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Equal Opportunity Commission

Seventh Circuit Holds that Applicant's Seizure Disorder is a "Direct Threat"

By Diana Schroeher, Esq.

On February 11, 2022, the U.S. Court of Appeals for the Seventh Circuit ruled that an applicant's Seizure Disorder (Epilepsy) would pose a "direct threat" to himself and others in the workplace, and the Court affirmed the lower court's order granting the employer's motion for summary judgment. The employer withdrew an offer of employment and the plaintiff filed suit, claiming that the employer discriminated against him on the basis of his disability. The Americans with Disabilities Act (ADA) defines "direct threat" as "a significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation". Determining whether an applicant or employee would pose a direct threat requires the employer to perform an individualized assessment of the individual's present ability to safely perform the essential functions of the job.

U.S. Steel extended a conditional offer of employment to plaintiff, for work as a Utility Person, a safety-sensitive position which required handling power tools and torches, controlling mobile equipment, and requiring him to work near hazardous chemicals and molten metal. The offer was contingent upon the plaintiff completing a fitness-for-duty examination. The medical examination revealed that plaintiff had suffered four seizures in the past, and had been taking medications for several years. The exam also revealed that, several months before he applied to U.S. Steel, plaintiff had stopped taking any medications because of the adverse side effects. This was done against his neurologist's advice. Plaintiff's seizure disorder was

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uncontrolled, and plaintiff was again at high risk for seizures.

The ADA prohibits discrimination against a qualified individual on the basis of disability. The ADA also prohibits employers from "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability … unless the standard … is shown to be job-related and is consistent with business necessity." The court acknowledged that a requirement that an employee not pose a direct threat to the health or safety of himself or others in the workplace is permissible, even if it tends to discriminate. The employee must show that he is a "qualified individual" able to perform the "essential duties" of the job with or without reasonable accommodation. It is the employer's burden to show that their qualification standards are necessary to prevent a direct threat, and that the employer conducted an individualized assessment.

The court stated that the ADA required the employer's direct threat analysis to include an individualized assessment of the applicant or employee, which must be informed by "a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence" and must also consider the following:

1. The duration of the risk;
2. The nature and severity of the potential harm;
3. The likelihood that the potential harm will occur; and
4. The imminence of the potential harm.

The court found that U.S. Steel's direct threat analysis included a review of adequate objective medical evidence, including the Department of Transportation's motor carrier handbook of physical qualifications for drivers of commercial motor vehicles, reports from several medical professionals, including plaintiff's neurologist, diagnostic tests, and plaintiff's own statements. In reviewing the four factors, the court found that since plaintiff's Seizure Disorder was uncontrolled, that the duration was "indefinite"; that the severity of harm was "catastrophic" if plaintiff lost consciousness in a dangerous setting; that the harm was likely to occur; and that the evidence relating to imminence of the potential harm (although not as strong) did weigh in favor of U.S. Steel, and a finding that employing plaintiff could result in a direct threat to himself or others in the workplace. The court found that the employer had not violated the ADA in rescinding its conditional offer of employment.

Securities and Exchange Commission

SEC Gets Active on Environmental, Social & Governance Disclosures

By Adele L. Abrams, Esq., CMSP

The federal Securities and Exchange Commission (SEC) announced on March 21, 2022, that it is launching a landmark proposal that would require publicly traded companies to disclose some environmental impact information, such as greenhouse gas emissions, as part of the Administration's effort to combat climate change. Initial approval was given during a public meeting, and once published will provide a 60-day comment period for the public.

The new rule would set up a reporting framework that would require disclosure of specified information in annual reports and corporate stock registration statements. Some speculate that this could be the "new Sarbanes-Oxley" in terms of impact on risk-based internal audits for ESH and other organizational and regulatory areas that influence Environmental, Social & Governance ("ESG) disclosures to shareholders and potential investors. The SEC

reported that about one-third of corporate annual reports already include some climate impact disclosures. Although business groups have signaled opposition to the initiative, investor groups have supported enhanced disclosure and argue that this better protects investors against risk that a company's value will plummet due to consumers rejecting investments that contribute to global warming.

ESG disclosures are not just a United States' initiative. The United Nations adopted 17 sustainability goals relating to ESG, and representations about ESG performance can have a multifaceted impact on multinational employers. There are a range of factors that can be considered when evaluating a company's track record on ESG including:

- *Environmental*: company's impact on environment; risks and opportunities associated with climate change, and its impact on org, its business & industry,
- *Social*: org's relationship with people/society (DEI, safety and health, human rights, community investment), and
- *Governance*: How company is run (transparency and reporting, ethics, compliance, shareholder rights) and composition and role of board (DEI).

