LAW OFFICE OF
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Occupational Safety and Health Administration

Who is a Controlling Employer?

By Gary Visscher, Esq.

OSHA's Multi-employer Worksite Enforcement policy generally allows OSHA to cite the general contractor or other site manager for violations of OSHA standards occurring on the worksite as a controlling employer, based on its real or perceived overall control of the worksite.

In its May 2022 decision in *Summit Contracting*, the OSH Review Commission said the "controlling" employer's obligation is not the same as that of the employer whose employees are or may be exposed to the violative condition. Instead, the "controlling" employer's obligation is a "secondary safety role," and to exercise (only) "reasonable care."

But it may not always be clear on multi-employer worksites whether an employer may be considered a "controlling" employer. May there only be one "controlling" employer? These are questions raised in a case which the Review Commission recently granted OSHA's petition for review of the Administrative Law Judge's decision.

The case is *A Crane Rental*. The case resulted from a crane accident and worker fatality during construction of a communications tower in Georgia. According to the ALJ's decision, A Crane Rental was one of five companies involved in project. Ericsson was a general contractor for the project. It subcontracted the project to Future Technology. Superior Broadband Towers was subcontracted to provide the workers. Big Rentz was subcontracted to provide the crane, and it contracted with A Crane Rental to provide the crane, a personnel basket, the rigging system, and a crane operator.

The personnel basket used for the operation was during the third day of construction, rated to carry no more than two persons. However, three workers rode the personnel platform along with equipment.

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While attempting to tie off to the tower, one of the employees fell and died as a result of the fall. OSHA cited A Crane Rental under two provisions of the Construction Crane Standard, §1926.1431 (f)(4), which states that the "number of employees occupying the personnel platform must not exceed the maximum number the platform was designed to hold or the number required to perform the work, whichever is less," and §1926.1431 (m)(2), which requires a pre-lift meeting, which must include "the equipment operator, signal person (if used), the employees to be hoisted, and the person responsible for the task to be performed."

Notably, although the Construction Crane standard is specific about which employer is responsible for many of the duties mandated in the standard, the standard does not specify who is responsible for ensuring that the sections under which A Crane Rental was cited in this case are complied with.

The ALJ found that the employees who were exposed to the hazard were employees of Superior, which provided the employees for the project. The ALJ then considered whether A Crane Rental could nonetheless be liable for violating the standards based on being a "controlling" employer. Quoting from a recent unpublished 11th Circuit Court of Appeals decision, *Fama Construction v. USDOL*, the ALJ said "the type of control required is … control over matters affecting the safety of workers on the jobsite."

Who had control over "matters affecting the safety of workers," specifically for complying with standard (not exceeding the number of persons for which the platform was rated and conducting the pre-lift meeting) regarding the use of the personnel platform?

A Crane Rental acknowledged the crane operator had authority to refuse to hoist personnel or terminate a lift if a safety concern was identified. But Superior, which was the employer of the workers on the project, was apparently responsible for determining which employees were hoisted in the basket.

It is not clear whether any of the project documents specified which employer would convene or conduct the pre-lift meeting. In vacating the citations against A Crane Rental, the ALJ said, "there is no evidence that [the crane operator's] … authority [to refuse to hoist personnel if a safety concern was identified] included the authority and ability to control the workers' use of safety equipment or adherence to safety procedures."

Whether the Review Commission will agree with the ALJ's distinctions remains to be seen. And, whichever way the Review Commission rules, employers on multi-employer worksites should be as clear as possible, in advance, as to the responsibilities for safety measures.

A Crane Rental, LLC; OSHRC Docket No. 19-1667

OSHA, MSHA Penalties Increase This Month

On January 15, 2023, federal OSHA's maximum penalties for willful and repeat violations will now be $156,259 – up from $145,027. Serious, other-than-serious,(OTS) and failure to abate sanctions rise to $15,625 (from $14,502).

