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COVID-19 Pandemic

States With COVID-19 Workplace S&H Standards on Rise

By Adele L. Abrams, Esq., CMSP

As federal OSHA has remained without a COVID-19 specific or infectious disease rule to enforce, some state plan OSHA agencies have stepped in to fill the void … as have some state officials in federal OSHA jurisdictions. Even municipalities have gotten into the act. This raises the potential for missteps by employers who operate in multi-state environments. As this is written, there are 14 states that now have some enforceable rules governing COVID-19 and workplace safety and health. This is a fluid situation, and more regulations may come on line so this requires regular monitoring.

A "one-size-fits-all" program may no longer protect employers from civil penalties issued by state agencies, and could even give rise to tort liability exposure in workplace situations where non-employees, such as temporary workers from staffing agencies or subcontractors, are present. For those workers, the host employer may find that worker's compensation does not apply and claims can be brought for personal injury or wrongful death if COVID is acquired while in the premises.

The state and municipal laws set a standard of care for these legal actions. Moreover, plans and programs developed and implemented in states with strict COVID workplace safety and health requirements can be deemed feasible, and be used to issue general duty clause citations to employers in other jurisdictions IF they did not roll out similar protections in those environments.

Moreover, insurance carriers are arguing that COVID-19 losses are not covered under commercial property

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liability policies, as well as under environmental insurance policies (arguing that COVID-19 is not a "pollutant"). This may leave employers in a no-man's-land when it comes to insurance coverage for a variety of COVID-related claims, including third party illness actions.

In related news, however, a federal district court judge in NY rejected Amazon workers' suits over violations of New York State's COVID-19 regulations, arguing that federal OSHA has "primary jurisdiction" over the issue, which raises the issue of how these non-OSHA regulations could be enforced against employers in federal OSHA states going forward. The workers had argued that enforcing the state requirements for more frequent breaks, social distancing and other pandemic protections was not an attempt to enforce federal OSHA law, but rather state policies and state common law.

The US District Court ruling in NY, holding that primary jurisdiction applies to state policies outside of the federal OSH Act, is not binding on other federal courts although it could be viewed as persuasive authority, and it could still be appealed to the US Court of Appeals. The November 2, 2020, decision does, however, provide a context to defenses that can be raised against actions brought under the state laws below, outside of those in "state plan states" (which do have authority to promulgate and enforce more stringent rules than does federal OSHA).

The "Big Four"

In terms of enforceable OSHA-type standards for the protection of employees, the "big four" are those OSHA "state plan states" with newly adopted emergency temporary standards (ETS) that can result in civil penalties of up to $134,937 per affected worker: Virginia, Michigan, Oregon and California.

The Law Office has previously discussed the complex Virginia OSHA ("VOSH") rule in an earlier newsletter, and the state is also considering a permanent standard that would take effect after the ETS expires in February 2021 (unless extended).

The Michigan standard, enforceable by its state plan agency "MIOSH," took effect on October 14, 2020, for a six-month period. This can be extended by the state, and it applies to all businesses. There are specific requirements for certain industries, including: construction, manufacturing, retail, health care, sports, exercise facilities, and restaurants and bars.

Employers in Michigan must establish an exposure determination for employees, evaluating both routine and anticipated tasks to determine potential COVID-19 exposure. As with the earlier VOSH rule, MIOSH also stratifies workplaces into "lower," "medium," "high," and "very high" exposure risk categories, with most workplaces falling in the medium category, except for workers whose work tasks do not require contact with the public or other workers (lower) or those in health care, law enforcement, death care, laboratories, nursing homes, dental, and EMS (high or very high, depending on task).

MIOSH requires creation of a written COVID-19 preparedness and response plan that includes exposure determination and detailed measures the employer will take to reduce worker exposure: engineering controls such as barriers; administrative controls such as staggered work schedules, telework and social distancing; hand hygiene and environmental surface disinfection; personal protective equipment (an N95 respirator is requires for those with frequent or prolonged close contact with known or suspected cases of COVID-19); health surveillance (screening protocols at start of shift, employee reporting of symptoms); and worker training.

California has instituted two new laws impacting how employers respond to COVID-19. SB 1159 created a rebuttable presumption that employees who test positive for COVID-19 contracted the virus at work for workers' compensation purposes. These employees are eligible for "full hospital, surgical, medical treatment, disability indemnity, and death benefits." AB 685 increased reporting obligations for workplaces with COVID-19 exposure. This bill requires employers who have notice of a potential COVID-19 exposure to provide written notice to employees who were at the

worksite at the same time as a potentially infected person. For more on these bills, see our Oct. 28, 2020 blog post.

