



Occupational Safety and Health Administration

OSHA Funding Gets Significant Bump in House Bill

By Adele L. Abrams, Esq., CMSP

On July 29, 2021, the House of Representatives passed its FY 2022 Labor-HHS-Education appropriations package, on a party line vote of 219-208, setting the stage for a showdown in the Senate – where action has been slow in developing a companion measure. The legislation sent over by the House includes \$691.7 million in funding for the Occupational Safety and Health Administration (OSHA), which is \$100 million above current levels and is \$20 million above the White House budget request for the agency. The federal government's FY 2021 ends on September 30, 2021, so passage is needed to avoid a government shutdown.

The House-passed bill includes a nearly \$22 million increase in the enforcement budget for the Mine Safety and Health Administration (MSHA), which total appropriations for the mine safety agency set at \$404.8 million. Unlike the hike for OSHA over the President's request, MSHA's House-approved funding is less than the White House's \$447.2 million proposal, but still represents more than the \$379.8 million it received from Congress in FY 2021.

When the US Department of Labor submitted its FY 2022 budget to Congress, representing the Administration's perspective, Secretary Walsh said the goal of increased funding was to "restore the department's capacity to protect the health, safety, rights and financial security of all workers." He noted that the funding increases for OSHA and MSHA will rebuild enforcement capacity, expand whistleblower programs, and increase outreach and compliance assistance.

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Much of the funding is directed at hiring new inspectors – the number of OSHA “CSHOs” (Compliance Safety and Health Officers) is at the lowest level in 48 years. Currently, it would take over 160 years for federal OSHA to inspect all workplaces under its jurisdiction. Another emphasis area is whistleblower protection, which would see its funding rise by \$11 million to \$30 million for the coming year.

Other winners in the FY 2022 appropriations legislation include the state grants program, which would receive nearly \$119 million, an increase over the FY 21 level of \$110 million. The Susan Harwood training grants program, which had been targeted for elimination in the Trump Administration, also would receive \$14.7 million, up from the current \$11.7 million level.



Occupational Safety and Health Administration

Commission Vacates Citation on Meaning of “Maintenance”

By Gary Visscher, Esq.

Does equipment “maintenance” include machine set up and adjustment? That was the question in a recent decision by the OSH Review Commission, in a case construing the Lockout/Tagout (LOTO) provision in the Concrete and Masonry Construction standard, 29 CFR 1926.702.

OSHA issued a citation against the employer after an employee was injured on a machine used to cut and bend rebar. The employee’s job included removing and replacing cylinders in the equipment in order to accommodate various sizes of rebar. The employee was removing a cylinder when the machine accidentally started, trapping and injuring the employee’s hand. Although the manual for the machine stated that the machine should be turned off

and power locked off when changing cylinders, the employee testified that he never did so.

OSHA cited the company for an alleged violation of 1926.702(j)(1), which states that “No employee shall be on permitted to perform maintenance or repair activity on equipment...where the inadvertent operation of the equipment could occur and cause injury, unless all potentially hazardous energy sources have been locked out and tagged.”

The Review Commission held that the standard did not apply to the activity involved, because the employee was not performing “maintenance” of the equipment. Instead, with reference to the dictionary definition of the term, the Commission said, “maintenance” under the Concrete and Masonry Construction standard applies only to “care, upkeep” of equipment.

The administrative law judge had found that the meaning of the standard’s reference to “maintenance” was ambiguous, and therefore OSHA’s interpretation in the enforcement case should be afforded deference. However, the Commission said that in the absence of a definition of “maintenance” in the standard, the dictionary definition should apply. The dictionary definition of “maintenance” (according to Webster’s 3rd New International) is “the labor of keeping something (as buildings or equipment) in a state of ... efficiency”; “care, upkeep.”

The Commission noted that the general industry LOTO standard (1910.147) defines “servicing/maintenance,” and includes “making adjustments or tool changes.” The ALJ had relied in part on the general industry standard’s definition in finding that removing/replacing cylinders on the rebar cutting and bending equipment in this case was equipment “maintenance.” However, the Commission said that the fact that the general industry standard’s definition of “maintenance” was not included in the Masonry and Concrete Construction standard is evidence of OSHA’s intention not to apply the same definition in the latter.





Mine Safety and Health Administration

Incident Report per Part 50.20(a) – How Much is Enough?

By Michael Peelish, Esq.

When completing an incident report, think of it this way: How much information would someone reading this report need to ensure this incident or something like it did not happen again? That should be the standard. Well, that is the standard under Part 50.11(b)(8) which states, “a description of steps taken to prevent a similar occurrence in the future.”