States that operate their own OSH Plans are required to adopt maximum penalty levels that are at least as effective as Federal OSHA's.

The Mine Safety and Health Administration (MSHA) has a new top penalty of $313,790 for flagrant citations, while their normal penalty range will be $159 to $85,580. Individual supervisor penalties under the Mine Act will also reach $85,580, and citations for failure to notify MSHA of a fatality or life threatening injury within 15 minutes will have a mandatory minimum fine of $7,133. Failure to abate MSHA citations will carry a potential sanction of $9,271 per day. MSHA fines also apply to contractors working at Mine sites.

The new penalties are published in the Jan. 13, 2023 *Federal Register*.

Occupational Safety and Health Administration

OSHRC: Judge May Not Assume Economic Feasibility in General Duty Case

By Gary Visscher, Esq.

Unlike citations issued for violating OSHA standards, where the economic and technological feasibility of the abatement required in order to comply with the standard is generally presumed, in order to prove a violation of the General Duty Clause, one of the four elements which the Secretary must prove is that "a feasible and effective means existed to materially reduce the hazard."

"Feasibility" means that a method of abatement of the hazard is "both economically and technologically capable of being done."

A recent decision by the OSH Review Commission, *Secretary of Labor v. UHS of Denver*, found that the Administrative Law Judge improperly assumed the proposed abatement methods were economically feasible for the company. The Commission remanded the case for further proceedings to determine whether there was evidence in the record on which to assess the economic feasibility of the proposed abatement.

The General Duty Clause citation against UHS was issued for the company's alleged failure to protect its employees from acts of violence by patients. After a hearing, the ALJ affirmed the citation and assessed the proposed penalty against UHS.

The citation included 10 proposed abatement measures. These included: reconfiguring nurse stations to prevent patients from entering; providing communications devices to all staff members; continuously monitoring security cameras; developing a comprehensive workplace violence prevention program; designating qualified staff to monitor for and respond to violent events; communicating incidents to all employees; training staff; investigating each workplace violence incident; ensuring adequate staffing levels to ensure coverage for behavioral emergencies; and, replacing or redesigning furniture to assure it cannot be used as a weapon.

During discovery, the Secretary requested copies of UHS' annual budgets and strategic plans. UHS's response objected to this request, and the Secretary did not follow up nor a file a motion to compel. The Secretary also requested to depose the company's Chief Financial Officer, but again, did not "force the issue" with a motion to compel attendance for deposition or for sanctions.

Instead, the Secretary claimed in a post-hearing brief that UHS had provided no evidence that it could not afford the proposed abatement measures. The Secretary also argued that the agency had not been able to perform any economic feasibility analyses because UHS had not produced financial information during discovery. Furthermore, the Secretary asserted that the ALJ should "draw an adverse inference with respect to economic feasibility based on UHS's failure to produce or introduce financial information."

In other words, not only would the Secretary place the burden of proof on UHS, rather than on the Secretary, to prove economic feasibility, but UHS's objections to the discovery requests or failure to submit evidence on economic feasibility at the hearing meant that this part of the Secretary case to prove was assumed.

Surprisingly, the ALJ agreed with the Secretary's argument. On appeal, however, the Commission reversed. The Commission noted that economic feasibility is part of the Secretary's burden to prove in General Duty Clause citation cases. Furthermore, insofar as the Secretary's proof for economic feasibility would rely on the company's financial evidence which the Secretary requested in discovery, the Commission said those issues could and should have been resolved through the normal means of resolving discovery disputes, including a motion to compel if necessary.

The Commission noted that the ALJ did not assess the record to determine whether there was evidence

sufficient to prove economic feasibility without the information which the Secretary had asked for in discovery, but simply assumed economic feasibility based on UHS's failure to submit its own evidence or respond to the Secretary's discovery requests.

The Commission remanded the case to the Chief Judge (the ALJ who had issued the initial decision has since retired) for reassignment, to allow a judge "to assess the record as it stands, make any necessary factual findings, and decide whether the Secretary has proven that the proposed abatement measures are economically feasible."