Oregon OSHA also adopted a temporary rule addressing COVID-19 in all Oregon workplaces. The rule, which took effect November 16, 2020, requires employers to carry out a comprehensive set of risk-reducing measures. The temporary rule's requirements include:

- Employers must ensure six-foot distancing between all people in the workplace through design of work activities and workflow, unless it can be shown it is not feasible for some activities.
- Employers must ensure that all individuals – including employees, part-time workers and customers – at the workplace, or other establishment under the employer's control, wear a mask, face covering, or face shield in line with the Oregon Health Authority's statewide guidance.
- Employers must provide masks, face coverings, or face shields for employees free of cost.
- Employers must maximize the effectiveness of existing ventilation systems, maintain and replace air filters, and clean intake ports providing fresh or outdoor air.
- Employers must conduct a risk assessment – a process that must involve participation and feedback from employees – to gauge potential employee exposure to COVID-19, including addressing specific questions about how to minimize such exposure.
- Employers must develop an infection control plan addressing several elements, including when workers must use personal protective equipment and a description of specific hazard controls.
- Employers must provide information and training to workers about the relevant topics related to COVID-19. They must do so in a manner and language understood by workers.
- Employers must notify affected workers within 24 hours of a work-related COVID-19 infection.

The Oregon rule is expected to remain in effect until May 4, 2021.

Other State Workplace Safety Actions

Pennsylvania: On November 19, 2020, the Secretary of Health issued an updated order requiring individuals to wear a "face covering" – defined as covering of the nose and mouth with material secured to the head with ties, straps or loops over the ears, or wrapped around the lower face. It can be made from various materials or factory-made. While procedural and surgical masks intended for health care providers and first responders, such as N95 respirators, meet the PA state requirements, those specialized masks should be reserved for appropriate occupational and health care settings (including for workers exposed occupationally to respirable crystalline silica, who will not be protected by a basic face covering if they must wear an APF-10 respirator under the OSHA silica rule).

Pennsylvania is under federal OSHA, but the state Order can be enforced by police who can issue individual citations, and the state Health Department can also issue citations to businesses and facilities that do not comply. The order notes that while a face covering must be worn in the workplace, there is an exception if a person works alone and does not expect to be around others. Examples of "working alone" include: being inside an enclosed cab of construction equipment, a worker in an office with four walls and a door, a worker in a cubicle with three walls and a door if walls are high enough to block the breathing zone of all who walk by and no one will enter the worker's space, or agricultural or others who work in open areas with no expected contact with others. When outdoors, one must wear a face covering when with others who are not members of the person's household and if they are unable to maintain sustained physical distance (6 feet or more).

New Jersey: On October 28th, Governor Murphy signed Executive Order No. 192, which adopts a

COVID-19 rule enforceable by the state health department. Public sector employees in NJ are already under a state plan, but the private sector is governed by federal OSHA. Effective November 5, 2020, all businesses including non-profits, schools and other governmental entities, are subject to the state rule, but religious institutions are exempt as are facilities under the US Government's control (e.g., military bases and airports).

The NJ Executive Order requires employers to maintain six-feet of distance, install barriers where possible, ensure all worker wear a mask provided by the employer at the business' expense (with exceptions), and require customers and visitors to wear a mask in accordance with CDC recommendations, deny entry to employees who refuse to wear a mask except where the federal ADA or state anti-discrimination laws apply. Employers must also provide hand sanitizer that is at least 60% alcohol and sanitizing wipes approved by the EPA for virus control. Gloves may also need to be provided to certain workers at employer expense, and all high-touch areas must be routinely cleaned and disinfected in accordance with DOH and CDC guidelines. Employers must also conduct daily health checks of employees (temperature screening, visual symptom checking, self-assessment checklists or health questionnaires) and send home workers with symptoms (as defined by CDC). The New Jersey sick leave and family leave laws also apply and may offer workers greater leave protections than do the federal analogs. There is also a mechanism for the state Department of Labor, in consultation with the Department of Health, to support complaints from workers, investigate and develop a process for having employers address potential deficiencies. Counties and municipalities in NJ are barred from enacting or enforcing any orders or rules that conflict with the state order.

Including the states discussed above, the national Employment Legal Project (www.nelp.org) reports that 14 total states have adopted COVID-19 worker protections, as of November 2020.

The other states with enforceable COVID-19 workplace rules are:

Illinois: Executive Orders pertain generally, with specific requirements for protein processing facilities and health care. The state also requires employees who have had contact with a co-worker or other persons diagnosed with COVID-19 to quarantine and see a test. All other employees should be alert for symptoms such as fever, cough, shortness of breath, and should take their temperatures. Illinois is a federal OSHA state but does enforce OSHA rules in public sector workplaces.

Kentucky: The state has adopted "Kentucky Healthy at Work" policies. Kentucky is a state-plan state but has declined to adopt an ETS.

Massachusetts: The state has issued guidelines for reopening, mandatory standards for workplaces, and protocols for reporting unsafe work conditions that are related to COVID-19.

