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Occupational Safety and Health Administration

# 6th Circuit Affirms Construction Crane Standard Citations

By Gary Visscher, Esq.

Midwest Equipment Co. was cited by OSHA after an employee was seriously injured during assembly of a mobile crane which was used to install antennas on a cell phone tower. Midwest employees were in the process of attaching and securing a jib to the crane's boom when the jib fell and injured one of Midwest's three employees on the site.

OSHA alleged that Midwest's crew had failed to follow the manufacturer's procedures for attaching the jib in two important aspects: failing to use a lifting strap during assembly, as prescribed, and substituting a tag line instead, and failing to ensure that a pivot pin was in place prior to swinging the jib.

Midwest was cited for violating 4 provisions of OSHA's Construction Crane Standard. After a hearing, the Administrative Law Judge sustained all four citation items. On review, the OSHA Review Commission vacated one of the four, while upholding the remaining three citation items.

The citation that was vacated alleged a violation of 1926.1404(b), which requires "the [assembly and disassembly] director must understand the applicable assembly and disassembly procedures." The Commission believed that Midwest's A/D director understood the required procedure (using a lifting strap), he simply chose to disregard it.

Midwest appealed the Commission's decision to the Court of Appeals for the Sixth Circuit. The 6th Circuit agreed with the Commission on each of the three citation items and denied Midwest's petition for review. For each of the three items, the Court of Appeals showed that compliance with the standard requires careful reading of and adherence to the wording of the standard.

Item 1 alleged that Midwest violated 1926.1403(a), which requires "when assembling or disassembling

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equipment (or attachments) the employer…must comply with … manufacturer procedures applicable to assembly and disassembly." The manufacturer's directions required use of a "lifting strap" (not a tag line) and that the crane operator ensure the pivot pin was in place. The evidence showed that neither of those was followed. Midwest argued that 1926.1403(b) allows employers to develop and use its procedures. However, the 6th Circuit said that provision also states that the employer which adopts its own procedures must comply with the provisions of 1926.1406, and Midwest failed to do so.

Item 2 alleged a violation of 1926.1404(d)(1), which states "Before commencing assembly/disassembly operations, the A/D director must ensure that the crew members understand…their tasks, the hazards associated with their tasks, and the hazardous positions/locations that they need to avoid." The Court of Appeals said the employees' actions at the time of the accident – including the injured employee going towards the jib rather than away as it began to fall - indicated that the employees did not understand the hazards or how to avoid them.

Item 3 alleged that Midwest violated 1926.1400(f), which states "Where provisions of this standard direct an operator, crewmember, or other employee to take certain actions, the employer must establish, effectively communicate to the relevant persons, and enforce work rules to ensure compliance with such provisions."

Here, the Court found evidence that Midwest's work rules were not sufficient nor sufficiently communicated. The Court cited the testimony of the injured employee who said "he was taught to stand outside the jib's fall zone but that he was not instructed where to position himself when holding and pulling the tag line at the Graysville worksite." The Court also faulted Midwest's enforcement of work rules, noting that no disciplinary action had been taken against any employee after the accident.

Occupational Safety and Health Administration

# 11th Circuit Limits OSHA Use Of General Duty Clause

By Gary Visscher, Esq.

The 11th U.S. Court of Appeals ruled that OSHA could not issue a civil penalty to a company for violating its "general duty" to maintain a safe workplace where the company had complied with a specific training standard for forklifts.

OSHA enforces both the health and safety standards that the agency has promulgated, as well as the "general duty clause" in section 5(a)(1) of the Act (employers' duty to provide their employees "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.")

Both Commission precedent and OSHA's own regulations provide that where a health and safety standard applies, OSHA must enforce the standard, not the general duty clause. An applicable standard "preempts" the application of the General Duty Clause in terms of OSHA enforcement.

The recent decision by the 11th Circuit addresses a "follow up" question – must the standard eliminate the hazard or only reduce the hazard for preemption to apply? Related to this first question was a second question – does a broad training requirement in the standard, which includes training on the hazard involved, sufficiently reduce the hazard for preemption of the General Duty Clause to apply?

The answer provided by the Court of Appeals in *Chewy Inc. v. U.S. Department of Labor* (11th Cir., May 30, 2023) is that the standard need not eliminate the hazard if it reduces the hazard. And, a broad employee training requirement, which includes training on the hazard, is sufficient to preempt an alleged General Duty Clause violation.

The *Chewy Inc.* case involved OSHA's forklift standard, 1910.178. OSHA's inspection was triggered by two workplace "under ride" accidents,

one of which caused serious injury and the other a fatality. (Quoting the Court:"An under-ride occurs when the rear part of a forklift is short enough that it can pass under warehouse shelves without colliding with them. If the forklift can pass under the shelving, the operator can hit or be crushed by the shelving, as happened to Chewy's workers.")

The standard requires that forklift operators receive hazard training. Various OSHA compliance documents highlighted the hazard of "under rides," and including avoiding "under rides" in operator training. As the Court of Appeals noted, there was no allegation by OSHA in this case that Chewy had failed to provide training, including training on the hazard of "under rides," to its forklift operators.

OSHA cited Chewy under the General Duty Clause, and the OSHRC Administrative Law Judge upheld the violation. The ALJ found that under-rides are a recognized hazard in the industry. Furthermore, Chewy Inc. had failed to adopt feasible measures which would have prevented under-rides, specifically, by either modifying its forklifts (by increasing the height of the back of the forklift) or the shelving (by lowering the shelf height so that the back part of the forklift would not fit under the bottom shelf).

The Court of Appeals disagreed. The Court said the forklift operator training standard, 1910.178, addressed the hazard of under-rides and reduced the risk of under-ride hazards, and therefore the standard preempted a General Duty Clause violation.

The Court said the ALJ's interpretation of OSHA's preemption regulation (1910.5) "was unreasonable because it requires that compliance with the specific standard eliminate the hazard for preemption to occur. Section 1910.5(f) nowhere requires that compliance with the standard 'eliminate' a hazardous condition." Similarly, the Court said, Commission precedent requires that the standard address the hazard but does not require that "the standard eliminate the hazard" in order to preempt the General Duty Clause, citing *Active Oil Serv.*, 21 OSH Cas (BNA) 1184 (2005) and *Armstrong Cork*, 8 OSH Cas (BNA) 1070 (1980).

The Court of Appeals decision is precedent only for cases arising in the 11th Circuit (Alabama, Florida, Georgia), but the distinction drawn by the Court, between a standard "addressing" and "preventing" the hazard for purposes of General Duty Clause preemption may be an important distinction in cases arising elsewhere as well.

