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Maryland Department of Labor

Maryland OSHA Proposes Heat Stress Rule

By Adele L. Abrams, Esq., CMSP

On October 7, 2022, the Maryland Department of Labor proposed adoption of a heat stress standard, to be enforced by the department's state-plan OSHA agency (MOSH). The proposed rule appears in the Maryland Register, Vol 49, Issue 21, and has a comment deadline of November 7, 2022, although that could be extended. The proposal was initially considered at an open meeting of the Maryland Occupational Safety and Health Advisory Board on August 23, 2022, and would apply to all industry sectors under MOSH jurisdiction.

The standard would be triggered when the "heat index" reaches 88 degrees Fahrenheit, or where external influencing factors increase the potential for serious heat-related illness – including radiant heat sources, conductive heat sources, movement of air, severity and duration of workloads, and the protective clothing and other PPE worn by the worker. The "Heat Index" is not specified but simply is defined as the "apparent temperature … what the temperature feels like to the human body, when relative humidity is combined with the air temperature."

The rule would also require employers to consider workers' "Personal risk factors" for heat-related illness when crafting a program and protocols. Those factors include: age, degree of acclimatization, health, consumption of water, alcohol and caffeine, and use of prescription medications. Inquiries into these matters may have implications under the Americans with Disabilities Act and the Age Discrimination in Employment Act, as well as the analogous Maryland and county statutes. Some inquiries could also raise HIPAA issues.

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Where conditions trigger the rule, employers would have to have a heat-related illness prevention and management program with provisions for: potable drinking water, rest and recovery breaks with shade or methods of cooling, monitoring of workers for heat-related illness and acclimatization, and identification of work process and external factors that increase the likelihood of heat risk: increased metabolic workloads, radiant and conductive heat sources, increased humidity, decreased air movement, and PPE use.

Both supervisory and hourly workers would also require mandatory training on recognizing working conditions that could cause illness, personal risk factors, importance of frequent consumption of water and acclimatization, and the signs and symptoms of heat illness and response procedures. The proposed rule also has a section on Emergency Response Procedures, making the employer responsible for ensuring effective communications with workers to enable emergency medical services, monitoring workers for signs and symptoms of heat stress, and contacting EMS or transporting workers to emergency medical providers, as needed.

Federal OSHA lost a heat stress case in recent years (*Sturgill Roofing*), brought under its General Duty Clause, because it attempted to rely on the National Weather Service's Heat Index, with the court finding that this was not a scientific measurement and therefore could not be used for enforcement. However, that decision is not binding upon Maryland's agency, which has its own body of case law through the state court system.

Federal OSHA is now in the process of a heat stress standard rulemaking but suggested that an 80-degree actual temperature would be the trigger for provisions. Other state plan states including California, Oregon and Minnesota, currently have heat stress prevention rules but all differ from each other – some only applicable indoors or outdoors. Both the Maryland proposal and the federal rulemaking would be applicable in all work environments, indoors and out.

Comments should be directed to: Michelle F. Vanreusel, Acting Deputy Commissioner, 10946 Golden West Drive, Suite 160, Hunt Valley, MD 21031, or can be emailed to dli.regulations+HS@maryland.gov, or faxed to 410-767-2986. No public hearing has been scheduled.

For assistance with comments or heat stress program development, contact Adele Abrams at safetylawyer@gmail.com.

Occupational Safety and Health Administration

Court of Appeals Reverses OSHRC in Important Case for Material Storage and Distribution Centers

By Gary Visscher, Esq.

At issue in the case, *Secretary of Labor v. Walmart* (2d Cir., Oct. 4, 2022) was the meaning and application of OSHA's standard on Secured Storage, 29 C.F.R. § 1910.176(b). The standard requires that "[b]ags, containers, bundles, etc. stored in tiers shall be stacked, blocked, interlocked and limited in height so that they are stable and secure against sliding or collapse."

The question was whether the standard applies when pallets are placed on racks or shelves, as is common in distribution centers (and large box stores), or only when containers or pallets sit directly on top of each other.

OSHA issued a citation for violation of the standard after a Walmart employee working at a distribution center in New York was injured by falling containers of

crescent rolls. The accident resulted when a forklift operator retrieving a pallet on the adjoining aisle inadvertently pushed a pallet holding containers of crescent rolls, causing the pallet to tip and containers to fall. The pallets were on storage racks, with pallets placed back-to-back. The pallets were placed on the racks, and not directly upon each other, leaving a space of about 42 inches under each rack.