A publicly traded corporation's track record on the governance component reflects its compliance with environmental, occupational safety and health, and employment laws, and so a history of violations, discrimination or whistleblower complaints can tarnish the company's reputation when scrutinized by investors who purchase stocks and other commodities regulated by the SEC.

Green is apparently Gold: over $30 Trillion (USD) in investment assets are already under management in ESG-linked products (up 525% between 2015-2019 – *Morningstar* statistics), and have a superior return on investment. The trend is expected to continue, but more scrutiny is being given now as to representations made by corporations professing to have strong "ESG" performance, so the new rules will be a way of policing such representations. Significantly, the anticipated rule is expected to have a downstream impact outside the public corporate sector, because those covered by SEC rules will have to disclose not only their own gas emissions, but also those of their suppliers and partners – "Scope 3 emissions."

For more information on this rule as it develops, contact the Law Office at 301-595-3520. We also assist with mandated SEC reporting of certain citations/orders issued by the Mine Safety and Health Administration to publicly traded companies.

California OSHA

California Employers Oppose New Bill Allowing Employees to Leave Workplace if They "Feel Unsafe"

By Josh Schultz, Esq.

A proposed California law, Senate Bill 1044, would greatly lower the threshold for employees to leave their workplace without discipline if they feel unsafe due to a "emergency conditions." The bill, which recently passed the California Senate Labor, Public Employment and Retirement Committee, will now move to the full state senate floor for a vote.

This bill proposes to prohibit employers from taking or threatening any forms of discipline against any employee for refusing to report to, or leaving, a workplace affected by emergency conditions because the employee feels unsafe. Further, SB 1044 would forbid an employer from preventing any employee from accessing the employee's mobile device or other

communications device for seeking emergency assistance, assessing the safety of the situation, or communicating with a person to verify their safety.

The bill was introduced by Sen. Maria Elena Durazo (D-Los Angeles), who said in a statement that "The ability to keep yourself safe on the job, and especially so in life or death situations, should be a given, but many workers are subjected to what is essentially confinement at their jobs during natural disasters. SB 1044 will make sure that these workers can look out for their own safety while not having to fear losing their job as a consequence."

Employer groups are concerned with the broad language of the bill. The bill's definition of "emergency condition," which triggers the right for employees to leave the worksite, is wide-ranging. The events which trigger the worker protections include:

- A Presidential declaration of a major disaster or emergency, caused by natural forces, in accordance with the federal Robert T. Stafford Disaster Relief and Emergency Assistance Act
- A declared state of emergency or local emergency due to conditions of disaster or extreme peril to the safety of persons or property within the affected area caused by natural forces.
- A federal, state, regional, or county alert of imminent threat to life or property due to a natural disaster or emergency.
- An event that poses serious danger to the structure of a workplace or to a worker's immediate health and safety.
- An order to evacuate a workplace, a worker's home, or the school of a worker's child.

Employer groups have pointed out that California has been in a continuous "state of emergency" due to COVID-19 since March 2020.

The bill's language, allowing employees to leave the worksite where they "feel unsafe," is far more subjective than the current standard. Employees would only have to say that they feel unsafe; there is no objective standard or a reasonableness requirement. Currently, under CalOSHA regulations, employees can refuse to work if the following conditions are met: Performing the work would violate a Cal/OSHA health or safety regulation; and the violation would create a "real and apparent hazard" to employees. Additionally, employees must inform their supervisors of the hazard and must be willing to continue working if the hazard is corrected. Federal OSHA requires that employees have a reasonable, good faith belief that there is a real danger of death or serious injury.

U.S. Department of Labor

Court Reinstates Trump Administration's "Independent Contractor Rule"

By Adele L. Abrams, Esq., CMSP

Employers who try to determine whether a worker should be classified as an "employee" or as an "independent contractor" have more changes to contend with now, after U.S. District Court (E.D.-TX) ruled on March 14, 2020, that the Biden administration's withdrawal of the Trump Labor Department's January 2021 "Independent Contractor" rule (governing worker status under the Fair Labor Standards Act) was invalid. The Biden administration failed to follow proper rulemaking procedures under the Administrative Procedure Act, which applies both to new rules and to modification or rescission of existing rules. The APA requires publication of a "notice" in the Federal Register and a period during which members of the public can submit comments. In some cases, public hearings may be required. While

publication of notice occurred, only a 19-day comment period was provided and no alternatives were presented for consideration.