Occupational Safety and Health Administration

# No Warrant Needed in National Emphasis Program to Prevent Workplace Falls

By Michael Peelish, Esq.

The saying that to do the same thing over and over and expect a different result is "insanity" applies to falls to a lower level.

The years of data regarding fall accidents supports OSHAs recently announced NEP (May 1st) aimed at preventing on-the-job falls. I could waste words and space explaining the NEP in detail, but that would not achieve my aim which is to reach and encourage employers and workers who read this article to do the right thing.

The NEP allows compliance officers to enter a construction site and open an inspection when he/she observes workers working at heights, and for non-construction work activities, an inspection may be initiated upon approval by area office management.

Now, I can already hear the outcries from industry and its cadre of lawyers claiming that OSHA will need a warrant to enter the property unless the OSHA officer observes an imminent danger. Well, that attitude and approach won't reduce what is one of the most preventable accidents.

I can hear employers saying, “well, the worker was only going up there for a few minutes”, or the worker saying, “it is a pain in the tail to go through all that rigamarole for a five minute task.” Well to all those employers, workers, and their lawyers, my response as a safety professional, prior executive with oversight of safety, mining engineer, and a lawyer is “tough ----, well I will have to end that thought by saying, get over it”.

OSHA must first begin this emphasis program by conducting outreach which it should do before enforcement begins. While OSHA and MSHA to often believe that compliance equals safety all the time, I am a firm believer that encouraging employers and workers to do what is right way because it gives them a chance to get it right first. As we know, enforcement can always follow. Of course, there will always be that 5%-to-10% of employers and workers who won’t do it the right way until someone gets hurt or they get caught by OSHA. And to those folks, I say **STOP** and think about the risks associated with what you are doing and the harm that one bad second can bring.

Supporting sound application of safety practices should be the focus of OSHA, employers, and workers. This approach will not always lead to 100% tie-off such as with the “rolling stock” exemption, but when the parties involved look and work hard enough at finding a solution without preconceived notions or irrational objectives, it is amazing how solutions will evolve.

So, all concerned need to focus on how to best solve this pervasive issue. Some of the employers that I work with are doing some amazing things to prevent falls, so I know the goal of reduced injuries is achievable. As dear friend and inventor who has left this earth once told me, Michael when solving problems “look for horses, not zebras”. If you want to know more about what that means, reach out to me. Put Good Into the World.

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Occupational Safety and Health Administration

# OSHA Considers Violence Prevention Rule For Healthcare Industry

By Diana Schroeher

OSHA is considering a new standard – Prevention of Workplace Violence in Healthcare and Social Assistance industries.

To inform its decision, in March 2023, OSHA convened a Small Business Advocacy Review (SBAR) Panel and heard from representatives from small businesses and who served as small entity representatives (SERs). The Panel was comprised of members from the Small Business Association’s Office of Advocacy, representatives from OSHA, and the Office of Management and Budget’s Office of Information and Regulatory Affairs. The Panel listened to Small Entity Representatives (SERs) who may be affected by the potential Rule. OSHA received input from SERs representing from the following industry sectors:

- Hospitals, including emergency departments;
- Residential behavioral health facilities;
- Ambulatory mental healthcare and ambulatory substance abuse treatment centers;
- Freestanding emergency centers;
- Residential care facilities;
- Home healthcare;
- Emergency medical services;
- Social assistance (excluding child day care centers; and
- Correctional health settings

The social assistance subsector consists of these industry groups: Individual and Family Services; Community Food and Housing, and Emergency and Other Relief Services; Vocational Rehabilitation Services; and Child Day Care Services.

Following five tele-conferences in March 2023 with SERs on how the potential Rule may affect the

operations of their workplace, the Panel issued its Report and Recommendations on May 1, 2023, now posted on OSHA's website at: www.osha.gov/sites/default/files/OSHA-WPV-SBAR-Panel-Report.pdf#page=47.

**Reasons Why OSHA is Considering a Rule**

Although OSHA does not have an existing standard, OSHA recognizes that workplace violence is a serious concern. OSHA has long been following the research, tracking interagency and stakeholder engagement, and trends as observed through OSHA's enforcement of the General Duty Clause of the OSH Act, under which OSHA has issued dozens of citations to employers who have exposed their workers to workplace violence.

The Healthcare and Social Assistance sector is comprised of 20.9 million employees and is a large sector of the U.S. economy. Workers in this sector face an increased risk of workplace violence from patients, clients, residents and/or visitors in the workplace. The Bureau of Labor Statistics (BLS) rates for 2019 show that:

- Healthcare and social assistance workers in private industry experienced workplace violence-related injuries at an estimated incidence rate of 10.4 per 10,000 full-time workers – for a total of 14,550 nonfatal injuries;
- For segments of these industries the rate is even higher, such as psychiatric and substance abuse hospitals (107.5 per 10,000) and residential mental healthcare facilities (44.4 per 10,000); and
- The rate of nonfatal workplace violence incidents that required the worker to take time off was 4.8 times greater in privately operated healthcare and social assistance than in private industry overall.

**What Would the Rule Require?**

OSHA is considering the following requirements:

**A Workplace Violence Prevention Program (WVPP)** Employers would be required to develop and implement a written a Workplace Violence Prevention Program, which would include at a minimum, procedures for employee reporting of a violent incident; how employee concerns would be investigated; and how employers would develop procedures to communicate their WVPP to other employers at the same worksite.

**Hazard Assessments**: Employers would be required to perform regular hazard assessments based on their own injury records, and identify and mitigate hazards. The assessments are intended to identify environmental and organization risk factors at a particular worksite. Employers would have the flexibility to tailor their assessment to the services provided, the physical characteristics of the establishment, number of patients and clients, and the surrounding community of the establishment.

**Implementation of Control Measures:** Employers would be required to implement controls to mitigate hazards found during the assessment process.

**Training:** OSHA is considering mandating specific training requirements for employees and supervisors. OSHA recognizes that education, training and awareness are key elements of the WVPP – elements that will provide employees with the tools necessary with identify workplace safety and security hazards.

**Incident Investigation and Workplace Violence Log:** Employers would be required to maintain a specific workplace violence recordkeeping log and perform incident investigation procedures. OSHA recognizes that post-incident investigations are an important component of an effective WVPP, and information obtained from these investigations can inform other elements of the WVPP, and insight into steps that may be taken to avoid future incidents.