Walmart contested the citation, and before the Administrative Law Judge argued that the standard did not apply because the material that fell was in the process of being "placed in storage" rather than "stored," as the standard requires. The ALJ rejected that argument, and held that the standard applied. The ALJ also found that OSHA proved the remaining elements for a violation and upheld the citation.

Walmart appealed, and before the Commission argued, among other things, that the standard did not apply in this case because the materials on the storage racks were not "stored in tiers" as the standard states. The Commission majority agreed with that argument. In the 2 to 1 decision, the Commission held that the standard did not apply because "tiers" require items to be in "layers," which the majority said, meant that that the items must be directly on top of each other. In this case, the pallets were placed on racks (or shelves), with space under each rack. The Commission therefore found 1910.176(b) did not apply to where pallets are placed on shelves or racks, rather than stacked directly on top of each other.

Since the Commission majority found the standard did not apply, it did not reach the other factors that OSHA must prove to uphold a citation (the terms of the standard were violated, the employer knew or could have known of the violative condition, and one or more employees had access to the cited condition), nor the affirmative defense of employee misconduct that had been raised by Walmart. OSHA appealed the Commission decision to the Second Circuit Court of Appeals. The Court unanimously reversed the Commission on the applicability of the standard, and remanded the case to resolve the remaining factors.

First, the Court disagreed with the Commission's "cramped definition" of the word "tiers." In its decision, the Commission cited a definition of "tier" ("a row, rank or layer of articles") found in Webster's Third International Dictionary (1971). The Commission then said that the spaces between the racks on which the pallets were placed meant that the pallets were not in "layers." The Court of Appeals cited definitions of "tier" found in other dictionaries of the same era (The American Heritage Dictionary of the English Language (1969), The Oxford English Dictionary (1971)) which defined "tiers" as items "one above another" but did not limit the word to situations in which "materials [were] stacked on top of each other directly." The Court also noted that The Oxford English Dictionary explicitly included "shelves" within its definition of "tiers."

Furthermore, the Court said, under the Supreme Court's decision in *Martin v. OSHRC*, 499 U.S. 144 (1991), "[e]ven if we were to find that the Commission's interpretation was reasonable, the Secretary's interpretation would prevail, as it is entitled to substantial deference 'so long as it is reasonable, that is, so long as it sensibly conforms to the purpose and wording of the regulations… We conclude that the Secretary's competing interpretation of the language of the standard is reasonable."

In its decision, the Commission majority offered as an illustration of "tiers" a wedding cake which "consists of individual layers that sit directly upon the layer below." In a footnote, the Court of Appeals observed that the Commission's example did not hold up: "we note, as the dissenting commissioner did, that even in the Commission's examples, the tiers stacked on top of each other often include materials in between. For example, a well-made cake will include buttercream between the tiers, for added flavor and stability. And intricate cakes include dowels inside, as well as decorative pillars, for added support."

Employment Law

Department of Labor Publishes Proposed Rule on Contractor-Employee Misclassification

By Diana Schroeher, Esq.

On October 13, 2022 the U.S. Department of Labor (DOL) published a Proposed Rule to modify the Fair Labor Standards Act (FLSA) test used to determine whether a worker is an independent contractor or an employee. The DOL's Press Release states that the new Rule would provide guidance on classifying workers, and seek to combat employee misclassification. The Proposed Rule would rescind the Trump-era Rule and signals a return to longstanding court precedent which includes the broader "totality of the circumstances" of the economic realities analysis. The DOL's October 11, 2022 Press Release can be viewed here: https://www.dol.gov/newsroom/releases/WHD/WHD20221011-0

The FLSA's minimum wage, overtime and recordkeeping protections apply to employees, not to independent contractors. When workers are misclassified as independent contractors, they are denied these rights and protections. The DOL states that misclassification of workers continues to be an issue of concern, as it "promotes wage theft, allows certain employers to gain an unfair advantage over other law-abiding businesses, and hurts the economy at large."

The current Rule became effective on January 21, 2021 at the tail end of the Trump administration. The Biden Administration quickly attempted a stay and withdrawal of the 2021 Rule, but court challenges required the process to proceed through more formal rulemaking procedures, providing "Notice and Comment" to the public. The current Trump-era Rule emphasizes two core factors in determining when a worker is an employee or an independent contractor – looking at the worker's degree of control over their work, and the worker's opportunity for profit or loss depending on managerial control over the work. The DOL believes that consideration of these two factors alone "departs from decades of case law applying the economic realities test, as it "limits the facts that may be considered as part of the test."