Workplace Awareness

Put the Freeze on Workplace Cold Stress

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

After the swampy summer of 2022, many people looked forward to the advent of winter and its cooler temperatures in many parts of the United States. While the "big chill" might be a relief in some ways, conditions can take a serious turn when workers must perform duties outdoors for extended periods during cold or inclement weather. Even indoor temperatures can pose a threat to worker health if they dip too low due to open doors in warehouse and loading areas or in unheated workplaces.

While everyone complains about the weather, and no one can control it, employers will be held responsible by OSHA if workers become ill or die on the job as a result of cold overexposure.

The National Institute for Occupational Safety and Health (NIOSH) defines cold stress as a condition that occurs when the body can no longer maintain its normal temperature, which for most people is around 98.6 degrees Fahrenheit. The result of excessive cold exposure can be hypothermia, or serious injuries including trench foot and frostbite, permanent tissue damage, or even death.

Cold stress is a preventable danger, so it is important for employers to educate workers and supervisors, and monitor those who are new, or returning from leave or vacations, as they will need time to be acclimatized to conditions. While usually viewed as connected to winter weather, most hypothermia cases actually occur in the fall and spring — even temperatures in the 50s can even be dangerous when coupled with wind and rain.

Hypothermia occurs when the body temperature drops too low, and symptoms include fatigue, confusion, disorientation, excessive shivering, and loss of coordination. It can occur even at temperatures above 40 degrees F if the person is also chilled from rain, sweat or cold water. Obviously, as hypothermia symptoms occur, it adversely impacts the worker's ability to perform duties safely.

At the later stage, hypothermia causes the skin to turn blue, pupils will dilate, pulse and breathing slows down, and the worker eventually loses consciousness and this leads to coma and death. It is critical to call 911 immediately, move the worker to a warm and dry place and remove wet clothing, and wrap the person in blankets. If help is more than 30 minutes away and the person is conscious, they can receive warm sweetened drinks (but not alcohol or caffeine) to raise their body temperature and use heat packs while awaiting help.

Frostbite occurs during extended cold exposure when ice forms in skin cells, blocking blood flow and this deprives body tissue of oxygen. First the extremities may grow numb, or the worker may experience "pins and needles" but as it progresses, frostbite manifests with blotchy or blue skin, and blisters or blackened skin may appear. Left to progress, frostbite often requires amputation of damaged tissue such as fingers, toes, hands and feet. This also requires contacting emergency medical services and moving the person to a warm and dry area until they arrive. For frostbite, heating pads should NOT be applied, nor should the area be

rewarmed without professional medical care.

The third potential cold stress complication is Trench Foot, caused by immersion in cold water or mud for extended periods. This can occur when temperatures are as high as 60 degrees because wet feet lose heat 25 times faster than dry feet. When this occurs, skin tissue dies and — as with frostbite — can lead to amputation. For this condition, remove wet shoes or boots and dry the feet. Normally this can be treated as a non-emergency situation, unlike hypothermia and frostbite.

Risks of cold impact both outdoor and indoor workers, depending on the nature of the job assignment. Indoors, workers involved with cold storage, refrigerated warehouses, or frozen food areas of markets can suffer from cold stress. Outdoor workers in construction, mining, transportation, and logistics may also be exposed to extreme cold for extended periods.

When it comes to government enforcement, the majority of employers are under federal OSHA. Because it lacks any rules on cold exposure, the agency will look to its "General Duty Clause" (GDC) as a gap filler. The GDC is section 5(a)(1) of the 1970 legislation that created the agency, OSHA. The GDC requires all employers to furnish a place of employment free from "recognized hazards" that could cause death or serious injury to employees. This includes temperature extremes to which workers are exposed in the course of their assigned duties.

