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Mine Safety and Health Administration

MSHA's New Powered Haulage Standard – Step Carefully Through the "Mine Field"

By Michael Peelish, Esq.

On September 9, 2021, MSHA issued its proposed Powered Haulage Rule which will require mine operators with six or more miners to develop a written safety program for mobile equipment and powered haulage equipment used at surface mines and surface areas of underground mines. The following are highlights of the proposed rule, what to watch out for, and concerns on how MSHA will enforce any final rule.

The proposed rule:

- Does not impose universal mandates, but rather uses a flexible approach which is important for small operators.
- Requires mine operators employing six or more miners to create and implement a powered haulage safety program addressing mobile equipment (but not conveyors) at surface mines and the surface areas of underground mines. No initial plan approval process is required.
- Requires a responsible person evaluate and update the written safety program at least annually or as mining conditions (such as seasonal weather changes) or practices change, accidents or injuries occur, or as surface mobile equipment changes, or modifications are made.
- Require operators to train miners and other persons at the mine necessary to perform work (e.g., office workers) to identify and address or

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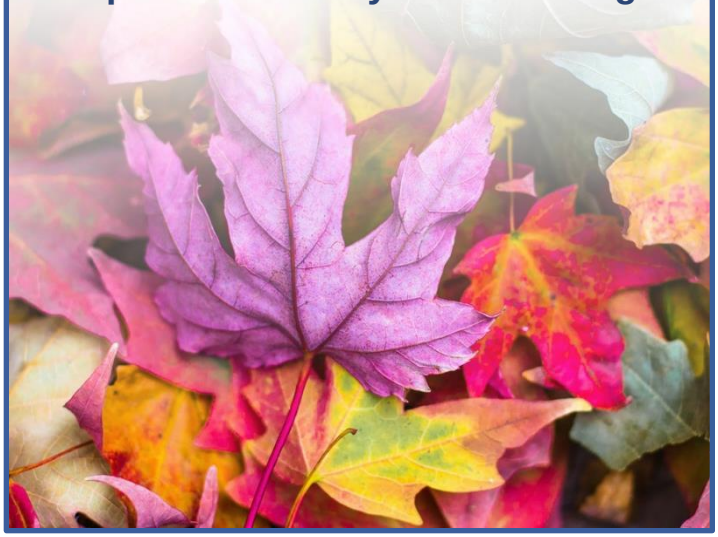


avoid hazards related to surface mobile equipment. This training would be met through existing training requirements.

What to watch out for:

- Requirement that the program include actions the mine operator would take to evaluate currently available and newly emerging feasible technologies that can enhance safety and evaluate whether to adopt them. The safety program would include a process by which operators would periodically evaluate new and existing technologies that could enhance safety. MSHA assumed in the proposed rule that mine operators will spend 60 hours each year evaluating technologies that enhance safety while only requiring 15 hours annually for hazard identification. That stark difference in approach indicates that MSHA is pushing mine operators towards engineering controls.
- Requirements that operators develop and maintain procedures and schedules for routine maintenance and non-routine repairs for surface mobile equipment integrating manufacturer's recommendations into the safety program. This is how MSHA will require a safe operating and maintenance program which it has always wanted but not able to require across the board. Now MSHA has its enforcement teeth in the mine operator.
- It appears MSHA will require mine operators to incorporate operating and maintenance manuals and consensus standards (e.g., SAE) in its programs. Does all your different equipment have a readable manual? Do you follow all recommendations?
- What if your maintenance is contracted out? What role does the contractor play in this program?