**Anti-Retaliation Provisions:** The Rule may require employers to inform employees that employees would have the right to the protections required by the Rule, and that employers would be prohibited from discharging or in any manner discriminating against any employee for exercising their rights under the Rule.

**Panel Findings and Recommendations**

The Report issued by the Panel noted that many Small Entity Representatives (SERs) had concerns about the issuance of a Rule. They summarized their concerns in each finding, and submitted recommendations based on each finding. Some of the SERs key findings and recommendations include:

**Finding: Whether a Rule was needed.** Many SERs acknowledged that workplace violence in the healthcare and social assistance industries is a problem, but some SERs questioned the need for a Rule, based on their belief that existing regulations, guidelines, accreditations and/or certifications already require them to implement a WVPP or other measures to protect workers from WPV. Many SERs reported having some form of accreditation or certification that requires WPV preventative measures, although some SERs acknowledged those do not include certain elements that OSHA contemplates including in an OSHA WPV standard, such as specifications for controls, violent incident investigation, or recordkeeping.

**Recommendation:** The Panel recommends that OSHA review existing regulations, guidance, and accreditation standards on WPV prevention in determining the need for a rule (e.g., CMS guidance and conditions of participation for Medicare and Medicaid and Joint Commission accreditation standards), avoid duplication unless necessary to mitigate risks associated with workplace violence, and ensure any OSHA requirements do not conflict with other governing bodies or standards-setting organizations.

**Finding: One-Size-Fits-All Approach.** SERs nearly universally expressed concerns that a potential WPV rule would attempt a one-size-fits-all approach that would be difficult for the regulated 48 entities to comply with. SERs repeatedly told the Panel that the difference between types of entities should be reflected in the requirements included in a proposed rule and that the agency should provide as much flexibility as possible.

**Recommendation:** The Panel recommended flexibility to allow employers to tailor their approaches to complying with the requirements of the rule to the size and complexity of their facility, setting, or industry while offering specificity where possible to alleviate confusion. The Panel also recommends that OSHA consider, to the extent practicable, incorporating elements that are "performance oriented" such that certain requirements are expressed in terms of outcomes, in order to allow sufficient flexibility for employers to pursue alternative innovative approaches.

Finding: Risk and Scope. Some SERs were concerned that significant occupational exposures may not be present in certain industries included in the draft regulatory framework. Some SERs, particularly those representing entities in the social assistance sector, such as supportive housing services and outpatient addiction treatment services, reported that violent incidents were uncommon in their settings.

**Recommendation:** The Panel recommends that OSHA evaluate available risk data for each healthcare and social assistance facility/setting and tailor the scope in such a way that eliminates lower hazard, lower risk facilities/settings from the scope of the standard.

**Finding: Engineering Controls.** Many SERs were concerned with OSHA's draft regulatory framework for engineering controls. SERs interpreted OSHA's framework to require numerous engineering controls that SERs thought would be difficult and costly to implement. Some SERs told the Panel that some engineering controls mentioned in the regulatory framework could not be used (e.g., cameras are not allowed in many areas of healthcare facilities for privacy reasons) or would be counter to the standard of care in their facility (e.g., furniture that could not be rearranged in hospice settings, or barriers in memory care areas that might distress patients).

**Recommendation:** The Panel recommends that OSHA revise the regulatory framework to clarify which engineering controls are appropriate for which types of settings, while maintaining flexibility for employers.

**Finding: Training.** The majority of SERs who commented on training recognized the value and effectiveness of training in mitigating the incidence of workplace violence and recognized training as a key component of a WPV program. Many SERs said that the most effective training programs are flexible and not one-size-fits-all. Several SERs noted that a hybrid approach that includes written materials, video instruction, and interactive live demonstration can be particularly effective, and many reported that de-escalation training is extremely useful in reducing WPV incidents. However, many SERs objected to requiring high levels of training for all staff exposed to workplace violence. SERs expressed concern because OSHA's draft standard contemplated higher levels of training to be tied to the designation of a high-risk service area, which SERs thought would encompass their entire facility under OSHA's draft definition.

**Recommendation:** The Panel recommends that OSHA research and identify effective WPV training programs in healthcare and social assistance and incorporate the elements of those programs into the proposed standard or agency guidance products, and that OSHA permit employers flexibility consistent with safety, and scalable with respect to the risks employers need to address.

**Finding: Recordkeeping.** Most SERs who weighed in on the topic objected to OSHA requiring employers to document workplace violence incidents, beyond complying with OSHA's existing requirements for recordkeeping that apply to all industries. Although most SERs reported that they already document incidents in their facility, they generally thought additional documentation requirements in an OSHA WPV standard would be costly and duplicative.

**Recommendation:** Along with the recommendation on the definition of a WPV incident discussed above, the Panel recommends that OSHA clarify the recordkeeping requirement to make it clear that, while certain information should be recorded about an incident, there would not necessarily be a requirement for a separate form or format that employers would be required to use, particularly if necessary information was being captured elsewhere in a different format. The Panel recommends that OSHA clarify its intention that, in many cases, employers would be able to use, or at least modify as applicable, their existing recordkeeping systems.

OSHA continues to accept comments through July 3, 2023 from all interested parties on the Final Report, the Preliminary Initial Regulatory Flexibility Analysis (PIRFA), the draft regulatory framework, alternatives and options that OSHA is considering, or any other aspect of the materials presented. Please contact the Firm for more information, or assistance drafting comments to submit to OSHA.

Occupational Safety and Health Administration

# OSHA Seeks Input On SHMS indicators

By Adele L. Abrams, Esq., ASP, CMSP

The U.S. Labor Dept.'s Occupational Safety and Health Administration (OSHA) is asking for stakeholder input on their current use of leading indicators and their impact on managing their safety and health management systems (SHMS).

OSHA revised its SHMS guidelines in 2016, and adoption of such systems is required for companies placed in OSHA's Severe Violator Enforcement Program as a condition for "early release" from SVEP status. Other models for SHMS include the ANSI Z-10 standard for general industry and the ANSI A10.33 standard for construction.

Leading indicators are proactive and preventive measures that can provide insight on the effectiveness of safety and health activities and reveal potential problems. They are vital in reducing worker fatalities, injuries, illnesses, and financial impacts.