Heat stress has become more recognized, and OSHA is now working on a new federal standard to address this risk because in the past two decades, summers have had the highest temperatures on record and approximately 40 workers die each year in the U.S. due to heat illness. Similarly, the GDC can be used to issue citations where an employer was aware of the risk to workers from cold exposure on the job but failed to take corrective action. Penalties in 2022 reached a maximum of $145,000 and were scheduled to rise again in January 2023. Although federal OSHA lacks a specific rule addressing cold stress, and its current rulemaking and National Emphasis Program focus on heat stress prevention, this is not universally the case.

States that run their own OSHA programs must have rules that are at least as effective but they can also be more stringent . At the end of 2022, there were 22 states as well, as the US territories, which have

WIND CHILL & FROSTBITE TIME

30 MINUTES | 10 MINUTES | 5 MINUTES

WIND (MPH) \ TEMPERATURE (°F)	40	35	30	25	20	15	10	5	0	-5	-10	-15	-20	-25	-30	-35	-40	-45
5	36	31	25	19	13	7	1	-5	-11	-16	-22	-28	-34	-40	-46	-52	-57	-63
10	34	27	21	15	9	3	-4	-10	-16	-22	-28	-35	-41	-47	-53	-59	-66	-72
15	32	25	19	13	6	0	-7	-13	-19	-26	-32	-39	-45	-51	-58	-64	-71	-77
20	30	24	17	11	4	-2	-9	-15	-22	-29	-35	-42	-48	-55	-61	-68	-74	-81
25	29	23	16	9	3	-4	-11	-17	-24	-31	-37	-44	-51	-58	-64	-71	-78	-84
30	28	22	15	8	1	-5	-12	-19	-26	-33	-39	-46	-53	-60	-67	-73	-80	-87
35	28	21	14	7	0	-7	-14	-21	-27	-34	-41	-48	-55	-62	-69	-76	-82	-89
40	27	20	13	6	-1	-8	-15	-22	-29	-36	-43	-50	-57	-64	-71	-78	-84	-91
45	26	19	12	5	-2	-9	-16	-23	-30	-37	-44	-51	-58	-65	-72	-79	-86	-93
50	26	19	12	4	-3	-10	-17	-24	-31	-38	-45	-52	-60	-67	-74	-81	-88	-95
55	25	18	11	4	-3	-11	-18	-25	-32	-39	-46	-54	-61	-68	-75	-82	-89	-97
60	25	17	10	3	-4	-11	-19	-26	-33	-40	-48	-55	-62	-69	-76	-84	-91	-98

approved state programs. Some of these have mandates for "Injury and Illness Prevention Programs," which are essentially safety and health management programs that require the employer to consider all hazards to which workers could be exposed — including cold temperatures — and then to implement actions to mitigate the hazards. In states with extremely cold temperatures, proactive measures include consideration of such exposures — both indoors and outdoors. In Minnesota, the state agency's heat stress rule includes a somewhat hidden provision that also requires employers to address indoor cold conditions. MN-OSHA's unique rule states:

A. Indoor places of employment shall maintain a minimum air temperature of 60 degrees Fahrenheit where heavy work is performed, unless prohibited by process requirements.
B. Indoor places of employment shall maintain a minimum air temperature of 65 degrees Fahrenheit where light to moderate work is performed, unless prohibited by process requirements.

What can employers do proactively to protect workers who have cold temperature exposures on the job? Training both employees and supervisors is critical because cold stress injury prevention is the goal. Workers should be informed about the environmental and workplace conditions that can expose them to cold stress hazards, how to limit these risks, how to report problems, give first aid to others and contact emergency services when needed.

Workers should also be aware that age, medical conditions and even medications can put them at elevated risk. Proper clothing selection, including loose layers that can insulate body heat, and fabrics such as wool, silk or synthetics keep moisture away from the body, and can be effective when coupled with an outer layer with ventilation that protects outdoor workers against wind and rain.