Concerns regarding MSHA enforcement include:

- While the program does not have to be "approved" by MSHA, the first citation issued to a miner operator for an inadequate program will place the program in an "approval" mode. It will no longer be the mine operator's program but will become MSHA's program by way of citation abatement. Once this happens, the mine operator will have forever lost control. This is the part of the regulation that concerns me. Yes, we like the program approach and the flexibility, but all that ends when MSHA requires conditions in the abatement of a citation.
- To avoid the inevitable abuses of MSHA's discretion, the mine operators should be given a hearing on the conditions required for abatement under a program, like OSHA when challenging a citation delays abatement. This is the only way to push back on MSHA wanting more and more and more. At first blush, MSHA's approach is a good approach until the Agency decides to push its weight around on what it wants in a program versus what the mine operator wants. Trust me, this will happen, and the mine operators will be left to endure the abuses of MSHA's discretion.

Since the mid-1990's MSHA has talked about powered haulage accidents and how to prevent them and for good reason. Organizations including NIOSH, mine operators, equipment manufacturers, and safety alliances have engaged in endless meetings, research, debates, discussions, and presentations searching for new ways to address these type accidents. Much has been accomplished over the years including development of best practices and emerging technologies. With this proposed rule, MSHA is using the program approach to require mine operators to put in writing safe operating and maintenance procedures and to require mine operators "evaluate" technology annually. However, the fear of big and small operators is how MSHA

manages the enforcement of any rule because of the financial impact and implementation nightmares for mine operators, and MSHA's proclivity to get what they want in programs and plans.

The industry has a chance to comment on this proposed rule which are due by midnight November 8, 2021. Our firm has expertise that can assist mine operators in developing surface haulage programs to meet what MSHA will ultimately finalize in a rule.

Link to proposed rule:

https://www.regulations.gov/document/MSHA-2018-0016-0111

Occupational Safety and Health Administration

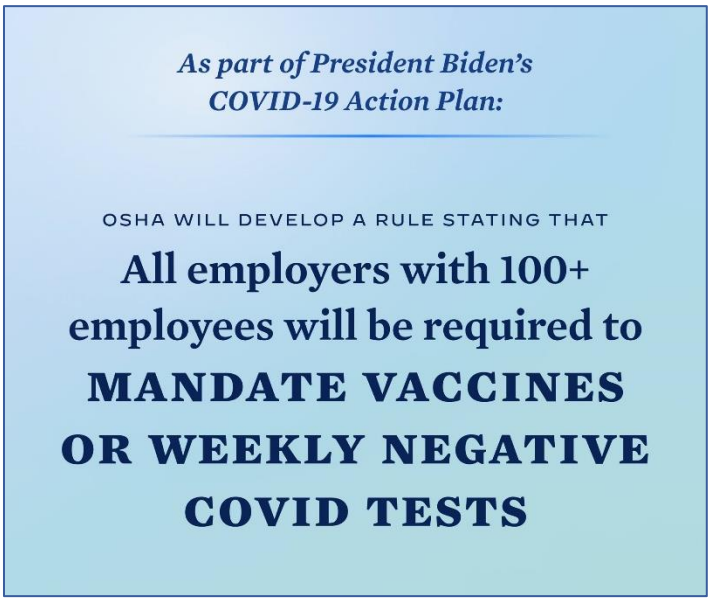
President Biden Announces COVID-19 Action Plan, Including Vaccine Mandates

By Josh Schultz, Esq.

On Thursday, September 9th, President Biden released a COVID-19 Action Plan, which includes a requirement that companies with 100 or more employees ensure their employees are vaccinated against COVID-19 or test negative for COVID-19 at least once a week. Additionally, President Biden signed Executive Orders requiring federal employees and most federal contractors to be vaccinated.

OSHA will release a Emergency Temporary Standard ("ETS") which will impact over 80 million workers in private sector businesses with 100+ employees. The Agency is authorized to issue an ETS if it can show that workers are exposed to a grave danger and that the rule is necessary to address that danger. This rule will apply to all states under the jurisdiction of Federal OSHA; states with state-run plans will have 30 days to adopt a standard that is at least as effective.

Further, the President's Action Plan will require COVID-19 vaccinations for workers in most health care settings that receive Medicare or Medicaid reimbursement, including hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies. The administration previously applied these vaccine requirements to nursing home staff as well as staff in hospitals, including clinical staff, individuals providing services under arrangements, volunteers, and staff who are not involved in direct patient, resident, or client care. These requirements will apply to approximately 50,000 providers and cover a majority of health care workers across the country, according to a press release from the White House.