As OSHA considers developing a Leading Indicators

Resource, the agency asks stakeholders to share their experience and expertise and provide detailed feedback on how/where they are used at their workplace. OSHA is interested in various perspectives on stakeholders' answers to questions, such as the following:

- What leading indicators do you use?
- What lagging indicators do you use (OSHA incident rates, for example)?
- What leading indicators are, or could be, commonly used in your industry?
- What metrics do you share with top management?
- How do you determine the effectiveness of your leading indicators?
- Do you link your leading indicators to outcome data, such as OSHA incident rates to evaluate results?
- How could employers be encouraged to use leading indicators in addition to lagging indicators to improve safety management systems?
- What barriers and challenges, if any, have you encountered to using leading indicators?

Stakeholders may submit comments at regulations.gov by July 17, 2023, which is the Federal eRulemaking Portal, identified by docket number OSHA-2023-0006.

For more information on development and implementation of SHMS, contact the Law Office at 301-595-3520.

# ORE. OSHA Hikes Penalties

**By Adele L. Abrams, Esq., ASP, CMSP**

As employers adjust to the heightened federal OSHA penalties, which were raised to a new maximum of over $113,000 as of January 15, 2023, Oregon has taken an even larger step forward. After years of having some of the lowest actual penalties among the state-run OSHA programs, OR-OSHA now has a new penalty structure. The new law was passed as an emergency measure and took effect immediately.

Governor Tina Kotek signed legislation in late May that raises the agency's new maximum fine to $250,000 in cases where a willful or repeated OSHA violation is linked to a workplace fatality. The minimum penalty was raised from $50 per citation to $1,116, and "serious" violations can incur a fine of up to $15,625 (the same as the 2023 federal schedule). The legislation also adds a $20,000 minimum and $50,000 maximum fine for fatalities linked to a violation. Under the new law, employers who have a fatality occur, or who accrue three or more serious violations in a year, will also undergo a comprehensive inspection by OR-OSHA.

For more information, contact Adele Abrams at safetylawyer@gmail.com.

**Federal Regulatory Agenda**

# Federal "Spring" Regulatory Agenda Published

By Adele L. Abrams, Esq., ASP, CMSP

On June 15, 2023, just under the seasonal wire, the federal government's semi-annual regulatory agenda was released. This is an aspirational, but non-binding, announcement of the rulemaking items each federal agency proposes tackling within the coming 12 months. It is quite common for items to slide, especially as a presidential election approaches, when there are controversial items under development.

Below are the key items impacting occupational safety and health activities.

**Pre-rule stage:**

**Mechanical Power Presses.** OSHA is analyzing comments from a Request for Information in 2021.
Workplace Violence in Healthcare and Social

Services. The action is currently limited in scope to medical and social services workplaces, and it is notable that workplace violence remains the Number One case of death for women on the job. OSHA has now completed its small business review step with the SBA. Watch for the potential that the scope of this rule could be expanded, in light of the many mass shootings at retail, service, education and other workplaces -- some unions have called for expansion of state OSHA workplace violence rules. OSHA is now analyzing comments on SBREFA report.

**Blood Lead Level for Medical Removal.** OSHA is reviewing comments from 2022 ANPRM – the next action is due 12/23. This impacts those doing welding work, as well as those engaged in demolition and waste removal activities, and shooting ranges.

Heat Illness. OSHA anticipates initiating the SBREFA process in August 2023. This will impact workplaces in terms of regulating exposure to both indoor and outdoor heat sources. OSHA is currently carrying out enforcement under a National Emphasis Program, and can use the General Duty Clause, recordkeeping/reporting and sanitation standards for enforcement. Note that this is a federal rulemaking and there are already mandated heat exposure reduction standards in a number of states that run their own OSHA programs (e.g., California, Washington, Oregon, Minnesota)

**Proposed rule stage:**

**PPE in Construction.** A NPRM is set to be published in June 2023, and this initiative could spill over to the other OSHA-regulated sectors. Women workers and some small statured male workers often are not provided with appropriately fitting Personal Protective Equipment (PPE), and this has been demonstrated to cause injuries and even death.

Powered Industrial Truck Design. The NPRM was published in February 2022, and would update the currently adopted ANSI standard from 1969 and replace it by incorporating more current (2019/2020/2021) ANSI standards for forklifts and other powered industrial trucks. The agency is now analyzing comments.

**Respirable crystalline silica:** The NPRM due in January 2024 to address medical removal, in in response to the court order of 2017 affirming the agency rule and granting the union request to reopen.

MSHA's counterpart respirable crystalline silica standard for coal and metal/nonmetal mines is also being revised to align more with the OSHA rule (MSHA's current permissible exposure limit is twice that of OSHA's) and that proposed rule is now at Office of Management and Budget (OMB) undergoing review, but is due for publication any day now.

**Worker Walkaround Representative Designation.** This controversial proposal would "clarify" that the designated representative does not need to be an employee if the representative is so designated by workers, including bring in a union representative or community organizer to non-union companies to assist with the OSHA inspection. This proposal reinstates the "Fairfax" memo from OBAMA OSHA. NPRM is due in JUNE 2023.

**Final Rule Stage:**

**OSHA's Hazard Communication** update, is set to be issued in June 2023, but delay is likely. While primarily impacting chemical manufacturers, it will also have an impact on importers and distributors and will likely require retraining of all workers to understand the changes in labeling and chemical classification (NOT at OMB yet).

**Tracking of Workplace Injuries and Illnesses** (to require electronic submission of OSHA 300A forms by certain employers of 20 to 99 workers, and expanded submissions by employers of 100 or more to include the OSHA Accident Forms 300 and 301). Due June 2023 (at OMB). A lawsuit by unions, to force OSHA to restore some 2016 requirements that were eliminated under the Trump administration, had been on hold but with the delay, the litigants have threatened to re-activate the case.

**MSHA's Powered Haulage** rule is due September 2023 covering off-road and over-the-road equipment

and would apply to contractors and delivery drivers at mine sites. The final rule is expected to have written program and maintenance requirements, enhanced training & inspection requirements. MSHA civil penalties are now a maximum of $313K with personal penalties of up to $85K against agents of management.

State Laws

## Minnesota Latest State To Legalize Cannabis

By Adele L. Abrams, Esq., ASP, CMSP

On May 30, 2023, Minnesota Gov. Tim Walz signed legislation into law making Minnesota the 23rd state to legalize and regulate the adult-use marijuana market. The legislative action makes MN the third new legal recreational cannabis state added in 2023 (following Maryland and Delaware).