Minnesota: The state has issued a number of policies, including rules specific to meat-packing operations, and protections for workers on the right to refuse unsafe work. Minnesota is a state-plan state but has not yet adopted a unique ETS.

Nevada: The governor has issued a series of emergency directives impacting the workplace, including reopening protocols. Nevada is a state-plan state but has not adopted a COVID ETS.

New York: The state has issued guidance for agriculture and also for some essential industries. NY is a federal OSHA state but does enforce OSHA rules in public sector workplaces.

Rhode Island: The state has developed a COVID-19 control plan template for employers, which can be filled in on-line, and also has reopening guidance for "vital workplaces."

Washington State: Governor Inslee has adopted protections for farmworkers who may be exposed to COVID-19, as well as emergency rules for worker housing, and guidance for employer reopening

(enforceable through Washington's state OSHA agency, WISHA). WISHA has not adopted an emergency COVID rule at this time.

What About Maryland?

Maryland runs its own state OSHA program but so far has resisted efforts to promulgate an enforceable COVID-19 emergency standard. However, in October 2020, the Maryland Public Justice Center filed a complaint with federal OSHA, alleging that Maryland's

Out of nearly 500 COVID-related complaints received by Maryland OSHA between March and October 2020, MOSH only conducted inspections in 30 of the cases.

"MOSH" agency has not followed its own procedures on when to conduct workplace inspections. The action followed an outbreak at a manufacturing facility where over a dozen workers became ill, and several were hospitalized. The complainants alleged that masks were not provided, adequate sanitation facilities and equipment was not present, and workers were not told about the hazards of the sickness.

"MOSH has watched as a mere spectator as COVID-19 continues to spread through Maryland workplaces due to employer practices that violate CDC guidelines," the complaint letter to OSHA stated. While the federal officials declined to respond, this issue could re-emerge once the Biden administration takes control of federal OSHA. MOSH has conducted relatively few inspectors and tends to forward COVID-related complaints to the local health departments. Out of nearly 500 COVID-related complaints received by Maryland OSHA between March and October 2020, MOSH only conducted inspections in 30 of the cases. Maryland contract tracers report that the "Number 1 high-risk location" noted in 42 percent of responses was a workplace outside the home.

California OSHA

CalOSHA Issues Updated FAQ for COVID-19 Emergency Standard

By Josh Schultz, Esq.

On January 8, CalOSHA issued a list of frequently asked questions clarifying their November 30, 2020 COVID-19 Emergency Temporary Standard ("ETS"). The is the second FAQ issued by the agency as guidance for the FAQ, which all applies to all California employees, except for (1) employees who are already covered under the CalOSHA Aerosol Transmissible Diseases standard, (2) employees who are working from home, and (3) single-employee employers who do not have contact with others.

The recent FAQ attempts to clarify uncertainty left by the original ETS and subsequent FAQ; this FAQ greatly increases the number of questions and answers from CalOSHA. This FAQ constitutes legal policy, thus it cannot enact new law, but it does clarify ambiguity in the original ETS.

The FAQ states that until Feb. 1, CalOSHA will issue citations but not assess monetary penalties for violations of the ETS that would not have been considered a violation of the employer's Injury and Illness Prevention Program, respiratory protection program or other applicable CalOSHA standards. Further, during this timeframe, CalOSHA will not assess monetary penalties for violations of the ETS as long as the employer shows good-faith efforts to comply with the ETS; the employer abates the violation; and the violation does not constitute an imminent hazard.

The updated FAQ also clarifies some of the social distance requirements of the ETS. The FAQ notes that measuring the space between two peoples' bodies or measuring the distance between two peoples' breathing zones (distance between their heads) are

both methods Cal/OSHA would accept when determining whether employees are maintaining 6 feet of physical distancing. Additionally, if physical distancing is not possible at fixed work locations an employer must install cleanable solid partitions that reduce the risk of aerosol transmission (such as Plexiglas barriers). These partitions must be large enough "to reduce the risk of aerosol transmission."

CalOSHA also responded to some feasibility issues regarding compliance with the ETS. The agency noted that some employers have processes that prevent the use of outdoor air for ventilation. The agency notes that they will consider the processes or environments necessary to perform the work when assessing feasibility.

The FAQ also addresses the changing nature of the pandemic due to the availability of vaccines. The agency notes that all prevention measures must continue to be implemented for employees who have been vaccinated, but CalOSHA will likely address the impact of vaccines in a future revision to the ETS.

The FAQ further notes that the ETS does not apply to employees who are working from remote locations other than their home, such as hotels or rental properties.

The full updated FAQ is available at: https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html

Occupational Safety and Health Administration

Court of Appeals Rules on "Repeat" Violations, Scope of PSM

By Gary Visscher, Esq.