Continue to follow our blog or contact for the Law Office for more information; we will provide additional detail on the OSHA ETS as it becomes available.

Employment Law

Cannabis Legislation Advances in Congress

By Adele L. Abrams, Esq., CMSP

On September 30, 2021, federal cannabis legalization took a giant step forward when the U.S. House Judiciary Committee advanced a bipartisan measure, HR 3617, the Marijuana, Opportunity, Reinvestment, and Expungement (MORE) Act of 2021. In the Senate, Majority Leader Chuck Schumer has also designated cannabis legalization as a legislative priority.

The bill was approved in Committee by a vote of 26-15, with 24 Democrats joined by two Republicans voting yes and 15 Republicans voting no.

A 2021 Quinnipiac poll posed the question: "Do you think that the use of marijuana should be made legal in the United States, or not?" The responses showed broad support across all party lines.

- Overall: 69% Yes – 25% No
- Democrat: 78% Yes – 17% No
- Republicans: 62% Yes – 32% No
- Independents: 67% Yes – 28% No

The MORE Act removes marijuana from the Controlled Substances Act — thereby ending the existing state/federal conflict in cannabis policies and providing state governments with greater authority to regulate marijuana-related activities, including retail sales. If enacted by Congress, medical cannabis users would be eligible for the same "reasonable accommodations" under the federal Americans with Disabilities Act (ADA) as workers using prescription drugs. Currently, the ADA does not protect "illegal drug" users although some state versions of the ADA have been applied in tandem with cannabis laws in order to protect workers at the state level.

The MORE Act also changes federal marijuana policy in other ways, including:

- Facilitating the expungement of low-level federal marijuana convictions, and incentivizing state and local governments to take similar actions;
- Allowing veterans, for the first time, to obtain medical cannabis recommendations from their VA doctors;
- Removing the threat of deportation for immigrants accused of minor marijuana infractions or who are gainfully employed in the state-legal cannabis industry; and,
- Providing critical reinvestment grant opportunities for communities that have suffered disproportionate rates of marijuana-related enforcement actions.

According to the FBI, over 545,000 Americans were arrested for marijuana-related crimes in 2019, with 90% of those arrested charged with mere possession. The ACLU reports that Black Americans are 3.6 times more likely to be arrested for cannabis-related crimes than white Americans.

California OSHA

California Enacts New Law Increasing CalOSHA Enforcement Authority

By Josh Schultz, Esq.

On September 27, 2021, California Governor Gavin Newsom signed Senate Bill 606 ("SB 606") into law, granting CalOSHA new tools to enforce their regulations. Most notably, the law creates a rebuttable presumption that certain violations committed by an employer that has multiple worksites are enterprise-wide and creates an "egregious" violation category, with potential for huge fines.

SB 606, which will go into effect on January 1, 2022, will have a great impact on employers with multiple worksites, as the agency will be authorized to use evidence from one worksite to establish a company-wide violation.

The bill creates a rebuttable presumption that a violation committed by an employer that has multiple worksites is enterprise-wide if CalOSHA can establish one of two elements:

- That the employer has a written policy or procedure that violates CalOSHA regulations, or
- The agency can show evidence of a pattern or practice of the same violation committed by that employer involving more than one of the employer's worksites.

Additionally, the bill authorizes the agency to issue an enterprise-wide citation requiring enterprise-wide abatement if the employer fails to rebut the presumption of a violation. Thus, for establishing a company-wide violation and requiring abatement, this law will shift the burden of evidence to the employer.