"We've known for too long that prohibiting the use of cannabis hasn't worked. By legalizing adult-use cannabis, we're expanding our economy, creating jobs, and regulating the industry to keep Minnesotans safe," Governor Walz said at signing. "Legalizing adult-use cannabis and expunging or re-sentencing cannabis convictions will strengthen communities. This is the right move for Minnesota."

The new law permits adults to purchase (up to two ounces from state-licensed retailers and/or 8 grams of concentrate and 800 milligrams worth of edible products), home-cultivate (up to eight plants, no more than four of which can be mature), and possess (up to 2 pounds in private) cannabis. The bill also facilitates the automatic review and expungement of records for those previously convicted of certain marijuana-related violations.

Adults in MN may legally possess cannabis on August 1, 2023. State officials at that time will begin the process of reviewing and expunging tens of thousands of marijuana convictions, but recreational sales will be delayed until 2024.

Unlike most states where marijuana is now legal, on-site consumption will be allowed at certain permitted events. Municipal officials will be able to impose regulations regarding the total number of cannabis businesses and their locations, but they may not prohibit their operations. Retail cannabis sales will be taxed at ten percent. Minnesota's new law lacks workplace protections for employees who use weed for recreational/off duty and test positive, unlike new policies in Connecticut, NJ and NY.

For help in updating corporate substance abuse policies, contact the Law Office at 301-595-3520.

Equal Employment Opportunity Commission

## EEOC: Discrimination Remains Significant Employment Barrier in Construction

Sarah Ghiz Korwan, Esq.

The U.S. Equal Employment Opportunity Commission (EEOC) recently issued a comprehensive report, "Building For The Future: Advancing Equal Employment Opportunity in the Construction Industry" regarding discrimination in the construction industry. This industry plays a critical role in the economy, employing millions of people and contributing to infrastructure development.

However, the report notes that discrimination remains a significant barrier to equal employment opportunities for women and people of color. The report takes a deep dive into the work the EEOC has done investigating cases of harassment, discrimination, and unequal treatment in recruitment, hiring, training, promotions, and work conditions within the industry.

This report emphasizes the need for new approaches and collaboration to address these persistent issues. The EEOC aims to work with federal agencies, fair employment practices agencies, unions, contractors, and industry groups to develop industry-specific prevention, training, and enforcement strategies. The report highlights the underrepresentation of women and certain racial and ethnic groups in the construction industry, discriminatory practices, pervasive harassment, and the need for effective reporting mechanisms and protection against retaliation.

Key findings from the report include the under-representation of women and people of color in higher-paid, higher-skilled trades; discrimination in recruitment and hiring; and, the prevalence of harassment on construction sites, including racial harassment. The report also recognizes the importance of addressing harassment as a workplace safety issue. It highlights the lack of awareness among workers regarding reporting procedures and multiple employers involved in construction projects, complicating complaint processes.

The EEOC outlines several next steps, including ongoing engagement with unions, employers, and industry groups, providing technical assistance and outreach to promote fair practices, training on equal employment and harassment prevention, and partnering with organizations to enhance diversity, equity, inclusion, and accessibility practices. The agency will continue investigations and litigation to enforce equal employment laws.

Given the projected growth of the construction industry, the report emphasizes the importance of ensuring equal opportunities and inclusive workplaces for all workers. It also emphasizes the significance of taxpayer-funded projects and the EEOC's responsibility to prevent discrimination in industries like construction.

Women and workers of color are significantly under-represented in the construction industry, both in the overall workforce and in higher-paying, higher-skilled trades. This lack of representation has serious implications for the industry's long-term success, especially considering the increasing demand for new construction and the recruitment challenges it faces. Women and workers of color are often concentrated in lower-paid construction jobs and are less likely to be business owners or executives compared to white men.

Workers of color, particularly Black and Asian workers, are also under-represented in registered apprenticeship programs, which serve as a vital entry point into the construction trades. Union apprenticeships tend to have more diversity compared to non-union programs, but there is still room for improvement in ensuring equal opportunities for under-represented groups. Overall, there are racial and ethnic disparities in business ownership and apprenticeship enrollment, hindering efforts to diversify the construction industry.

Addressing these under-representation issues is crucial for the industry's future success, as it needs a diverse and skilled workforce to meet the growing demand for construction. Increasing the representation of women and workers of color in the industry, promoting equal access to apprenticeships, and addressing barriers to advancement and business ownership can contribute to a more inclusive and thriving construction sector.

**Equal Employment Opportunity Commission**

# Sex, EEOC and Rock-N-Roll

**By Adele L. Abrams, Esq., ASP, CMSP**

It's not just the "squares" complaining about rude music in the workplace! The US Court of Appeals, 9th Circuit, confirmed in its June 2023 decision that some music can violate Title VII of the federal Civil Rights Act by creating a hostile work environment resulting in gender discrimination, even if both male

and female workers object to the tunes.

The case involved a manufacturing company in *Nevada, Sharp v. S&S Activewear LLC*, which allowed managers to play sexually explicit and misogynistic music in its workplace and disregarded the workers' complaints.

The "equal opportunity harasser defense," which protects employers from liability for harassment against both men and women because the harassment couldn't be said to be "because of sex," was expressly rejected by the 9th Circuit. The music at the core of complaints included the song "Blowjob Betty" by Too $hort (with references to "bitches and hoes") and Eminem's song "Stan," about the murder of a pregnant woman. The music was blasted throughout the company warehouse on a commercial sound system. When the music played, some male employees made sexually explicit gestures, made obscene remarks to female workers, and they also shared pornographic videos in the workplace.

The decision reverses a US District court ruling, which held that the music at issue couldn't factor into a sex-based hostile work environment claim because both men and women were offended. The Appellate Court decision is only binding precedent in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands. However, the decision could be viewed as persuasive authority in other jurisdictions.

However, the Ninth Circuit said it was "beyond [their] purview to pass judgment on the appropriateness of music in the workplace" or ascribe "misogyny to any particular musical genre." Employers may have policies prohibiting offensive music, but they must be enforced consistently and complaints must be taken seriously and investigated. Supervisors must take the lead in avoiding offensive conduct (including playing or condoning workplace music that could be viewed as racist or sexist), as their conduct is imputed to management in support of discrimination claims.

The case can be read here:

**https://cdn.ca9.uscourts.gov/datastore/opinions/2023/06/07/21-17138.pdf**

For guidance on how to maintain a discrimination-free workplace and for developing codes of conduct that are legally effective, contact the Law Office at 301-595-3520.

National Labor Relations Board

# NLRB Again Revises, Reverses Test for "Employee or Independent Contractor"

By Gary Visscher, Esq.