Supervisors must be educated about cold stress and understand that workers must be gradually introduced to the cold, be provided with frequent breaks in warm and dry areas, and be monitored for signs of cold stress.

Supervisors can schedule outdoor tasks for the warmest parts of the day where feasible, check the National Weather Service's wind chill information, watches and warnings, and make sure workers use a "Buddy system" to lower fatigue and enable monitoring of each other's wellbeing. Wind chill monitoring is critical as conditions can change quickly, and while the air temperature might be 40 degrees and not viewed as a risk, if the wind is 35 mph, the wind chill temperature is the equivalent of 28 degrees F.

So when the wind begins to blow, and the forecast calls for snow, make sure your workers won't be singing the blues … oh baby, it's cold outside!

Occupational Safety and Health Administration

Covid-19 Standard Sent to OMB for Final Review

By Sarah Ghiz Korwan, Esq.

OSHA has sent its Covid-19 rule for Healthcare to the Office of Management and Budget (OMB) for review. A review generally takes 90 to 120 days before being published in the *Federal Register.*

In June 2021, OSHA issued an emergency temporary standard (ETS) to protect healthcare workers from occupational exposure to Covid-19. The ETS took effect immediately and also served as a proposed rule on which OSHA requested comment. The new rule is a long-term version of that 2021 ETS, developed under OSH Act procedures that allow OSHA to enact a permanent standard based on the ETS without a new proposal, should the agency determine that the danger will persist beyond the short term. Although it is one of the final steps in the regulatory process before publication, it's uncertain how long review by the OMB will take.

In January of this year, a group of unions filed an

emergency petition asking the US Court of Appeals for the District of Columbia to order OSHA to issue a permanent rule within 30 days and to enforce its temporary version in the meantime. However, in September, the Court ruled that it could not order OSHA to create a permanent standard, "OSHA has no clear duty to issue a permanent standard, so we cannot compel the agency to do so," the judges said.

The court also pushed back on the unions' request that OSHA act faster.

"OSHA's determination of whether, when and how vigorously to enforce a particular standard is committed to the agency's discretion and not subject to judicial review," the court said.

It's unknown what the final standard will include, but if it's anything like the ETS, it will have a lot more requirements than just face mask requirements.

For employers with 10 or more employees, the ETS required facilities to have a Covid-19 plan that included a designed safety coordinator with the "authority to ensure compliance." In addition, the ETS required covered facilities to conduct a workplace-specific hazard assessment, monitor and limit points of entry in areas where direct patient care is provided, and develop and implement policies and procedures to limit Covid-19 transmission.

The ETS also included regulations related to personal protective equipment, cleaning and disinfection, social distancing, and paid time off for sick leave or when employees receive the vaccine or if needed to recover from the side effects from a vaccine.

Of course, there are voices on both sides. One of the loudest in favor of the regulation comes from the National Nurses United (NNU), which is one of the unions that filed the lawsuit in January. NNU has urged OMB to complete its review promptly so the standard can be issued without delay.

On the other side, the American Hospital Assn. opposes the standard on the grounds that it is redundant.

The text of the final draft has not been made public.

OSHA and MSHA Release Latest Regulatory Agendas

Twice a year the Office of Management and Budget publishes a unified agenda of all agencies' plans for new and revised rules for the next twelve months.

The fall 2022 regulatory agenda was published on January 4, 2023, and lists the regulatory items that the agency is working on, with anticipated dates and goals towards final rule promulgation.

OSHA Regulatory Agenda

OSHA's fall 2022 agenda lists 27 rules, broken down into pre-rule, proposed rule, and final rule stages. Following is a summary of the listed items, if you would like additional information about any item, please contact our office.

OSHA Pre-rule Stage

- **Process Safety Management standard revisions and additions**. OSHA is reviewing comments from the stakeholder meeting held in October 2022.
- **Mechanical Power Presses.** OSHA is analyzing comments from a Request for Information in 2021.
- **Workplace Violence in Healthcare and Social Services.** OSHA plans to initiate the SBREFA process in 2023.
- **Blood Lead Level for Medical Removal.** OSHA is reviewing comments from an Advanced Notice of Proposed Rulemaking in 2022.
- **Heat Illness.** OSHA anticipates initiating the SBREFA process in early 2023.