In the recent past, I have seen MSHA issue citations under Part 50.11(b)(8) and Part 50.20(a) for mine operators failing to include sufficient detail in reportable incident reports. MSHA wants more information about the cause of the accident and what could have prevented it. However, some mine operators are hesitant to go too deep into detail because they are uncertain where it leads and that is always a risk when MSHA reviews injury reports. Look at it this way, every industry requires incident reports so MSHA is no different.

There is never a simple answer to any incident, so you need to know how to look for it, face “unwanted facts,” and do what is right to prevent it from happening again.

Also, I can already hear the next response from the mine operators to my comments; “I know what happen, the knucklehead placed his/her hand where it should not have been” or “the knucklehead was not using the blade knife correctly by cutting towards his/her leg when the knife slipped” or “the knucklehead was not watching where s/he was going when s/he tripped.”

That won't do it. Defining the root cause of any near miss or first aid or reportable incident is required by good safety management practice regardless of Part 50. To do so requires some initial effort and then follow-up, in other words some work. Don't brush-off this important aspect of safety and health management. Even if a mine operator thinks they know the root cause right off the bat, go through the process to ensure all the bases are touched and to implement procedures to share with others so a repeat does not occur.

A lot of times mine operators simply don't want to hear what I call “unwanted facts” because it may take some effort and/or financial resources and/or time to make it right. As a former head of safety for a large mining company, I would rather know if an employee lacked knowledge of lockout/tagout and why, or lacked training in proper tool use and why, or tripped on material because of poor housekeeping practices and why. There is never a simple answer to any incident, so you need to know how to look for it, face “unwanted facts,” and do what is right to prevent it from happening again. In the spirit of the upcoming football season, mine operators must go deep, and complete the play by following up.

Our firm reviews and drafts safety and health policies and programs, conducts on-site safety and health audits, and conducts Part 46 new miner and annual refresher training. My previous education and experience includes a degree in engineering of mines, working in coal mines, managing a corporate safety and health department for 19 years with over 30 years total mining experience.





California OSHA

CalOSHA Spotlights the Agency's Heat Illness Prevention Standard

By Josh Schultz, Esq.

In the midst of high August temperatures, CalOSHA issued a news release reminding employers of the requirements of their heat illness prevention standard. All outdoor places of employment in California are required to comply with the heat illness prevention standard, although agriculture, construction, landscaping, oil and gas extraction, and some transportation industries are subject to additional requirements when the temperature equals or exceeds 95 degrees Fahrenheit.

California industries with outdoor workplaces may expect programmed or complaint inspections during high heat days in which inspectors closely examine your heat illness prevention training and written plan. Additionally, inspectors will ensure that you are meeting all other requirements of the standard, including providing outdoor workers fresh water, access to shade at 80 degrees and whenever requested by a worker, cool-down rest breaks in addition to regular breaks.

The heat illness prevention standard has specific requirements for providing water to employees. The water must be fresh, pure, suitably cool, and provided to employees free of charge. The regulations require that the water be located as close as practicable to the areas where employees are working. Where plumbed drinking water is not available, employers must supply enough water at the beginning of the work shift to provide one quart per employee per hour for drinking for the entire shift.

The regulations also prescribe requirements for access to shade. When the outdoor temperature in the work area exceeds 80 degrees Fahrenheit, employers

must maintain shaded areas that are either open to the air or provided with ventilation or cooling. There must be enough shade to accommodate the number of employees on recovery or rest periods, so that they can sit in a normal posture fully in the shade without having to be in physical contact with each other. As with the water provisions, the shade must be as close as practicable to the areas where employees are working.

CalOSHA offers a training slideshow for use by employers to help meet the training provisions of the heat illness prevention standard. This slideshow can be accessed [at this link](#).



COVID-19 Pandemic

DC Government Employees & Contractors Subject to Vaccine Mandates

By Adele L. Abrams, Esq., CMSP

On August 10, 2021, District of Columbia Mayor Muriel Bowser issued an order mandating COVID-19 vaccination certification requirements for DC government employees, contractors, interns and grantees. Mayor's Order 2021-099 takes effect on September 19, 2021, and requires all employees and interns of DC government agencies to attest and "provide proof" that they have received a full course of a COVID-19 vaccination either approved by the FDA (as Pfizer's vaccine was on August 23, 2021) or authorized for use on an emergency basis (currently Moderna or Johnson & Johnson), or qualify for one of the exemptions under Section III of the Order.