For the third time in a decade, the National Labor Relations Board (NLRB) has revised the criteria or test it will use for determining whether workers are "employees" or "independent contractors."

Employees are covered by rights provided by the National Labor Relations Act (NLRA) while independent contractors are not.

The NLRA does not define employee, except by stating that employees do not include independent contractors.

A 1968 Supreme Court decision, *NLRB v. United Insurance Company*, held that the applicable test for employee is the "common law agency test," which has been "codified" in the Restatement (Second) of Agency. The Restatement lists 10 factors to consider, but also says that these factors are not exhaustive of the factors that may be considered in making the determination of whether a worker is an employee or an independent contractor. Furthermore, the Supreme Court said, determining whether an individual is an employee or independent contractor is not a matter of tallying which side (employee or independent contractor) has the majority of the 10 factors listed in the common law test.

In a 2009 decision, *FedEx Home Delivery v. NLRB* (FedEx I), the Court of Appeals for the D.C. Circuit found that the NLRB had over time adopted a "more accurate proxy" to help in evaluating "the unwieldy control inquiry" involved in applying the multi-factor common law test. The "proxy" identified by the Court of Appeals was whether the putative independent contractors "have significant entrepreneurial opportunity for gain or loss."

The Court's decision in FedEx I not only recognized that the Board had adopted this "proxy," but accepted the Board's adaptation and use of "entrepreneurial opportunity" in making the determination of employee or independent contractor status.

In 2014 the NLRB issued a decision in a second *FedEx Home Delivery* case (FedEx II), in which the Board said it "declined to adopt the Court of Appeals holding insofar as it treated "entrepreneurial opportunity as an animating principle of the inquiry." The Board's decision was subsequently appealed to the D.C. Circuit, which reaffirmed its earlier decision.

In 2019, with different members, the NLRB reversed course and in the case of *Supershuttle DFW* essentially adopted the D.C. Circuit's decision in *FedEx 1*. The Board's "new" (or old, depending on perspective) test gave greater prominence in the evaluation of whether workers are employees or independent contractors to "entrepreneurial opportunity." According to the Board's decision in *Supershuttle*, "entrepreneurial opportunity" was not a "super-factor" replacing the common law factors, but "a principle by which to evaluate the overall effect of the common law factors," a "prism" through which to view the entirely of the relationship between the employer and the workers in question.

The factual issue in *Supershuttle* involved operators of shared ride vans at the Dallas Fort Worth airport. The airport contracted with Supershuttle, which in turn operated vans through franchise agreements with individuals who purchased or leased (from Supershuttle) vans.

Subject to certain limits, franchisees could employ other drivers. Franchisees set their own work schedules. Franchisees also kept all fares they collected, after paying a weekly flat system fee. After evaluating the arrangements between Supershuttle and franchisees, including work scheduling, compensation, and other factors, the majority of the NLRB found that the arrangement "provided franchisees with significant entrepreneurial opportunity and control over how much money they make each month." The Board found the franchisees were independent contractors not covered by the NLRA.

In the newest decision, issued June 13, 2023, the NLRB again reversed and revised the test it will use. The Board reinstated its 2014 decision in *FedEx II*, and reversed its position in the 2019 decision in *Supershuttle DFW*.

The 2023 case involved The Atlanta Opera, specifically, whether makeup artists, wig artists, and hairstylists who work for the Opera only during final rehearsals and shows by the Atlanta Opera are employees or independent contractors under the NLRA. The Board majority analyzed in some detail how the makeup artists, wig artists, and hairstylists are hired or retained for the intermittent work involved, how they are scheduled for each production, and the nature of their work and compensation. Reviewing each of the 10 "traditional common law factors" against the facts in the case, the Board found that the majority of the 10 factors favored a conclusion that the makeup artists, wig artists and hairstylists are employees.

In reversing its position from *Supershuttle*, and adopting the former test from *FedEx II*, the Board majority said it considered "entrepreneurial opportunity" to be one of the many factors the Board could consider, but that it would not consider it a "super-factor" or "an animating principle" or a "prism" through which to consider the employee or independent contractor question.
Board Member Marvin Kaplan dissented in part and concurred in part. Kaplan found that the same result (i.e. that the makeup artists, wig artists, and hairstylists are employees of The Atlanta Opera)

would obtain under the Board's Supershuttle test, and it was unnecessary to reverse *Supershuttle* to reach the same result.

Member Kaplan also predicted that the Board's new test would be short-lived because it would be rejected by the court of appeals, just as was the Board's decision in *FedEx II*. It is likely that the effort to locate precisely what and where "entrepreneurial opportunity" fits, and the broader issue of determining whether workers are employees or independent contractors under the National Labor Relations Act will remain in flux.

# Beat the Heat: Work Safe

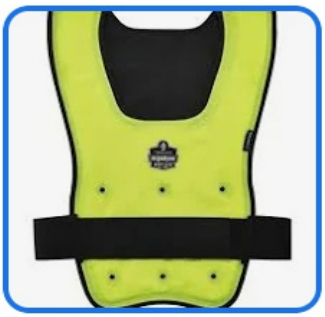
With record-setting temperatures across the U.S., OSHA is stressing the need to protect workers from heat stress.

According to a National Institutes of Health study using OSHA Severe Injury Reports (2015–2022) and OSHA fatality inspection data (2017–2020), respectively, of the 1,682 exertional injury cases reported, 1,546 of those injuries were heat-related cases. In 2017–2020, there were 4,598 fatalities reported in the OSHA fatality inspection database with 78 of those fatalities related to heat stress.

Most fatalities occur in the first few days of working in warm or hot environments because the body needs to gradually build a tolerance to the heat over time. The process of building tolerance is called heat acclimatization. Lack of acclimatization represents a major risk factor for fatal outcomes, affecting both indoor and outdoor workers.

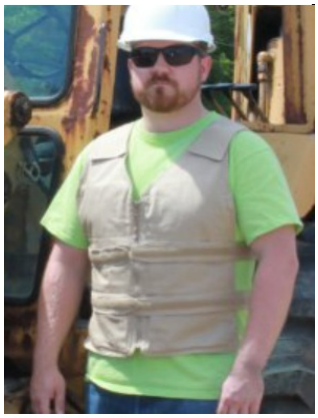
Workers who are 'new to working in warm environments' need time to acclimatize unless they have previously worked in hot environments. To prevent heat-related illnesses, they should work shorter workdays in the heat during their first one to two weeks (see: www.osha.gov/sites/default/files/publications/Maritime-Protecting_Workers_from_Heat_Illness_in_Confined_Spaces.pdf**).**

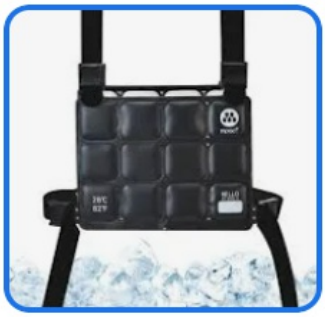
There are many "cooling vests" on the market that can help prevent heat stress in workers.