Scalia v. Wynnewood Refining, (10th Cir., Oct. 27, 2020) arose from a 2012 boiler explosion at an Oklahoma refinery which killed two workers at the refinery. After the explosion and investigation, OSHA issued the refinery 12 citations for violations of the Process Safety Management (PSM) standard, including 11 citations relating to the boiler itself. OSHA also assessed all 12 citations as "repeat" violations, because of previous PSM violations at the refinery which became final orders in 2008.

The Court's holding and discussion on this issue is important for any employer facing a repeat violation after changes in ownership and/or corporate structure.

Wynnewood appealed the citations to the OSH Review Commission. (See article on the Commission's decision in our June 2019 Newsletter). Wynnewood argued that the boiler was not covered under PSM because it did contain highly hazardous chemicals. The Review Commission upheld the PSM violations, holding that even though the boiler itself did not contain the threshold amount of highly hazardous chemicals, it was a vessel that was "interconnected" with the PSM-covered process and therefore covered by PSM requirements. The Commission also found that the boiler met the "location" test for PSM coverage in that it was located "such that a highly hazardous chemical could be involved in a potential release."

The Commission also held, however, that the PSM violations could not be upheld as "repeat" violations

because the refinery, under new ownership after 2008, had hired several new managers, including persons responsible for safety and health.

Both Wynnewood Refining and OSHA appealed the Review Commission decision to the Court of Appeals.

The Court of Appeals affirmed the Commission decision on both issues. Regarding whether the boiler was covered by PSM, the Court said that the text of the PSM regulation was clear, and "supports the Commission finding that the Wickes boiler is part of a process covered by the regulation because it is interconnected with the FCCU and the alkylation unit." Because the Court found that the boiler met the "interconnected-ness" test, the Court did not reach the question of whether the boiler was covered under the "location" test.

The Court also upheld the Commission's conclusion that the citations were not "repeat" violations. The issue of whether the citations could be cited as "repeat" violations arose because the predecessor citations, in 2008, were issued when the refinery was owned by Gary-Williams Energy Corporation and operated as Wynnewood Refining Company. The stock of the parent company was subsequently purchased by CVR Energy, and the new owners registered Wynnewood as an LLC.

The Court of Appeals agreed that the Commission had traditionally applied the "substantial continuity" test to such questions, and that was the applicable test here. The "substantial continuity" test analyzes three factors: (1) the nature of the business and the continuity of products/services and customers, (2) the similarity and continuity of jobs and working conditions, and (3) the continuity of personnel, particularly the personnel who control decisions related to health and safety.

The Court majority (2-1) found that the Commission properly applied the "substantial continuity" test. Although the first two factors weighed in favor of "substantial continuity," the Court said that the Commission could, in considering the totality of the circumstances, find that the third factor, changes in management personnel, defeated a repeat violation. The Court's holding and discussion on this issue is important for any employer facing a repeat violation after changes in ownership and/or corporate structure.

The Court of Appeals decision includes a discussion of the role of "preamble" in the interpretation of an OSHA standard. The "preamble" to an OSHA standard is the lengthy material printed with the standard in the Federal Register, and includes background, economic analysis, response to comments on a proposed rule, and explanation of the standard's provisions. The preamble is generally hundreds of pages long, and OSHA (and other agencies) sometimes use the preamble to "create" obligations beyond those in the standard itself. Here the reverse was the case. In Wynnewood, the company cited language in the preamble which limited PSM coverage to interconnected vessels which contained highly hazardous chemicals. However, the language in the preamble was not in the text of the regulation itself, and the Court of Appeals declined to consider the language in the preamble. The Court said that the text of the regulation itself was not ambiguous, and only if the text of the regulation is ambiguous, after "giving each word its ordinary and customary meaning," should other sources outside the regulation, including the preamble, be considered.

Mine Safety and Health Administration

Inspector General - MSHA Falling Short on Protecting Miners from Silica Exposure

By Michael Peelish, Esq.

According to a new report issued on November 12, 2020 from the Department of Labor's Office of the Inspector General, as the saying goes, MSHA is two

decades late and without teeth to issue fines when companies violate air quality standards such as silica dust in the coal industry. Essentially, the report points out that coal mine operators do not continuously sample for silica dust and thus there could be significant periods of time that miners could be overexposed to silica dust. Whether it has been NPR reporting on the increase of silicosis in the coal industry or Congress holding oversight hearings or other health and labor organizations raising alarm about this horrible disease, the presence of silicosis in miners and its cause has been the worst kept secret ever. However, to the benefit of MSHA, the coal dust standard was reduced in 2014 which considers the presence of silica and which lowered the incidences of silica overexposure. With OSHA having issued its respirable crystalline silica standard in 2016, MSHA is clearly on the spot to do something. MSHA has been promising a new silica standard for some time now (at least 2014), but it has never made it to the proposed rule stage.