The Proposed Rule would restore the multi-factor "totality of the circumstances" analysis which includes a six-factor test to determine whether a worker is "economically dependent" on an employer for work. These factors are designed to reflect the true "economic realities" of the relationship, and include:

- The opportunity for profit or loss depending on managerial skill;
- Investments made by the worker and the employer;
- The degree of permanence of the work relationship;
- The nature and degree of control over the working relationship;
- The extent to which the work performed is an integral part of the employer's business; and
- The skill and initiative of the worker in performing the work.

Both the current and Proposed Rule permit additional factors to be used if applicable to the economic realities of the relationship. The DOL urges that the enumerated factors are "not to be applied mechanically, but should be viewed along with any other relevant facts in light of whether they indicate economic dependence or independence." The economic reality is what matters, and not labels or formalities.

Interested parties may submit comments to the DOL on the Proposed Rule until November 28, 2022. Please contact the law firm for assistance with preparing comments, or for more information.

Mine Safety and Health Administration

Court of Appeals Upholds Flagrant Violation

By Josh Schultz, Esq.

In an August 22, 2022 decision, the United States Court of Appeals For the Eighth Circuit upheld a "flagrant" order against an iron ore mine operator in Minnesota after a contract worker was injured on a walkway. In the case, *Northshore Mining Company v. Secretary of Labor,* the 8th Circuit also found two managers employed by Northshore personally liable for the violation and assessed each with a $4,000 fine based on the managers' lack of effort to encourage repairs despite knowing about a dangerous walkway.

The court noted that in June 2015, an independent engineering report commissioned by the company found that an elevated walkway at its iron ore processing plant was structurally inadequate and unsafe for use. Mud and debris often covered the walkway, which hid the deficiencies from miners' view. The decision states that "Northshore made no efforts to repair the walkways and did not prohibit access to them or put up signs warning about their condition. [Management] decided to implement a fall protection policy for miners on the outer walkways. Northshore did not enforce compliance with the policy."

In September 2016, a miner working on the walkway about 50 feet above the ground was injured when the walkway collapsed. The miner suffered a spinal contusion, was diagnosed with PTSD, and experienced disrupted sleep. He filed a hazard complaint with MSHA, leading to the inspection resulting in the citations at issue.

The "flagrant" designation was added to MSHA's citations and orders after Congress passed the Mine Improvement and New Emergency Response Act in 2006 (MINER Act). The MINER Act created the flagrant designation, with penalties currently up to $291,234, to be imposed for flagrant violations of mine health and safety standards. The MINER Act defines a flagrant violation as "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury."

MSHA's litigation position, taken from the Second Restatement of Torts, defined reckless to mean "if [a mine operator] knows, or should know to ameliorate a known violation, but fails to make reasonable efforts to fix the violation."

In determining whether Northshore's failure to repair the walkway constituted a flagrant violation, the Court of Appeals looked to the definition of "reckless." The Court noted that the MINER Act does not define reckless nor is its meaning readily apparent from references to other sources such as the Mine Act. MSHA's litigation position, taken from the Second Restatement of Torts, defined reckless to mean "if [a mine operator] knows, or should know to ameliorate a known violation, but fails to make reasonable efforts to fix the violation." MSHA argued that this "definition also is consistent with how civil recklessness is defined elsewhere." The Court of Appeals found that MSHA's definition of reckless was reasonable and aligned with the MINER Act's purpose. Thus, MSHA's showing that Northshore's failure to make reasonable efforts to fix

the walkway, and that the condition reasonably could have been expected to cause death or serious bodily injury justified the flagrant characterization to the Court of Appeals.

Safety Standards

ANSI/ASSP Changes to SRDs are Effective for Manufacturers February 1, 2023

By Michael Peelish, Esq.

During a recent meeting of fall protection device experts that was sponsored by the Washington Metropolitan Area Construction Safety Association (WMASCA) that I attended, it dawned on me that employers and mine operators might not fully understand the changes to the new **ANSI/ASSP Z359.14-2021 Safety Requirements for Self-Retracting Devices for Personal Fall Arrest and Rescue Systems** because some of the safety professionals there were confused. So, with some information gathered at that meeting, the following is some background information and some notable changes between the former Z359.14-2014 standard and the new 2021 standard.