The Section III exemptions from vaccination certification require that the employee submit a request



for exemption, provide information and documents needed to support the request, and the request must be approved by the employer. There are three possible exemptions:

1. Employees who object in good faith and in writing ... that the employee's vaccination would violate their sincerely held religious belief;
2. Employees who have obtained and submitted written certification from a physician or other licensed health professional who may order an immunization, that being vaccinated for COVID-19 is medically inadvisable as a result of the employee's medical condition; and
3. Employees who agree to be tested weekly for COVID-19.

All employees who qualify for one of these exemptions must wear a mask in the workplace, even if current indoor masking orders are rescinded or superseded, and they must be tested weekly for COVID-19 and provide a negative test result on a weekly basis in order to report to work. Employees who are partially vaccinated would fall into this category as well, it appears, since there is no exemption for those who are awaiting a second dose of Pfizer or Moderna, or who have had all doses but 14 days have not elapsed since the final dose.

In addition to direct DC government employees, the Order impacts those contractors and grantees doing business with DC government agency or under contracts with the government. Those contractors and grantees must ensure that each of their "employees, agents and subcontractors" who provide goods or perform services in DC facilities or worksites, or who have in-person contact with other persons in order to complete their work under the contract or grants have been either: (i) fully vaccinated against COVID-19, or (ii) granted one of the exemptions identified in Section III of the Order, are undergoing weekly COVID-19 testing AND only reporting to the workplace when such test result is negative, AND are wearing masks while working.

The contractor/grantee section does not limit masks to indoor work environments for all who are not fully vaccinated. Existing contracts will be amended to include this requirement, and failure of contractors to adhere to the requirements "may result in adverse action" according to the Order. Contractors and grantees may be required to provide written certification to the DC government to prove compliance with the vaccination and masking requirements. Nothing precludes having stronger vaccination requirements or mandated, subject to applicable laws.

Currently, the EEOC says that employers can mandate COVID-19 vaccinations, and the new FDA approval of the Pfizer vaccine will only strengthen this legal position. The Mayor's Order does not address booster shot regimes at this time, although the federal government has now recommended boosters for all adults who are 8 months or more beyond their final dose, due to the diminishing effectiveness over time against some recent variants. For more information on the DC Order or other COVID-19 program requirements for employers and contractors, contact Adele Abrams at safetylawyer@gmail.com.

have enacted ETS; CalOSHA has an aerosol transmissible disease rule applicable to high risk medical and related employers, as well as a pending ETS that is COVID-specific.

Law Office of Adele Abrams adds another Colorado Bar Membership

Josh Schultz, Managing Attorney of the Law Office's Denver Office, is now a member of the Colorado Bar as well as the Maryland Bar. The Law Office now has attorneys licensed in Colorado, Maryland, Michigan, Pennsylvania, Washington, D.C., and West Virginia



Occupational Safety and Health

National Advisory Committee on Occupational Safety and Health (NACOSH) Meeting Update

By Sarah Ghiz Korwan, Esq.

On June 22, 2021, the National Advisory Committee on Occupational Safety and Health (NACOSH) met by teleconference and WebEx for the first time this calendar year. The meeting, which lasted approximately four hours, was a condensed version of a meeting that is typically spread over two days.

The meeting was opened by Andy Levinson, Deputy Director, OSHA Directorate of Standards and Guidance, and lead by Anne Soiza, Committee chair, who offered opening remarks and asked those on the Advisory Committee and in attendance to introduce themselves and to give a brief background of themselves. Ms. Soiza also gave a brief history of NACOSH and discussed the charge to the committee, which is to advise, and make recommendations to the secretaries of labor and health and human services on matters relating to the Occupational Safety and Health Act including regulatory, compliance assistance and enforcement issues through the participation in workgroups.

The agenda included: remarks from the Director of the National Institute for Occupational Safety and Health, Dr. John Howard; an ethics review and training presentation by Vanessa Myers, ethics attorney with the Office of the Solicitor; an OSHA update from Acting Assistant Secretary James Frederick; a presentation on Occupational Heat Illness Prevention, from by Ashley Bieniek-Tabasco and Augusta Williams, and, an OSHA Safety and Health Programs Development, presented by Pam Barkley and Lisa Long. Vanessa

Myers presented the Committee with an overview of the ethics rules to which they are subject while serving on NACOSH. While most of the members are not employees of the federal government, they are still expected to uphold a standard of conduct that ensures public trust in the integrity of the government and its processes. Ms. Myers outlined the key rules that federal advisory committee members are expected to follow, including the prohibition from misusing government affiliation, resources, and information. Additionally, members were strongly encouraged to disclose any conflicts of interest to the Agency and to keep separate government work from their private work and/or political activities.