What happens now is that all members of the mining industry will be impacted through regulatory actions because the data from the IG report highlights an issue that affects coal and metal/nonmetal mine/plant operations. In the various meetings with industry stakeholders, MSHA has given indication on key items of any rule such as (i) a lower limit will be proposed in all mining sectors, (ii) the monitoring frequency will increase, (iii) the use of the proven process of applying engineering controls and administrative controls to control exposure, and (iv) the use of respiratory protection for compliance purposes. Although, MSHA's response to the IG report did not commit to specific language that might be included in any proposed silica dust rule, MSHA has given indications of its thinking which industry should hope is memorialized in a proposed rule soon. While administrative maneuverings can derail an agency action, it is important to have on the record what appears to be a reasonable and proven approach to controlling silica dust exposure and thus eradicating silicosis from miners.

This IG report is a stark reminder of what the mining industry must do to protect its most precious resource – the miner. We must never forget what that means.

Occupational Safety and Health Administration

OSHA Issues Guidance on COVID-Related Citations

By Adele L. Abrams, Esq., CMSP

In November 2020, federal OSHA issued new guidance to provide insight into which standards are most-frequently cited during COVID-19-related inspections. These are inspection that are normally initiated via referrals, complaints, fatality investigations, and for the purposes of this enforcement data, the inspections occurred primarily at health care and protein processing facilities.

Notably, OSHA's data did not include any General Duty Clause citations (under Section 5(a)(1) of the OSH Act), and the published list only involved three standards: respiratory protection (29 CFR 1910.134), personal protective equipment (PPE) hazard assessment (29 CFR 1910.132) and injury/illness recordkeeping (29 CFR Part 1904).

OSHA reports that the most frequently-cited alleged violations during COVID-related inspections were for:

- Not performing appropriate fit testing of respirators
- Failure to keep required records of work-related injury/illness and fatality cases
- Improper storage of respirators and other PPE
- Not conducting hazard assessment for COVID-19 to determine need for respirator or PPE
- Insufficient training on safe use of respirators and/or other PPE in the workplace

- Failure to establish/implement written respiratory protection program with site-specific procedures
- Not providing medical evaluation before workers are fit-tested or use a respirator

It is important to note that while OSHA has temporarily exercised some enforcement discretion on respirators, employers must demonstrate and document "good faith" efforts to comply with standards! There are also 14 states that now have specific COVID-19 workplace safety and health requirements, some enforceable through state plan OSHA agencies, and some through state health departments. Multi-state employers must be careful not to provide disparate protections for workers and third parties, such as temporary staffers, based on where the worksite is located. Best practices call for adopting programs that are geared toward the most protective standards in force at any company location.

Occupational Safety and Health Administration

OSHA Issues Guidance on COVID-19 & Workplace Ventilation

By Adele L. Abrams, Esq., CMSP

On November 5, 2020, the federal Occupational Safety & Health Administration (OSHA) released new guidance to assist employers in ensuring "adequate ventilation throughout the work environment" in order to prevent the spread of occupational COVID-19. While this policy is not enforceable per se by federal OSHA, knowledge of the recommended "best practice" to reduce the recognized hazard of COVID-19 could be imputed to the employer if embedded in its own policies at certain locations (employer recognition), or if recommended by a trade association or other organization to which the employer belongs (industry recognition). This can result in citations of up to $134,937 per affected worker under OSHA's General Duty Clause, even in the absence of an enforceable COVID-19 rule.

To date, federal OSHA has rejected calls by unions and congressional members to adopt an emergency temporary standard to address COVID-19. The US Court of Appeals similarly rejected a Petition for an emergency rule. It is expected that in the next administration, a COVID-specific rule could be enacted by OSHA, or the ongoing "infectious disease" rulemaking could come off the side-burner and be placed on a fast-track for adoption.

In addition to serving as guidance for employers in federal OSHA jurisdictions (or those in MSHA-regulated worksites), the new policy also adds specificity to the much vaguer ventilation provisions in some of the newly adopted or pending state OSHA ETS for COVID-19: Virginia, Michigan, and Oregon have enacted ETS; CalOSHA has an aerosol transmissible disease rule applicable to high risk medical and related employers, as well as a pending ETS that is COVID-specific.

Federal OSHA's ventilation policy is not mandatory, but with the pending Administration changes, it could easily be incorporated into a future OSHA COVID ETS or a permanent infectious disease rule, such as the one that was close to completion at the end of the Obama administration. The guidance encourages employers are directed to work with HVAC professionals to consider steps to optimize building ventilation, regardless of business sector. The key steps recommended are:

- Ensure HVAC systems are fully functional, especially those shut down or operating at reduced capacity during pandemic
- Remove/redirect personal fans to prevent blowing air from one worker to others
- Use HVAC system filters with a MERV rating of 13 or higher (where feasible)

- Increase the HVAC system's outdoor air intake, and open windows and fresh air sources where possible
- Use portable high-efficiency HEPA fan/filtration systems to increase clean air
- When changing filters, wear appropriate PPE (N95 respirator, eye protection, disposable gloves), and
- Make sure exhaust fans in restrooms are fully functional, operating at max capacity, and set to remain on.