- Test Mass increased from 282 pounds to 310 pounds
- SRD Classifications revised away from Class A and B:
- Class 1 SRD is for use with anchorages AT or ABOVE the dorsal D-ring with maximum allowable freefall of 2 feet
- Class 2 SRD is for use with anchorages ABOVE or BELOW the dorsal D-ring with a maximum allowable freefall of 6 feet
- Icons have been designated for labels that now include Class 1 (white background, black letters) and Class 2 (black background, white letters)
- Updated SRL Categories are: SRL; SRL-P (new for personal); SRL-R (carryover); SRL-LE has been removed and now designated under Class 2
- Webbing and synthetic rope used in Class 2 devices must now be 5,000 pounds which was formerly 4,500 pounds
- The average arresting force (AAF) has been increased from 900 pounds to 1,350 pounds and the arrest distance (AD) shortened from 54 inches to 42 inches.

Products manufactured under prior Z359.14 standards (2014 most likely) are grandfathered for use so long as the devices meet the manufacturer's inspection requirements conducted by a competent person. All the manufacturers who spoke at the meeting stated that they had authorized repair places to provide technical assistance ensure testing and relabeling and repair of former units.

What are the practical effects or things to keep in mind for the OSHA regulated employers and MSHA regulated operators?

- All manufacturers who spoke at the meeting stated they would be ready by the 2/1/2023 date to manufacture the SRDs under the new Z359.14 (2021) standard, and some already are selling
- Class 2 SRDs accommodate all situations of anchorage points and leading-edge issues
- If a worker in a lift basket may have to exit the basket, using a Class 2 harness ensures complete compliance while exiting the basket

and at the workplace the worker is trying to reach

- Class 2 SRD has an integrated shock absorber, while a Class 1 is optional
- Manufacturers will provide clearance and swing charts
- For fall clearance calculations, the arrest distance will likely change to 42 inches
- Manufacturers are providing a trade-in, trade-up programs
- My sense was that employers who will purchase units in the future will purchase the Class 2 SRDs notwithstanding the additional costs

Good information to share internally and to use to establish purchasing guidelines going forward before your next SRD purchase!

Occupational Safety and Health Administration

OSHA Relaunches Beefed-Up Severe Violator Enforcement Program

By Adele L. Abrams, Esq., CMSP

OSHA has relaunched a revised Severe Violator Enforcement Program (SVEP), building on its 2010 program that went dormant during the Trump administration. OSHA's updated SVEP criteria include the following:

- Program placement for employers with citations for at least two willful or repeated violations or who receive failure-to-abate notices based on the presence of high-gravity serious violations.
- Follow-up or referral inspections made one year – but not longer than two years – after the final order.
- Potential removal from the Severe Violator Enforcement Program three years after the date of receiving verification that the employer has abated all program-related hazards.
- Employers' ability to reduce time spent in the program to two years, if they consent to an enhanced settlement agreement that includes use of a safety and health management system with seven basic elements in OSHA's Recommended Practices for Safety and Health Programs (I2P2).

OSHA first introduced the SVEP in June 18, 2010, replacing the "Enhanced Enforcement Program." OSHA designates employers as "severe violators" if they have an inspection meeting one or more of the following criteria:

- Fatality/Catastrophe Criterion: A fatality/catastrophe inspection in which OSHA finds one or more willful or repeated violations or failure-to-abate notices based on a serious violation related to a death of an employee or three or more hospitalizations.
- Non-Fatality/Catastrophe Criterion Related to High-Emphasis Hazards: An inspection in which OSHA finds two or more willful or repeated violations or failure-to-abate notices (or any combination of these violations/notices), based on high gravity serious violations related to a High-Emphasis Hazard. High-Emphasis Hazards are targeted and include fall hazards and hazards identified from the following National Emphasis Programs (NEPs): amputations, combustible dust, crystalline silica, excavation/trenching, lead, and shipbreaking.

- Non-Fatality/Catastrophe Criterion for Hazards Due to the Potential Release of a Highly Hazardous Chemical (Process Safety Management): An inspection in which OSHA finds three or more willful or repeated violations or failure-to-abate notices (or any combination of these violations/notices), based on high gravity serious violations related to hazards due to the potential release of a highly hazardous chemical, as defined in the PSM standard.
- Egregious Criterion: All egregious (e.g., per-instance citations) enforcement actions will be considered SVEP cases.

For assistance on OSHA compliance and enforcement, contact the Law Office at 301-595-3520.

Mine Safety and Health Administration

MSHA 3rd Quarter Stakeholder Meeting

By Michael Peelsih, Esq.