**"Chill It" cooling vest made by Ergodyne.** Available through Home Depot and Amazon or: https://www.ergodyne.com/cooling/vests

**Polar Products Adjustable Zipper Vest** with Kool Max® frozen water-based packs and a set of Cool58® 58º Fahrenheit phase change packs. To order go to: www.polar@polarproducts.com or call 800.763.8423





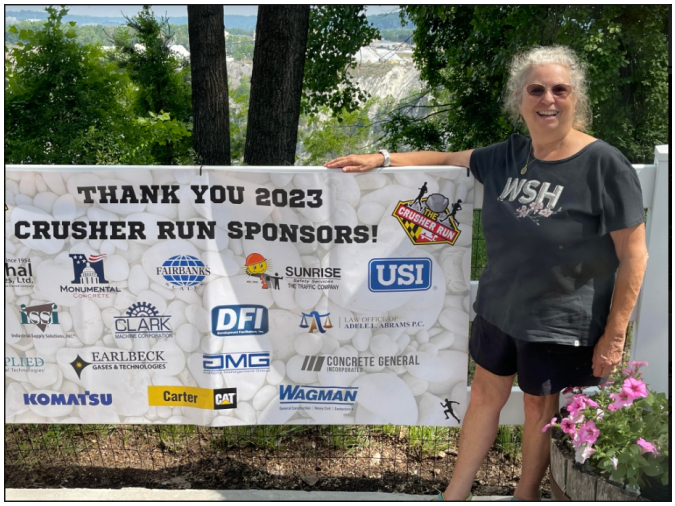
**mpac+ Cooling Vest** | Ice Vest for Men and Women, Personal Cooling System with Gel Cold Pack available through www.amazon.com/mpac-Cooling-Cooling-Personal-Reusable/dp/B0B28K2RMK

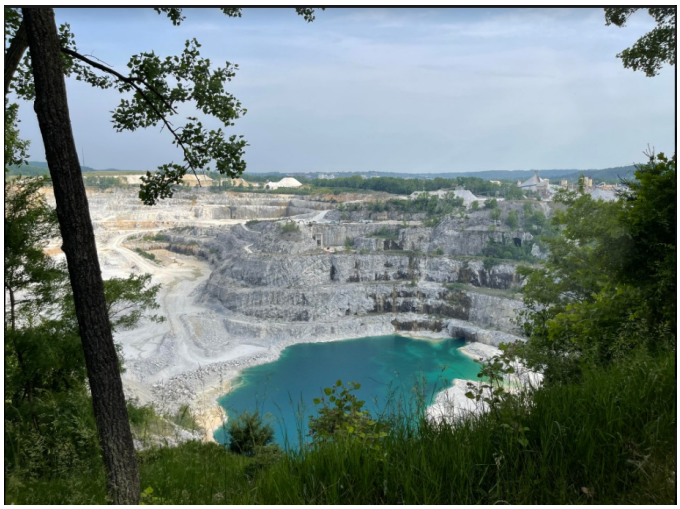
LAW OFFICE OF
ADELE L. ABRAMS P.C.

Vol. 4 Issue 4
June/July 2023

# Construction Angels 5K At Martin Marietta

The Law Office of Adele Abrams co-sponsored a 5K race in early June at the beautiful Martin Marietta quarry in Cockeysville, MD, for the benefit of Construction Angels. The group provides support for the families of construction workers killed on the job, including six who died earlier this year in the Maryland construction work zone tragedy. It's a good charity, and we hope you will consider supporting it too. https://www.constructionangels.us.



**The Law Office of Adele L. Abrams PC** is a full service law firm, focusing on occupational and mine safety and health, employment, and environmental law.

Our attorneys are admitted to practice in Maryland, Colorado, Washington DC, Michigan, Montana, Pennsylvania, and West Virginia. We handle OSHA, MSHA, and EPA administrative law cases around the United States. Our attorneys are admitted to federal courts including: US Supreme Court, US Court of Appeals (DC, 3rd and 4th Circuits), and US District Courts (Maryland, Tennessee, Washington, DC, and West Virginia).

In addition to our litigation practice, the Law Office offers mediation and collaborative law services, as well as consultation, audits, and training on safety, health and employment law issues.

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LAW OFFICE OF
ADELE L. ABRAMS P.C.

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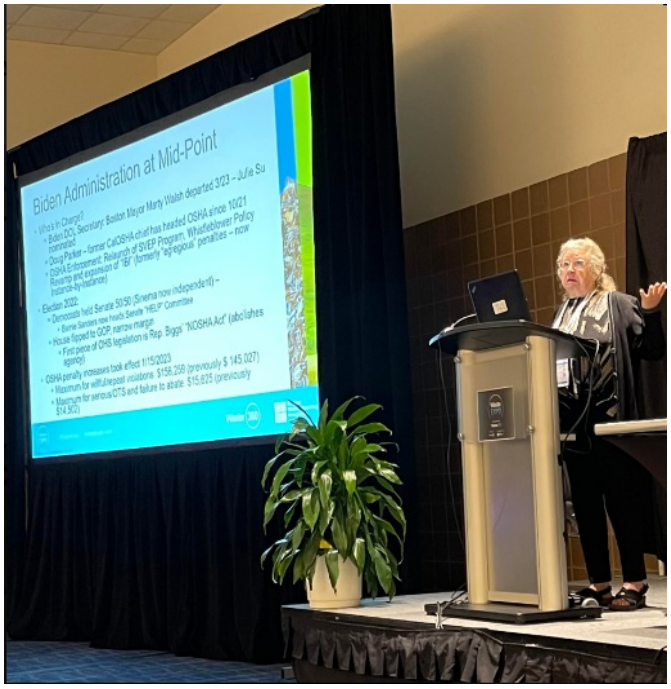
June/July 2023

