the importance of separating people from automated equipment with physical barriers, signage and training. He stressed that separate areas for robots and workers must be maintained. Finally, he discussed awareness of scanning capability, noting that scanning ranges change, and pick up areas and pinch points create high hazard areas, requiring regular training and testing.

The final speaker was Brian Duffy, Director of Corporate Environmental and Manufacturing Safety, Crown Equipment Corporation. He presented on a highly successfully, detailed safety program developed at Crown. The twenty-week program looks at focused behaviors of material handlers and pedestrians and involves coaches, or peers, who are respected and trained to positively reinforce safe behaviors. The program uses observations, training, and feedback to constructively address behaviors which need to be corrected. Crown also has re-training program if a worker has an accident or other problem. The results have been a dramatic decrease in lift truck accidents and an increase in compliance to 95%.

For assistance with safety training at your operation, call the Law Office at 301-595-3520.

Mine Safety and Health Administration

MSHA Announces Enhanced Enforcement Program for Powered Haulage

By Adele L. Abrams, Esq., CMSP

MSHA has announced its Enhanced Enforcement Program for powered haulage, focusing on mobile equipment safety and inspection, for mine operators and contractors (including customer truck drivers).

MSHA inspectors will focus on the following standards:

- Control of Equipment: 56.9101, 57.9101, 77.1607(a) and (b)
- Use of Seat Belts: 56.14131, 57.14131
- Chocking of Wheels: 56.1402, 57.1402, 77.1607(n)
- Pre-operational Inspection: 56.14100(a), 57.14100(a), 77.1606(a)
- Maintaining Brakes in Functional Condition: 56.14101(a)(3), 57.14101(a)(3), 77.1605(b)

MSHA will also focus on the task training of drivers, and site-specific hazard awareness training. Click here for MSHA's bulletin information. Contact the Law Office for assistance with MSHA compliance or training needs.