As is normal, MSHA reviewed some of the fatal injuries that occurred between June 28th and October 20th which totaled ten (10) at all mines and highlighted the following in the categories noted: Mine Size - less than 20 employees contributed 50% of the fatal injuries; Experience at Mine - miners with less than 2 years' experience contributed to 50% of the fatal injuries; and Experience at Task - miners with less than 2 years performing the task contributed to 50% of the fatal injuries. Contractors for the first time in a long time were not a focus of fatalities accounting for only 1 fatal injury (and one is too many) during this period. MSHA focused generally on the need for effective training to eliminate fatal injuries.

Fall protection was a major focus which is a carryover from the previous administration. While only one (again, and one is too many) of the 10 fatal injuries was caused by a fall to a lower level; MSHA shared numerous examples of near misses could have raised the number of fatal injuries very easily.

Greg Meikle, Chief Division of Health – Enforcement, provided summary percentage data for Coal and M/NM regarding silica overexposures by occupation/task, best practices for abatement, and a list of abatement measures taken. In my opinion, the most interesting aspect of this discussion was the list of abatement measures for dust overexposures and how MSHA is trying to track this data.

During the 3rd quarter, MSHA kicked off the Health Matters Campaign to focus on the "health" side of safety and health. Assistant Secretary Chris Williamson spoke passionately about miner "health awareness" and the need to focus on this aspect of mining especially in coal mining. The Assistant Secretary explained that a Part 90 miner outreach is underway with coal miners because MSHA knows the program is underutilized. This is likely due to the fear miners may have to exercising these rights. MSHA wants to provide information to all miners so they may make an informed decision, and especially younger coal miners since the NIOSH data shows that younger miners are getting sick quicker.

I would note that several numbers were tossed out by MSHA during the call without any support or scientific attribution. For instance, someone said that silica was 20 times more harmful than coal dust. This statement has been around a long time and derived from a math equation, not scientific studies. The coal standard was 2,000 micrograms and the silica standard is 100 micrograms, thus silica is 20 times more harmful. I believe that is the extent of the science. Also, someone from MSHA stated that miners can no longer work for 45 years and not expect to contract silicosis which is a broad statement but maybe applicable to only a few occupations.

The Assistant Secretary spoke about the priority areas to work on to improve the Part 90 coal miner program including awareness of the Part 90 miner program; assisting miners in making the decision to enter a Part 90 miner program; and provide assurances to the miner that he/she can exercise that right without fear of retaliation.

Also, when asked, the Assistant Secretary did not provide a projected date that the notice of proposed rule would be issued for respirable crystalline silica. Only several questions were taken and none of the submitted questions were read. My takeaway from the meeting is that MSHA is taking a big enforcement step into health, fall protection will get more attention, and training, training, training is the course of the day.

Congratulations to the MSHA mine rescue team won first place in the international competition!!

Occupational Safety and Health Administration

OSHA Stakeholder Meeting on PSM

By Gary Visscher, Esq.

On October 12, 2022 OSHA conducted a "virtual informal stakeholder meeting" to provide an update and receive public comments on its rulemaking project to amend and broaden the Process Safety Management (PSM) standard, 29 C.F.R. 1910.119.

The current rulemaking began with a Request for Information in 2013, followed by a SBREFA panel and report completed in 2016. The stakeholder meeting was the first formal action in the rulemaking since the completion of the SBREFA panel report.

The PSM standard was published in 1992, after several major incidents at chemical facilities in the U.S. and other countries. The standard requires covered facilities to implement process safety management programs covering 14 management system elements for controlling highly hazardous chemicals. Since 1992, several court decisions and the occurrence of a number of large and sometimes fatal releases at chemical handling and processing facilities, have led to calls and proposals to add to the coverage and requirements of the 1992 standard.

In its overview of the rulemaking, OSHA said it is considering 24 changes to the scope and requirements of the PSM standard. A full list of the issues OSHA is considering for change is in the September 20, 2022 Federal Register notice of the stakeholder meeting and on OSHA's website, at www.osha.gov/process-safety-management.

The one additional item to the issues previously under consideration and presented in the SBREFA panel process is in response to Executive Order 13990, which requires agencies to consider the effects of climate change in regulatory actions. Pursuant to the Executive Order, OSHA said it would propose that PSM-covered facilities include consideration of natural disasters, such as hurricanes and severe flooding, as well as extreme temperatures in their PSM programs.

Following OSHA's overview presentation of the rulemaking, OSHA took comments from stakeholders. Written comments and materials may be submitted until November 14, 2022.

No dates were given for the next formal step in the rulemaking process, which will likely be issuance of a proposed rule. A number of speakers at the stakeholder meeting criticized OSHA for not moving faster on the rulemaking, and urged that the PSM rule be a priority for the agency.