The Trump rule was published in early January 2021, shortly before the Biden inauguration, and was slated to take effect in March 2021, but was placed on hold initially in February 2021, and then was formally withdrawn in May 2021. The Coalition for Workforce Innovation, representing "gig" economy employers who use many flexible workers who would be considered contractors under the Trump rule but would be deemed employees under the Biden interpretation (which reverted to Obama-era case law and guidance that the Trump standard had superseded).

Proper classification of an individual is important because employees are eligible for protections under civil rights law, the Affordable Care Act, unemployment insurance and worker's compensation, and other company benefits such as paid leave or pensions. Employers must also make tax contributions (FICA) on behalf of employees, whereas independent contractors must pay both the employee and the employer contributions into Social Security. There are also different tax consequences for both the employers and for the workers classified as contractors.

The Trump independent contractor rule places significant emphasis on whether a worker was "dependent" on the purported employers for work versus being dependent upon the income received. The test prior to 2021 looked at seven "economic realities" factors (also used by the Internal Revenue Service) to analyze the work relationship. Those seven factors were reduce to a two-factor test under the Trump standard: (1) the nature and degree of control over the work; and (2) the worker's opportunity for profit and loss.

For additional clarification, there were three other factors that could be considered if the issue was not resolved by the two-part test: (1) Amount of specialized training or skill required for the work that the purported employer does not provide; (2) Degree of permanence of the working relationship, focusing on the continuity and duration of the relationship, and leaning toward classifying the worker as a contractor if the work was sporadic; and (3) Whether the work performed was "part of an integrated unit of production."

The Labor Department can still appeal the case to the US Court of Appeals, or it can opt to re-promulgate the rescission properly under the APA. Because this is a key issue for the Administration, it is unlikely that the Trump rule will be left in effect permanently. The DOL definition of "independent contractor" can also be a factor in OSHA and MSHA enforcement, particularly when it comes to applying the multi-employer worksite tests or determining the entity with primary responsibility for training, PPE and other OHS issues.

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

Safety Culture

Data Suggests Mine Operators Need to Focus on Miners' Mental Health

By Michael Peelish, Esq.

Mine operators are good at paying attention to data. Operators review their mine's tons or yards per shift, maintenance downtime, hours of tire life, etc., etc., etc. However, when it comes to healthcare or workers compensation data about subjects like mental health, operators throw the data under the proverbial haul truck without taking a moment to review.

NIOSH kicked off the Miner Health Program (MHP) in October 2021 as a long-term, systematic effort to understand and improve the health and well-being of all miners through focused integration of research,

transfer of findings, evaluation, and community engagement. The second meeting of the MHP was held virtually on March 10th and involved a presentation by Dr. Michel Lariviere and Dr. Zuzsanna Kerekes regarding a 5-year research project to develop a mental health strategy studying the mental health of miners and other workers at Vale's Sudbury operations in Ontario, Canada using several clinical instruments. The virtual meeting had a 30-minute break out session that allowed for group discussion which was helpful to receive other points of view.

Why did Vale agree to and fund this intrusive research project and why did the USW agree to support its members' participation? Data showed that of disability claims related to mental health across the province, 78% were short term while 67% were long-term. Vale's data for its Ontario operations showed that one in four disability claims was associated with mental health. Despite those statistics, there is very little research done on predictors, facilitators, and barriers to mental health in mining. Thus, Vale embarked on an ambitious journey.

A total of 2,224 participants (56%) from Vale across 25 work sites responded to a series of four questions, and of those who participated the average was 43.6 years old, with 17.2 years of mining experience.

Q1: Participants were asked about their state of mental health and the well-being of Vale employees? 56% responded they are experiencing enough symptoms to pay some attention; 18% showed mild levels of depressive symptoms; 10% experienced thoughts of suicide, but weren't planning to carry those thoughts out; and 10% showed symptoms of post-traumatic stress disorder (PTSD).

Q2: Participants were asked what factors most strongly relate to the mental health and wellbeing of workers? 30% experienced "fairly bad sleep" averaging 6.2 hours of sleep and 28% screened positively for signs of burnout. Miners are telling management that they're tired. The research did show that employees were committed to the work they were doing and perceived that their physical safety on the job to be greater than their psychological safety. Additional factors impacting workers' mental health included anxiety, which in itself is exacerbated by things like chronic pain, physical illness, depression or stress, a previous mental health diagnosis, drug use (self-medicating), and workload. The participants did note that social support from family and friends helped counteract negative influences.