The bill further creates an "egregious violation," which subjects employers to elevated penalties because each employee exposed to an egregious violation will be considered a separate violation. CalOSHA needs to establish just one of the following seven criteria to issue an egregious violation:

- The employer, intentionally, through conscious, voluntary action or inaction, made no reasonable effort to eliminate the known violation.
- The violations resulted in worker fatalities, a worksite catastrophe, or a large number of injuries or illnesses. For purposes of this paragraph, "catastrophe" means the inpatient hospitalization, regardless of duration, of three or more employees resulting from an injury, illness, or exposure caused by a workplace hazard or condition.
- The violations resulted in persistently high rates of worker injuries or illnesses.
- The employer has an extensive history of prior violations of this part.
- The employer has intentionally disregarded their health and safety responsibilities.
- The employer's conduct, taken as a whole, amounts to clear bad faith in the performance of their duties under this part.
- The employer has committed a large number of violations so as to undermine significantly the effectiveness of any safety and health program that may be in place.

The Senators who authored the law utilized the COVID-19 pandemic to increase support for the bill, with Senator Lena A. Gonzalez (D- Long Beach) stating that the legislation will "address the need for stronger enforcement measures to keep workers safe as the COVID-19 pandemic continues." Senator

Gonzalez further said that "We cannot allow large corporations to shrug aside their responsibilities. Paying fines that amount to no more than a tiny fraction of their profits and refusing to provide workers safe working conditions is irresponsible and unconscionable."

Occupational Safety and Health Administration

OIG Makes Harsh Findings on OSHA's Protection of Workers from Exposure to Silica

By Adele L. Abrams, Esq., CMSP

The Office of Inspector General (OIG) issued its findings on September 29, 2021 to the simple question: To what extent has OSHA protected workers from exposure to respirable crystalline silica?

The simple answer is not so good since the new silica standard became enforceable on September 23, 2017 for construction and June 23, 2018 for general industry and maritime. What the OIG found is that silica inspections went from 2,108 in 2016 and 2017 to 880 in 2018 and 2019, a more than 50% reduction. The OIG attributes this reduction to the cancellation of the National Emphasis Program that had been in effect since January 2008 and a Special Emphasis Program that became effective May 1996 which required 2% of all inspections be silica-related inspections. The OIG found that notwithstanding the new standard and the purported OSHA outreach, with the enforcement obligation evaporating, OSHA "did not effectively mitigate risks to works exposed to silica." The recommendation for OSHA is to issue an agency policy that requires implementation of future emphasis programs such that an enforcement lapse does not occur between canceled, revised, or new programs. OSHA did reissue its latest NEP for Silica during February 2020 so inspections are required again.

Further, the OIG noted that the OSHA-provided silica inspection and violation data was inconsistent with publicly available data, however the explanations and final recommendations call for more transparency which sounds like a canned solution.

Another big miss was the outreach program to workers. OSHA noted that most of its inspections were complaint-based inspections following the rule. OSHA had estimated that 2.3 million workers are at risk annually for exposure to silica. OSHA had provided activity reports which suggested that 1.3 million workers attended outreach programs which included some OSHA extrapolation.

OSHA issued its response to the report which essentially stated:

- Regarding prioritizing resources, OSHA has discretion on how it allocates its resources and one agency of the government should stay out of another agencies' business when it comes to allocating resources. Also, OSHA doubled down by claiming that the lapse in enforcement was to give the industry time to implement the controls and programs and other aspects of the new rule.
- Regarding data inconsistencies, it is complicated and it is not worth the time to give OIG access to OSHA's internal systems and train them on the systems when publicly available information exists. Further, OIG auditors and analysts change so frequently that the time training is lost.
- Characterizing outreach efforts, OSHA noted that establishing metrics and goals is a good idea. However, it claims that the OIG mischaracterizes the audience and the scope of its outreach and that the report did not take into consideration the "trickle down" effect of the training to other workers at the work site.

Well, I came out of industry where I worked for 28 years, half those years as an executive. If I ever walked into an executive meeting or a board meeting and gave these kinds of responses to legitimate questions, I am not sure I would have been working in that company much longer. The one thing I found in industry is that it is okay to admit failure (or as some people like to say, "it did not go as planned") as long as you have a plan to recover or eliminate the identified risk in the future. To argue as OSHA did that their actions were fine, then improvement is not possible. Industry is asked to self-reflect all the time on how it does work safely. Maybe OSHA should take some guidance from industry and do the same.