Employment Law

Voters Pass Recreational and Medical Marijuana Law in 5 States, Psychedelic Mushrooms in Oregon, DC

By Sarah Ghiz Korwan, Esq.

On Election Day, voters in Arizona, Montana, New Jersey, and South Dakota legalized recreational use of marijuana. South Dakota, along with Mississippi, also approved medical marijuana. In Oregon, voters decriminalized — but not legalized — all drugs, including cocaine and heroin. While not legalized federally, 35 states have now legalized marijuana for medical use and 15 states have legalized recreational use.

Also, in Oregon, voters legalized the use of psilocybin, a psychedelic drug found in magic mushrooms, for supervised therapeutic uses. In Washington, DC, voters in effect decriminalized psychedelic plants. Oregon also passed a measure that decriminalizes 110 hard drugs, including heroin, cocaine. Proponents say that decriminalization supports rehabilitation.

Notably, in every state where marijuana legalization was on the ballot, it passed. However, in a reversal of fortune for legalized marijuana the Nebraska Supreme Court ruled that the medical marijuana ballot initiative was unconstitutional and the ballot was pulled from the 2020 November election. The decision came in response to a lawsuit filed by opponents arguing that the measure violated the state's single-subject rules.

Where cannabis is permitted, laws vary from state to state, so employers should review their policies and practices to ensure compliance with the new state laws. One certainty for employers is that no state requires employers to accommodate on-the-job marijuana use. States that have already legalized medical marijuana, but have now allowed recreational use of marijuana have some of employment regulations in place. For those states which just passed marijuana legislation, below is a summary of their related employment laws:

Arizona

· Does not restrict the rights of employers to maintain a drug-and-alcohol free workplace or affect the ability of employers to have workplace policies restricting the use of marijuana by employees or prospective employees." Section 36-2851(1).

· Does not require an employer to allow or accommodate the use, consumption, possession, transfer, display, transportation, sale or cultivation of marijuana in a place of employment." Section 36-2851(2).

· Does not restrict the rights of employers … to prohibit or regulate conduct otherwise allowed by this chapter when such conduct occurs on or in their properties." Section 36-2851(6).

Mississippi

· It is yet to be determined how Mississippi's medical marijuana laws will impact employers and employees. Undoubtedly, employers will not be required to

accommodate use in the workplace. This is an emerging area.

Montana

· Employers may prohibit use of marijuana in the workplace.

· An employer is not required to accommodate use of marijuana by a registered cardholder in the workplace.

· Although employers are not specifically mentioned, the law addresses licensing boards and the Montana Department of Labor and Industry stating that a legal medical marijuana patient cannot be penalized, denied any right or privilege for their status as a cardholder, use, or possession unless their use hinders their job-related performance and then he or she may receive penalties or discipline.

· Montana has a drug testing law with detailed restrictions with which an employer needs to comply if they are going to do drug testing, including definitions around subjected employees, policy, notice and testing requirements, training and education requirements, and more.

New Jersey

· Employers are prohibited from taking adverse employment action against an employee or applicant "based solely on the employee's status" as a registered medical marijuana patient. The new law defines "adverse employment action" as "refusing to hire or employ an individual, barring or discharging an individual from employment, requiring an individual to retire from employment, or discriminating against an individual in compensation or in any terms, conditions, or privileges of employment."

· Employees and job applicants who use lawful medical marijuana off premises and during non-working hours are now expressly protected from discrimination.

· The employer must provide the employee or applicant with written notice of a positive test result and notify him or her of his or her right to explain the positive drug test result by presenting a "legitimate medical explanation" within three workdays.

· Employers are not required to accommodate use of medical marijuana in the workplace.

South Dakota

As with Mississippi, this is the first time South Dakota has legalized any form of marijuana so there is no guidance on how it will impact employers or employees.

Oregon

· Employers are not required to accommodate the use of medical marijuana in the workplace.

· Employers may fire or discipline employees for testing positive for marijuana, even if the use was off duty and with a valid medical marijuana card.

· Applicant testing permitted if there is reasonable suspicion applicant is under the influence of alcohol or controlled substance.

In states in which medical marijuana has been legalized, employers should be aware that there may be a potential duty to accommodate. In addition, it appears that in states where the use of recreational marijuana is legal, the trend has been to move away from pre-employment testing for marijuana, especially by employers that are not governed by federal regulations (e.g., the U.S. Department of Transportation's regulations) or that do not have large populations of safety-sensitive employees. While pre-employment testing for marijuana is largely a business decision for organizations, employers may want to continue to maintain post-employment testing for marijuana, such as for reasonable suspicion, even if marijuana is legalized for recreational use. When effective marijuana impairment tests are available (several companies have marijuana impairment tests in development), employers will have more options for addressing employees' marijuana use and determining whether an employee is "fit for duty."