Dr. John Howard, Director of the National Institute for Occupational Safety and Health, provided an update on NIOSH operations, budget and goals. He noted that NIOSH is statutory partners with OSHA and MSHA and works with them toward mutual health and safety goals. He also briefly noted the work NIOSH is doing in the areas of robotics, work and fatigue, extramural research, health hazard evaluation programs. Regarding the COVID-19 response, Dr. Howard discussed NIOSH's response, noting that 145 million Americans have been vaccinated. He also discussed the need for ongoing research and development related to barrier face coverings (BFCs).

Next, James Frederick, Acting Assistant Secretary of Labor for Occupational Safety and Health presented on multiple topics. He opened by noting the importance of the contributions to OSHA by stakeholders such as the advisory committee which brings perspective and expertise from various industries. He also noted that OSHA is celebrating 50 years of bring safety to the workplace.

Of substance, Mr. Frederick discussed the how OSHA has responded to the pandemic by providing guidance and a roadmap to help businesses decrease risk and improve worker safety. In addition, OSHA considered and issued an Emergency Temporary Standard (ETS) to protect workers most vulnerable, specifically, those in healthcare settings. Mr. Frederick stated that the Spring 2021 regulatory agenda reflects the Biden



Administration's priorities with renewed focus on improving working conditions related to workplace safety and health. In addition, OSHA has included rulemaking on Heat Illness Prevention in Outdoor and Indoor Work Settings to its regulatory agenda and plans to issue a Request for Information on this topic. Mr. Frederick further discussed OSHA's commitment to improve working conditions related to workplace safety; ensuring that workers are empowered to speak-up about workplace health and safety concerns; engaging employee involvement in safety and health for their workplace; and ensuring workers receive training in a language they understand. Finally, Mr. Frederick discussed the budget in broad terms and specifically noted that OSHA recently announced the availability of \$10,000,000 for Susan Harwood Training Grants to cover emerging hazards in a post-pandemic economy, such as increased workplace heat hazards in the face of global climate change.

Next was a comprehensive presentation on the Heat Illness Prevention in Outdoor and Indoor Work Settings program from Ashley Bieniek-Tabasco and Augusta Williams. The discussion started with emerging themes and priorities, such as the inclusion of indoor and outdoor industries. Priorities include acclimatization of new and returning workers; COVID-19 and face coverings; identifying signs and symptoms; and practical solutions for employers'. The communications campaign will provide new materials and information on social media. Importantly, there was also a discussion on OSHA's intent to engage a NACOSH workgroup which OSHA will direct with questions to consider on topics such as prevention, monitoring, heat emergencies, worker training and engagement, and best practices versus existing practices as well as gaps and challenges.

Finally, there was an extensive presentation from Pam Barkley and Lisa Long on OSHA's Safety and Health Programs, which is an actionable safety program for small and medium size employers. The Recommended Practices present a step-by-step approach to implementing a safety and health program centered around seven core elements that make up a

successful program. The idea is to begin with a basic program, described as "bite size chunks", and simple goals to make it more accessible for small and medium sized employers. The "organizing schemes" include: Management Leadership; Worker Participation; Hazard Identification and Assessment; Hazard Prevention and Control; Education and Training Program; Evaluation and Improvement; Communication and Coordination for Host Employers, Contractors, and Staffing Agencies. The Program also emphasizes a risk-based safety approach since this fully considers the human factors involved in the hazard versus risk analysis.

If your business needs help developing and implementing a Safety and Health Program which contemplates OSHA's Recommended Practices, the Law Office of Adele L. Abrams, P.C., is available to guide you through this. Feel free to contact us at (301) 595-3520.



Occupational Safety and Health Administration

OSHA Releases New COVID Guidance

By Adele L. Abrams, Esq., CMSP

The federal Occupational Safety and Health Administration ("OSHA") today issued updated guidance to help employers protect workers from the coronavirus. It reflects developments in science and data, including CDC's updated COVID-19 guidance issued July 27.

The updated guidance expands information on appropriate measures for protecting workers in higher-risk workplaces with mixed-vaccination status workers, particularly for industries such as manufacturing; meat, seafood and poultry processing; high volume retail and grocery; and agricultural processing, where there is



often prolonged close contact with other workers and/or non-workers.