OSHA Proposed Rule Stage

- **Infectious Diseases**. Notice of Proposed Rulemaking to be published in September 2023.
- **Amendments to Cranes and Derricks in Construction.** NPRM to be published in June 2023.
- **Shipyard Fall Protection.** NPRM to be published July 2023.

- **Communication Tower safety.** NPRM to be published March 2023.
- **Emergency Response.** NPRM to be published in early 2023.
- **Lock Out/Tag Out update.** NPRM to be published in July 2023.
- **Tree Care standard.** NPRM to be published in May 2023.
- **Welding in Construction.** NPRM to be published in early 2023.
- **PPE in Construction.** NPRM to be published in early 2023.
- **Powered Industrial Truck Design.** NPRM was published in February 2022. OSHA is reviewing.
- **Walking Working Surfaces amendments.** NPRM plans to re-open the rulemaking record May 2023.
- **Crystalline Silica medical removal**. NPRM to be published in September 2023.
- **Arizona State Plan.** NPRM was published in 2022, OSHA analyzing comments.
- **Worker Walkaround Rep Designation.** This new item on the agenda clarifies that a designated representative does not need to be an employee if the rep is designated by workers.

OSHA Final Rules

Of the eight final rules which the Regulatory Agenda anticipates will be issued in 2023, four are rules which spell out procedures for Whistleblower and Anti-Retaliation investigations.

In addition, OSHA anticipates final rules on the following in 2023:

- **Hazard Communication update.** To be issued March 2023.
- **Tracking of Workplace Injuries and Illnesses** (to require electronic submission of records by employers of 20 or more and expanded submissions by employers of 100 or more). OSHA anticipates a final rule in March 2023.
- **Procedures for use of Administrative Subpoenas.** This is a new item on the Regulatory Agenda, and OSHA anticipates bypassing the NPRM stage by issuing an "interim final rule." The stated goal is to clarify provisions in the current procedures for issuing such subpoenas during OSHA investigations.
- **Occupational exposure to covid 19 in health care.** The Regulatory Agenda indicates that OSHA is continuing to work towards a final standard, however the Agenda also states that OSHA is considering alternative approaches.

MSHA Regulatory Agenda

MSHA's Regulatory Agenda lists 3 items:

- **Crystalline silica.** MSHA anticipates issuing an NPRM in April 2023.
- **Requiring Safety Programs for Surface Mobile Equipment.** MSHA anticipates issuing a Final Rule in July 2023.
- **Testing, evaluation, and Approval of Electric Motor driven mine equipment** (to allow use of voluntary consensus standards). A final rule anticipated in June 2023.

Other DOL rules include the Wage and Hour Division anticipates issuing a final rule in May 2023 to rescind the January 2021 rule regarding classification of independent contractors, thus reinstating the previous classification.

Equal Employment Opportunity Commission

EEOC Publishes Strategic Enforcement Plan

By: Diana Schroeher, Esq.

On January 10, 2023, the Equal Employment Opportunity Commission (EEOC) published its draft Strategic Enforcement Plan for fiscal years 2023 – 2027 in the *Federal Register*.

The EEOC is the federal agency charged with advancing opportunity in the workplace, and is responsible for enforcing federal laws prohibiting workplace discrimination.

The Strategic Enforcement Plan (SEP) was a collaborative effort involving representatives of EEOC leadership and program offices, with input from civil rights and workers' rights organizations, employer and human resource representatives, and attorneys representing plaintiffs and defendants in EEO matters.