The sands of marijuana legalization are ever shifting. Employers should monitor these developments with an expectation that legalization efforts will continue in the years to come. If you need help navigating this area, we specialize employment, health and safety law and compliance assistance. We can assist in updating your substance abuse prevention programs to reflect the recent changes to the law in the cannabis area.

Mine Safety and Health Administration

MSHA Stakeholder Meeting – "Thanks for a Job Well Done"

By Michael Peelish, Esq.

MSHA held its quarterly Stakeholder Meeting on December 17, 2020 and went through the familiar agenda.

Notable achievements in 2020 include the reduction of fatal injuries charged to contractors and the improvement in surface haulage accidents with no fatal accidents attributable to not wearing a seatbelt. Areas of concern were noted in that most of the accidents occurred at mines with less than 20 employees, to miners with less than 2 years of experience, and to miners with less than 2 years of experience at the mine where they worked.

MSHA listed its assessment of the top root causes categories of fatal injuries:

1. Training
2. Workplace Exams and Corrective Actions
3. Safe Access & Working Conditions
4. Visibility and Communication
5. Blocking against motion
6. Lock Out Tag Out energy sources
7. Fall Protection

This data is instructive to operators and makes for good topics to share with miners during safety meetings.

MSHA also weaved in a discussion about Safety Culture and Education and used a triangle involving miner competency, environment, and behavior to describe how it all works together. They discussed how all three legs must be strong for sustainable safety improvement.

The health and enforcement discussion provided the same type of data regarding quartz exposure monitoring results as it has in the past and nothing is really changing or giving us greater insight into what we already know.

So, the discussion turns to enforcement. In metal/nonmetal, since 2016 MSHA has issued 926 citations and 28 section 104(b) order for failure to timely abate. MSHA is quick to point out that if quartz samples continue to exceed the PEL, then something is not working and that is a serious issue. MSHA is also rightfully concerned about increase in injuries to supervisors who should be setting the right example. When MSHA discusses a company's safety culture, the supervisor is the person who implements that culture so company's need to reassess supervisor training and commitment to safety.

MSHA did not set out any 2021 initiatives during the call but stated it would be based on its analysis. They did mention that the surface haulage rule and the respirable quartz proposed rules were going through review but did not make any commitments as to when that would be completed.

One last note. I would like to thank Assistant Secretary Zatezalo for his leadership over the last several years and the way he has led MSHA to address the serious issues facing the mining industry. He would be the first to admit he left some work undone, however, it was not for a lack of trying. Mr. Assistant Secretary, job well done!

Occupational Safety and Health Administration

Federal OSHA Inspectors Increase in FY 2020

By Adele L. Abrams, Esq., CMSP

After hitting record low numbers of federal OSHA inspectors during 2019 - at 752, the agency had reached the lowest in the agency's 50 year history -- 2020 marked a rebound, with 790 compliance safety and health officers now on duty. The data came in response to a FOIA request by Bloomberg Law. By comparison, the agency's inspectorate reached 860 in FY 2014, following which OSHA was subject to a series of budget cutbacks. The peak number of inspectors was in 1980, a decade after the agency was created, when OSHA had 1,469 inspectors. About a third of OSHA's inspectors are industrial hygienists, who address such issues as silica, ergonomics, noise, and heat stress, while the remainder are safety officers and engineers.

Despite the inspector hiring spike for 2020, overall the agency conducted 35 percent fewer inspections than it did in 2019. COVID-19 impacted inspections by drawing resources to health care facilities and investigation of worker hazard and retaliation complaints. The data cover the period of October 1, 2019 through September 30, 2020.

In 2019, the US House of Representatives noted in its FY 2020 Appropriations report for the Labor Department that, with current inspectors, OSHA could visit each workplace under its jurisdiction once every 165 years. In addition to federal OSHA enforcement resources, there are 22 states and several territories that administer their own OSHA enforcement agencies. Those state-plan states inspectors are not included in the Bloomberg data.

During his tenure, President Trump has repeatedly called for significant cutbacks in OSHA funding, although this did not occur due to passage of continuing resolutions in lieu of individual appropriations measures in recent years. It is expected that OSHA funding will increase under President-elect Biden, and President Obama's OSHA chief, Dr. David Michaels, was recently appointed to the Biden transition team to address workplace safety issues.

U.S. Department of Labor

Fall 2020 Regulatory Agenda: OSHA and MSHA

By Gary Visscher, Esq.