Q3: What factors predict an absence from work? Participants listed working more than eight hours, reporting symptoms of burnout, engaging in hazardous work, feeling discriminated at work, commuting more than an hour to work, and a mental health diagnosis or treatment as the top factors.

Talk to employees more openly about how they feel and ask if they are "present" today to go to work safely.

Q4: What helps get people back to work after they've been away for an injury or illness-related absence? 66% of participants cited access to good medical support as the most significant factor. Other factors included receiving appropriate and timely medical treatment, family support, modified work, supervisory support, and assistance from Vale's occupational disease committee. Financial need came up as the top barrier to workers returning to work since workers felt like they had to go back to work because they were financially struggling which makes for a riskier return-to-work situation.

So now what did Vale do with these new data points? The company used the findings to introduce new mental health policies into the workplace also creating a new mental health strategy, called MINES for Minds – MINES being an acronym for monitor, intervene,

normalize, encourage, support. Its three-pronged approach will (1) focus on identifying and minimizing risk factors for workers and the company, (2) promoting protective factors and eliminating the stigma of mental health, and (3) optimizing support services that help workers stay at or return to work.

So now what do mine operators, safety professionals, and operations management do with these research finding? That is something that you will need to sort out by reviewing the four simple questions and the responses. There may be some ideas in this information that may assist your operation. Talk to employees more openly about how they feel and ask if they are "present" today to go to work safely. Consider introducing a mental aid first aid course in 24-hour refresher training. Also, ensuring folks returning to work after an absence are fit for duty and in a good state of mind without feeling they must be there for another reason such as financial. Looking at schedules may be another idea. Providing traveling miners a fair per diem to remove the anxiety of being away from home 4 nights a week, or altering the work schedules so they start late on a Monday. Or giving miners today a fuel bonus for the long distances they may have to travel.

Regardless, how you feel about this topic of mental health, do not ignore the potential to improve your operations overall performance and retention of workers by showing some empathy, not sympathy, for workers needing a hand up. From what I have learned over the years managing human resources and safety for publicly-traded mining companies, if you do embark on exploring opportunities to address mental health, work with her healthcare provider and/or consultant who have knowledge and programs to assist you, and go slow. This is not like a P/F drug or alcohol test. As one of the participants in our breakout session said, "it is time to get uncomfortable", and they are right.

Safety Culture

Alcohol Caused More Deaths than COVID in 2020

By Adele L. Abrams, Esq., CMSP

A new federal study by the National Institute on Alcohol Abuse and Alcoholism found a 25.5 percent increase in alcohol-related deaths in 2020, compared with 2019 – whereas the increase from 1999 to 2019 had been just 3.6 perecent. This startling data showed that more adults under age 65 died from alcohol-related factors (74,408) than died from COVID-19 (74,075) in 2020. Overall, just under 100,000 Americans (99,017) died from alcohol-related factors in 2020 – representing 3 percent of all deaths that year.

Most studies, including this one that appears in the Journal of the American Medical Association, have observed an increase in alcohol and drug abuse and deaths related to substance abuse since the COVID-19 pandemic began. Mental health issues, including use of substances in response to stress, anxiety or depression, and lack of access to treatment programs were factors in these increased deaths, but the JAMA study notes that other causes of alcohol-related death included alcohol withdrawal and issues with transplants for alcohol-associated liver disease. The study authors also assumed that many people who were in recovery but who had reduced access to support systems such as AA and NA relapsed during this period.

Alcohol sales were at the highest level in 18 years during 2020, and consumption in the U.S. that year represented the largest year-over-year increase since 2002. Online alcohol sales quadrupled as well – from $441 million in 2019 to $1.87 billion in 2022.

Meanwhile, fentanyl became the top cause of death for Americans in the 18-45 age bracked in both 2021 and in 2022 to date, with 64,178 deaths in 2021 compared

with 32,754 for 2019. The fentanyl deaths in that age group exceeded the number of deaths caused by car accidents, suicides, cancer or COVID-19.

Employers can play a key role in substance abuse prevention, by supporting recovery efforts through medical insurance and Employee Assistance Programs, and through education and outreach in the workplace. Substance abuse – both alcohol and (legal and illegal) drugs -- impacts worker health and safety, on and off the job! For assistance in crafting legally effective substance abuse prevention and drug testing programs, contact Adele Abrams at safetylawyer@gmail.com.

Oregon OSHA

Oregon OSHA Removes Indoor Masking Requirements

By Josh Schultz, Esq.