The SEP will help guide and effectively implement the EEOC's work of advancing equality and justice in the nation's workplaces, through EEOC outreach, public education, technical assistance, enforcement and litigation. The new SEP updates and refines the EEOC's priorities and goals with a vision of "fair and inclusive workplaces with equal opportunity for all, while also recognizing the significant challenges that remain in making that vision a reality."

Three Guiding Principles of the SEP

In developing the draft Fiscal Year 2023-2027 SEP, the EEOC relied on three guiding principles, adapted from the principles underlying the prior two SEPs.

A Targeted Approach: The EEOC will take a targeted approach to enforcement of laws prohibiting discrimination. A targeted approach "empowers Commission staff throughout the agency to direct attention and resources to the specific priorities identified in this SEP, with the goal of positively influencing employer practices and promoting legal compliance."

An Integrated Approach: The EEOC's integrated approach involves collaboration, coordination and consistency within the agency, while also ensuring that its enforcement is integrated across the agency. An integrated approach means that the EEOC operates as one national law enforcement agency, while also appropriately reflecting local or regional differences. Meeting this goal will require collaboration, coordination and communication between EEOC offices, staff, and program areas across the Commission, as well as consistent procedures in public-facing activities throughout the country.

An integrated approach also includes collaboration with shared-responsibility agencies including the Department of Justice, Department of Labor, Fair Employment Practices Agencies (FEPAs), Tribal Employment Rights Offices (TEROs), and the private bar, which all play vital roles in preventing and remedying employment discrimination.

Accountability and Delivery of Results: The EEOC will strive to achieve results while considering their existing resources. The EEOC is the primary federal agency entrusted by Congress with enforcing the nation's workplace discrimination laws, the EEOC is "accountable to the public it serves to ensure its resources are used strategically and effectively to enforce the laws and serve those most in need of its assistance. Accountability means taking ownership to achieve results and deliver timely, consistent, and high-quality service to the public given available resources."

The EEOC's subject matter priorities detailed in the SEP include:

- Eliminating barriers in recruitment and hiring;
- Protecting vulnerable workers and persons from underserved communities from employment discrimination;
- Addressing selected emerging and developing issues (such as COVID-19 in the workplace);
- Advancing equal pay for all workers;
- Preserving access to the legal system; and
- Preventing and remedying systemic harassment.

Employers would be well-served to ensure their policies and procedures align with all anti-discrimination laws, including those on a federal, state and local level.

The EEOC is seeking public comment on the draft SEP, and comments are due by February 9, 2023. Please call the Law Firm for compliance assistance, more information on the SEP, or for assistance in drafting and submitting comments to the EEOC.

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Occupational Safety and Health Administration

Voluntary Use of Respirators – Appendix D PLUS

By Michael Peelish, Esq.

Whether advising and/or conducting training for employers, the topic of Voluntary Use and ***Appendix D*** is inevitably raised. And the discussion will go something like this, "we provide the employee with ***Appendix D*** and that is it".

But some regulatory requirement are not quite as simple as they first seem.

Giving the employee ***Appendix D*** is only part of the regulatory requirement. The employer is also obligated to "determine that such respirator use will not in itself create a hazard".

How many employers have a copy of the ***Appendix D*** signed by the employee showing the employee was given a copy and how many employers have a short form hazard assessment that is signed by the employee to document that the use of the respirator in itself will not create a hazard?

I am waiting for a show of hands.

To avoid a simple citation to issue that could be classified as Serious, the employer must first comply with 29 CFR 1910.134(c)(2)(i) which requires the employer to assess whether the use of a respirator will in itself create a hazard. Only after complying with this requirement, can the employer permit the use of a respirator and provide a copy of ***Appendix D*** to the employee.

But there is more

OSHA requires each employer to make different assessments prior to allowing the voluntary use of N-95 dust masks and the use of half mask (elastomeric) masks. (See ***Appendix A*** in the OSHA Inspection Guidance CPL 02-00-158: Inspection Procedures for the Respiratory Protection Standard, https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-00-158.pdf.)