The Fall 2020 Regulatory Agenda, released on December 10, is a government-wide listing of regulations which each agency expects to take some type of action or review on over the coming twelve months. (The complete agenda, which can be searched by department, is at https://www.reginfo.gov/public/do/eAgendaMain)

The twice-yearly (spring and fall) Regulatory Agenda includes anticipated dates for each listed action, though the listed dates are seldom met (as is obvious in the newest Agenda, which in many cases lists dates for actions that have already been missed). Still, the Regulatory Agenda provides a list of priorities and a convenient summary of the status of regulations on which each agency is working.

The priorities will likely change as of January. It is common for a new administration, of either party, to initially put a 60 or 90 day “pause” on regulatory activities while it reviews the items being worked on and establishes its own priorities. In addition, we can anticipate that executive orders put in place by the Trump Administration which affect regulatory actions across the federal government will be rescinded.

The latest listings for OSHA and MSHA reflect little change from the previous agenda, which was released in June. It should also be noted that neither OSHA nor MSHA includes any mention of the "elephant in the room" -- an Emergency Temporary Standard regarding COVID-19, which is likely to be the first major regulatory issue for both agencies under the new administration.

OSHA

OSHA lists three rules in "final rule" stage, and all three address procedural issues for OSHA's responsibilities in administering federal whistleblower statutes.

A much longer list – 14 items – is listed as in the "proposed rule" stage, indicating that a Notice of Proposed Rulemaking may be issued in the next year. They include:

1. A long-awaited update of the Lock-Out/Tag-Out standard.
2. Updates and revisions to the Powered Industrial Truck standard (and a separate rulemaking on Powered Industrial Truck design standard)
3. Revisions to Table 1 in the Construction Crystalline Silica standard
4. Revisions to the medical surveillance/medical removal provisions in the crystalline silica standard (response to court order in the case challenging OSHA's standard)
5. "Technical" changes to the Walking Working Surfaces standard
6. A new "tree care" standard
7. A new standard on communication tower safety
8. Codification of provisions on drug testing and safety incentives (from injury and illness reporting rule)

OSHA also lists 4 rules at the "prerule" stage, indicating a proposed rule is at least a year off. The four rules listed are:

1. A comprehensive standard on Emergency response
2. Removing provisions outdated provisions in the mechanical power presses rule
3. A new standard on Prevention of workplace violence in health care and social assistance
4. Revising (by reducing the blood lead levels for Medical Removal) the general industry and construction lead standards.

Several of OSHA's most significant regulatory initiatives remain listed as "long-term actions" with no specific action scheduled. Some of these may become priorities, however, under a new administration. They include:

1. New standard on infectious disease
2. Amendments and additions to the Process Safety Management standard on prevention of chemical accidents
3. Requiring a separate column on the injury and illness reporting forms for musculoskeletal disorders (MSDs)
4. Revisions to Medical Surveillance and Medical Removal provisions in substance-specific health standards to achieve greater consistency and uniformity.

MSHA

MSHA does not list any rules in the "final rule" stage for the next 12 months. At the proposed rule stage, MSHA lists 4 rules:

1. Respirable Crystalline Silica standard
2. Alternatives to Petitions for Modification for certain surveying equipment
3. Requiring safety programs for surface mobile equipment
4. Rule on testing and approval of certain electric motor driven mine equipment

MSHA lists one action at the "prerule" stage: Exposure of Underground miners to diesel exhaust.

In addition, MSHA's "Retrospective Study of Respirable Coal Mine Dust Rule," which generated considerable controversy when it was initiated several

years ago, remains listed under the agency's "long-term actions."

Occupational Safety and Health Administration

OSHA Inspector Extortion Alert!

By Adele L. Abrams, Esq., CMSP

Two New Jersey men – a federal OSHA inspector and his brother – have been charged with extortion and conspiracy, after seeking money from a construction employer in exchange for relief in enforcement. The OSHA Inspector – Alvarado Idrovo – was assigned to the Parsippany, NJ, office and was charged in federal court.

The US Department of Justice issued a press release on the indictment, which notes that the inspector offered to sell one contractor training certificates for $6,000 in cash (paid to the inspector's brother, posing as a vendor, and negotiated down from an original $13,000 demand) to avoid "big fines and possible jail" which he told the employer could result from his alleged violations. That contractor notified officials, and participated in recording further extortion discussions, with permission of law enforcement. The defendants face up to five years in prison and $250,000 in fines.

Federal authorities charged both men with "knowingly and intentionally conspiring to commit an offense against the United States, specifically to commit an act of extortion under color of Alvaro Idrovo's office or employment with OSHA."

Companies cited by Inspector Idrovo in NJ during the period at issue (Spring 2020) should notify authorities if they were subject to similar extortion efforts. The indictment will also no doubt impact the credibility of the inspector should any of the cases in which he is involved proceed to a hearing. For more information, contact Adele Abrams at safetylawyer@gmail.com.