Equal Employment Opportunity Commission

EEOC Recognizes "Long COVID" as a Covered Disability under the ADA

By Adele L. Abrams, Esq., CMSP

On September 9, 2021, the EEOC updated its COVID-19 guidance by recognizing that "long COVID" may now be a covered disability under the Americans with Disabilities Act (ADA) and Section 501 of the Rehabilitation Act, in certain circumstances. The EEOC agrees with the analysis of "long COVID" by the Departments of Health and Human Services and Justice in their "Guidance on 'Long COVID' as a Disability Under the ADA, Section 504, and Section 1557." EEOC technical assistance about COVID-19 and ADA "disability" in the employment context will be released in the coming weeks. Contact the Law Office for assistance in implementing legally effective COVID-19 compliance programs.

Mine Safety and Health Administration

MSHA Stakeholder Meeting – What's on the Horizon

By Michael Peelish, Esq.

MSHA held its Stakeholder meeting on September 29, 2021 with unfortunately more of the same news – too many fatalities. There were 12 fatalities recorded from 6/9/2021 to 9/21/2021. Powered-haulage fatalities led the way, larger mines >50 incurring a greater share, age was not a factor, and experience at the mine and at the activity had an odd pattern with the most and least years having most fatalities.

One common thread that continues to plague the mining industry is that miners need to anticipate better the consequences of their actions. They need to ask the "What If Questions". What if welding fumes accumulate in the pipe? What if I slip off the ledge or it breaks and falls away? What if this pipe joint moves when it is loosened? This approach has had many fancy safety slogans over the years, but it boils down to common sense safety. What if this bottom roller is adjusted without LOTO since it worked the two previous times? The next safety talk you have with your crews, ask them to ask themselves "What If" before they begin a work activity. Just keep it simple.

MSHA also mentioned several new emphasis programs including roof and rib control and pillar collapses in underground limestone mines. MSHA shared interesting data to support its concerns. Also, as MSHA explained, there has been an ongoing powered haulage initiative for a long time that is now culminating in an issued on September 9, 2021 a proposed rule in which comments are due by November 8, 2021. If MSHA holds public hearings, they will be virtual but none have been scheduled. Any implementation of the rule will involve outreach meetings and materials. As I explained in our article covering the proposed rule, while the rule provides the

appearance of flexibility, it provides a simple pathway for MSHA to make unreasonable demands of operators to install engineering controls or other control measures before, and most definitely after, an accident occurs.

The more interesting portion of the Stakeholder calls are the audience questions. Several notable responses from MSHA:

- An ETS for vaccines will not be issued by MSHA because of the strength of the Mine Act versus OSHA's laws and regulations. Also stated but not fully explained was the comment that the EO does not cover MSHA.
- All MSHA inspectors should be following CDC guidance regarding wearing a mask and physical distancing where possible.
- The silica rule is in the process and is a top priority.
- For purposes of the booster shots, mining is not included in the CDC guidance that workers occupationally exposed to Covid-19 should receive booster shots.
- MSHA is not doing pandemic research with any grant money.
- MSHA has issued 370 citations since March 2020 for Covid-19 related to operator conditions or practices that were not following CDC guidance. While MSHA has not done so, it would have no issue with shutting down a mine if an outbreak occurred.
- MSHA did note that previous emphasis programs have included contractors and fall protection.

So, what is on the Horizon? Greater opportunity for enforcement of more stringent rules with MSHA pushing around its unreviewable right to cite an operator and call it reasonable discretion. This situation can only be addressed by policy guidance since the courts are hamstrung under existing legal decisions. In my 30 plus years in this industry, the MSHA discretion issue ebbs and flows with each administration. With the current lay of the land, I submit it will be a flash flood.