On March 18, 2022, Oregon OSHA amended their Rule Addressing COVID-19 Workplace Risks to remove the indoor masking requirements and most other provisions. The amendment followed the expiration of Oregon Health Authority rules requiring masks in indoor public places and schools.

Although the amendment repeals the indoor masking requirements, some provisions also remain in place for all Oregon workplaces. The provisions require employers to allow workers to voluntarily use facial coverings and provide facial coverings at no cost to workers. Additionally, employers must facilitate COVID-19 testing for workers if such testing is conducted at the employer's direction by ensuring the employer covers the costs associated with that testing, including employee time and travel.

Oregon OSHA also recommends that employers should: Continue to optimize the use of ventilation systems to help reduce the risk of COVID-19 transmission; follow Oregon Health Authority, public health, or medical provider recommendations for isolation or quarantine of employees for COVID-19; and provide notice to workers who have had a potential work-related exposure to COVID-19 within 24 hours.

Virginia OSHA

VOSH C-19 Rule Revoked!

By Adele L. Abrams, Esq., CMSP

Virginia's Safety and Health Codes Board voted on March 21, 2022, to revoke the state OSHA agency's COVID-19 standard covering all industry sectors, finding that COVID-19 no longer posed a "grave danger" to workers. Virginia's agency, "VOSH," was the first of the 22 states that operate their own OSHA programs to promulgate a COVID-19 standard in July 2020, and also was the first to make it a permanent rule – rather than an emergency temporary standard.

With the election of Gov. Glenn Youngkin (R-VA), there was immediately a call by him for the Board to rescind the rule, which had been enacted under Democratic Gov. Ralph Northam to combat COVID outbreaks in the state's protein plants, health care facilities, correctional institutions, and other workplaces where close contact between workers indoors occurred. The rule was quite comprehensive and required worker training, improved indoor ventilation, masks or respiratory protection, sanitation measures, and reporting of outbreaks at a worksite.

The Standards Board's vote to rescind the rule was 6-0 to and the rescission became effective upon publication in the *Richmond Times-Dispatch*

newspaper (the state paper of record). VOSH continues to encourage vaccination against COVID-19 and can still enforce existing VOSH/OSHA standards such as sanitation, respiratory protection, recordkeeping/reporting of COVID-19 work-related cases, and under the overarching "General Duty Clause." The revocation does not block VOSH from promulgating another COVID-19 rule in the event that circumstances warrant it, such as a resurgence of work-transmitted cases due to a new variant. However, the same process used for the original rule – including approval by the Standards Board – would be required in the future.

Occupational Safety and Health Administration

OSHA Reboots Rulemaking Process for COVID-19 Final Rule

By Adele L. Abrams, Esq., CMSP

The Occupational Safety and Health Administration (OSHA) has reopened the Healthcare Emergency Temporary Standard (ETS)/proposed rule for prevention of COVID-19 rulemaking record and scheduled an informal public hearing to seek comments on specific topics that relate to the development of a final standard to protect healthcare and healthcare support service workers from workplace exposure to the COVID-19 virus. Interested parties can submit comments online (Docket No. OSHA-2020-0004) by the new deadline of April 22, 2022.

The public hearing is scheduled online for April 27, 2022, and individuals interested in testifying at the hearing must submit a Notice of Intention to Appear no later than 14 days after the notice appears in the March 23, 2022, Federal Register.

In June 2021, OSHA issued an ETS to protect workers in healthcare settings from occupational exposure to COVID-19. The ETS also served as a proposed rule – focused on healthcare workers most likely to have contact with people infected with the virus. The agency is reopening the rulemaking record, in part, to allow for new data and comments on topics, including the following:

- Alignment with the Centers for Disease Control and Prevention's recommendations for healthcare infection control procedures.
- Additional flexibility for employers.
- Removal of scope exemptions.
- Tailoring controls to address interactions with people with suspected or confirmed COVID-19.
- Employer support for employees who wish to be vaccinated.
- Limited coverage of construction activities in healthcare settings.
- COVID-19 recordkeeping and reporting provisions.
- Triggering requirements based on community transmission levels.
- The potential evolution of SARS-CoV-2 into a second novel strain.
- The health effects and risk of COVID-19 since the ETS was issued.

As OSHA works towards a permanent regulatory solution, employers must continue to comply with their obligations under the General Duty Clause, Personal Protective Equipment and Respiratory Protection Standards, as well as other applicable OSHA standards to protect their employees against the hazard of COVID-19 in the workplace, both within and outside of the healthcare industry where there is a recognized hazard from COVID-19.