OSHA's latest guidance:

- Recommends that fully vaccinated workers in areas of substantial or high community transmission wear masks in order to protect unvaccinated workers;
- Recommends that fully vaccinated workers who have close contacts with people with coronavirus wear masks for up to 14 days unless they have a negative coronavirus test at least 3-5 days after such contact;
- Clarifies recommendations to protect unvaccinated workers and other at-risk workers in manufacturing, meat and poultry processing, seafood processing and agricultural processing; and
- Links to the latest guidance on K-12 schools and CDC

OSHA continues to emphasize that vaccination is the optimal step to protect workers and encourages employers to engage with workers and their representatives to implement multi-layered approaches to protect unvaccinated or otherwise at-risk workers from the coronavirus.

For assistance with COVID-19 prevention in the workplace, contact the Law Office at 301-595-3520



Mine Safety and Health Administration

MSHA Believes Miners are Making “Bad Decisions”

By Michael Peelish, Esq.

During its June 9, 2021 stakeholder meeting, MSHA was at a loss to explain the increase of fatal injuries (15 so far this year versus 29 in 2020) that have occurred in 2021. MSHA went through its analysis of age, experience at the task and the mine, size of operator, etc., and made several noteworthy points. All size operators are affected, most miners have less than four years of experience at the task and the mine, and most miners are under 40 years of age. Also, powered haulage/conveyor accidents are on the rise. MSHA was somewhat humble during this stakeholder call and sought support from the industry on addressing the underlying causes of these fatalities. One of MSHA's conclusions is that miners are making “bad decisions”. Said another way, miners are not performing adequate hazard assessments before beginning work on a task.

If MSHA wants assistance from the industry, then maybe MSHA should change its approach to “training and teaching” instead of irrelevant discretionary enforcement. My point is this: MSHA will cite an operator for a guard that has been accepted for 10 years and suddenly it is no longer acceptable. Sure, MSHA may issue a low negligence and non-S&S, but why? Why not spend more time talking to mine operators and miners about hazard assessments, about performing better workplace examinations, about safe operating procedures? MSHA has a wealth of knowledge, but their inspectors hide behind the mantra “if I see it, I must cite it.” Well, that is not true if MSHA uses its discretion in a better way. If MSHA really wants to get a handle on fatal injuries in mining, then it must do more work observations, more



explaining to miners why it is important to conduct workplace hazard assessments, and less writing.

MSHA always says if you see something, then say something. Well, the industry folks are saying something, I just hope MSHA will listen.

Based on the safety background and experience of the firm's members, part of the firm's practice is conducting safety and health assessments at MSHA and OSHA facilities.



Oregon OSHA

Oregon OSHA Adopts New Heat Illness Prevention Rules

By Adele L. Abrams, Esq., CMSP

Oregon OSHA is adopting [these Heat Illness Prevention rules](#) in Division 2 - General occupational safety and health and Division 4 - Agriculture. These rules offer protections in both indoor and outdoor environments, with exceptions for heat generated from a work process (such as occurs in foundries).

When the heat index temperature in the work area equals or exceeds 80 °F, the rule provides provisions for access to shade and drinking water for workers. In addition, by August 1, 2021, the rule calls for employers to ensure that employees exposed to such conditions have training on heat-related illness and how to prevent it.

The rule specifies additional high-heat practices that employers must follow once the ambient heat index exceeds 90 °F. They must also have an emergency medical plan in place describing procedures to be followed if a heat illness happens. Lastly, employers must develop and implement effective acclimatization practices.

OSHA'S TOP 10 MOST FREQUENTLY CITED STANDARDS, FY 2020

1. FALL PROTECTION, CONSTRUCTION (29 CFR 1926.501)
2. HAZARD COMMUNICATION STANDARD, GENERAL INDUSTRY (29 CFR 1910.1200)
3. RESPIRATORY PROTECTION, GENERAL INDUSTRY (29 CFR 1910.134)
4. SCAFFOLDING, GENERAL REQUIREMENTS, CONSTRUCTION (29 CFR 1926.451)
5. LADDERS, CONSTRUCTION (29 CFR 1926.1053)
6. CONTROL OF HAZARDOUS ENERGY (LOCKOUT/TAGOUT), GENERAL INDUSTRY (29 CFR 1910.147)
7. POWERED INDUSTRIAL TRUCKS, GENERAL INDUSTRY (29 CFR 1910.178)
8. FALL PROTECTION— TRAINING REQUIREMENTS (29 CFR 1926.503)
9. EYE AND FACE PROTECTION (29 CFR 1926.102)
10. MACHINERY AND MACHINE GUARDING, GENERAL REQUIREMENTS (29 CFR 1910.212)