# Don't Miss These Events in 2023

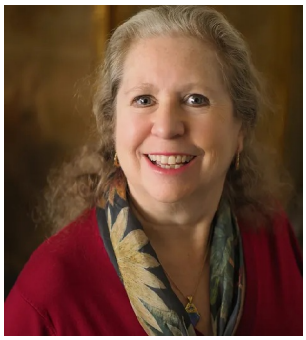
**Adele Abrams, Esq., ASP, CMSP**

**July 6:** Simplify Compliance webinar on Infectious Disease Control in the Workplace
**July 13:** Chesapeake Region Safety Council webinar on Cannabis & Workplace Safety
**July 24:** Lorman webinar, Manager's Guide to OSHA Compliance
**July 25-27:** BLR 12 hr master class on Employment Lab
**Aug. 3-4:** NSC Networks Conference, presentation on Cannabis & Workplace Safety, Washington, DC
**Sept. 11:** ASSP Region VI PDC -- Pre-conference class on OHS Update
**Sept. 13:** ASSP Region VI PDC -- presentation on Psychological First Aid & Workplace Safety
**Sept. 19-20:** BLR Master Class on OSHA Recordkeeping and Enforcement (virtual, 8 hours total)
**Sept. 26-27:** BLR Master Class on CalOSHA law and federal changes, San Diego, CA
**Oct. 4-5:** Chesapeake Region Safety Council conference, presentation on Cannabis & Safety, Baltimore, MD
**Oct. 20:** OSHA Silica Competent Person Train-the-Trainer, Chesapeake Regional Safety Council (**Presented by Michael Peelish, Esq.)**
**Oct. 22**: National Safety Council: pre-Congress master class on Substance Abuse Prevention & Drug Testing, New Orleans, LA
**Oct. 23:** NSC Congress, presentation on OSHA/MSHA Enforcement Initiatives 2023, New Orleans
**Oct. 24**: PA Governor's Safety Conference, Presentation on Psychological First Aid, Hershey, PA




Adele Abrams at the National Waste & Recycling Assn. Annual Conference asks: *Who's In Charge?*

# Our Attorneys



**Adele L. Abrams, Esq., CMSP**
**Firm president**

**Adele L. Abrams** is the founder and president of the Law Office of Adele L. Abrams P.C. in Beltsville, MD, Charleston, WV, and Denver, CO, a multi-attorney firm focusing on safety, health and employment law nationwide. As a certified mine safety professional, Adele provides consultation, safety audits and training services to MSHA and OSHA regulated companies. She is a member of the Maryland, DC and Pennsylvania Bars, the U.S. District Courts of Maryland, DC and Tennessee, the U.S. Court of Appeals, DC, 3rd and 4th Circuits, and the United States Supreme Court. She is a graduate of the George Washington University's National Law Center. Her professional memberships include the American Society of Safety Professionals, National Safety Council, the National Stone, Sand & Gravel Association, Associated Builders and Contractors, the Industrial Minerals Association-North America, and the American Bar Association. In 2017, she received the NSC's Distinguished Service to Safety Award.

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**Diana Schroeher's** practice is concentrated in employment law, occupational safety and health law, and maintains a wide-ranging local Maryland practice. She has extensive experience representing clients in the Maryland Courts, before the federal Equal Employment Opportunity Commission, the Department of Labor, Mine Safety and Health Administration, the Occupational Safety and Health Administration and many other federal and state administrative agencies. Diana is a member of the Maryland bar, and the U.S. District Court for the District of Maryland.

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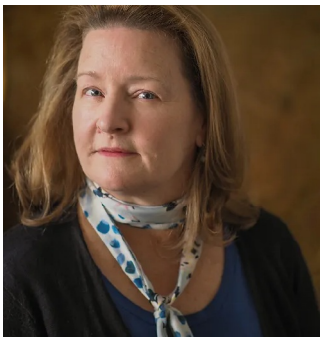

**Diana Schroeher, Esq.
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**Gary Visscher, Esq.
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(DC, MI)**

**Gary Visscher** has long-time involvement in occupational safety and health (OSHA and MSHA) and employment law. Prior to his current position, Gary worked in several U.S. government positions, including Workforce Policy Counsel for the U.S. House of Representatives Education and Workforce Committee, Commissioner on the Occupational Safety and Health Review Commission, Deputy Assistant Secretary for OSHA, and Board Member for the U.S. Chemical Safety Board. He has also served as Vice President, Employee Relations for the American Iron & Steel Institute, and as adjunct professor of Environmental and Occupational Health Policy at the University of Maryland Baltimore County (UMBC). Gary is a member of the Michigan and District of Columbia bars.

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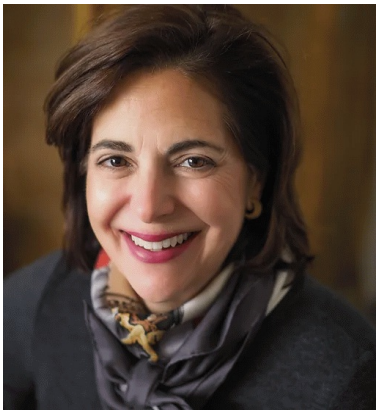
**Sarah Ghiz Korwan** is a graduate of West Virginia University College of Law. She is the Managing Attorney of the Law Office of Adele L. Abrams P.C.'s West Virginia office. She has extensive experience representing mine operators and individuals cited by the US Department of Labor, Mine Safety and Health Administration and the WV Office of Miners' Safety and Training, and in accident investigations.



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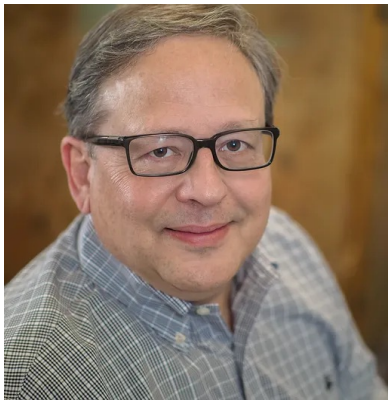

**Michael R. Peelish, Esq.
Sr. Counsel (CO, WV, PA)**

**Michael R. Peelish** is an attorney and mining engineer with degrees from West Virginia University College of Law, Morgantown, WV (JD), and West Virginia University, Morgantown, WV (B.S. in Mining Engineering). He has over 28 years working in the mining sector and at OSHA-related facilities. He has handled cases before the MSHA and OSHA Review Commissions and in state and federal courts. Throughout his career, he has worked with mine operators and OSHA general industry facilities on 5 continents to implement safety and health programs and audits.

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