So, how does the employer fulfill the threshold requirement of whether the respirator itself would not create a hazard? That in part will depend on whether the N-95 (i.e., dust mask) or a half mask (i.e., elastomeric) is used.

If the N-95 (which do not have to be NIOSH approved) is used, then the employer could assess any hazards and also consult with the employee regarding:

- Have you ever worn a respirator before? If so, what type and model? How often (e.g., hours/shift, number of years)?
- Will the respirator affect your ability to do all work tasks safely?
- Will the respirator cause you discomfort?
- Will the respirator cause you to become disoriented?

Any assessment should be documented or else OSHA can't believe the employer when it goes to informal conference to contest the citation because OSHA needs proof to put in the file.

If the half-mask (elastomeric) is used, then the employer must comply with 29 CFR 1910.134(c)(2)(ii) which requires that elements of the employer's respiratory protection program be implemented including medical evaluation and cleaning, storage, and maintenance. This places a much higher burden on the employer essentially requiring a medical evaluation be performed at the employer's cost using ***Appendix C*** for mandatory use of respirators. Also, training on the proper ways to clean, store, and maintain the respirator is required, however, the employer is not required to pay for the half-mask, cleaning supplies, or replacement parts such as filters.

So, what should an employer do to ensure the safe and healthy voluntary use by an employee of a respirator and to comply with 29 CFR 1910.134(c)(2)(i and ii)?

First, develop a short form hazard assessment to ensure safe use. The questions above could be a starting point.

Second, provide a copy of ***Appendix D*** to

employees and review it and have them sign copy and keep it in the file.

Third, limit the voluntary use of respirators to N-95 since a medical evaluation is not required. The employer has the right to restrict the voluntary use of half-mask respirators under its Respiratory Protection Program.

Federal Motor Carrier Safety Administration

FMCSA Denies Truckers' Group Request for Hair Test

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

On December 23, 2022, the Federal Motor Carrier Safety Administration (FMCSA) denied the application from The Alliance for Driver Safety & Security (aka "The Trucking Alliance") for an exemption from agency safety regulations "to amend the definition of actual knowledge to include the employer's knowledge of a driver's positive hair test, which would require such results to be reported to the FMSCSA's Drug and Alcohol Clearinghouse and to inquiring carriers.

The Trucking Alliance maintained that hair testing enhances public safety due to the longer detection period for controlled substance use, and by minimizing the potential from fraud during specimen collection. The trucking companies' advocate argued that hair testing is a more reliable form of drug testing than urine tests, and was an appropriate method for preemployment and random drug testing protocols.

The DOT agency denied the application, after reviewing public comments on the exemption reques. DOT determined that the FMCSA lacks statutory authority to grant the exemption and to amend the definition of "actual knowledge" to include positive hair tests.

The definition of "actual knowledge" is published at 49 CFR Part 382.107, imputing knowledge of driver

How does a hair drug test work?
A hair drug test uses a hair sample from the hair's root, to screen for drug use. When someone uses drugs, the substance is absorbed into the blood-stream. Each hair follicle has a blood vessel, and traces of drugs can be detected in the follicle.

alcohol or controlled substance use to employers based on any of the following:

- They directly observe a driver using alcohol or controlled substances;
- They receive information provided by the driver's previous employer(s);
- They are aware that a driver was issued a traffic citation for driving a commercial motor vehicle while under the influence of alcohol or controlled dangerous substances; or
- The employee admits alcohol or controlled dangerous substance use, except as provided under 49 CFR 382.121.

The employer's direct observation of prohibited use does not include observation of employee behavior or physical characteristics sufficient to warrant reasonable suspicion testing under 49 CFR 382.207.

Drug and alcohol use regulation by the FMCSA is authorized under the Omnibus Transportation Employee Testing Act of 1991, as amended. It requires DOT to follow the US Department of Health & Human Services guidelines for technical and scientific issues related to drug and alcohol testing

.HHS has not issued any final mandatory guidelines for hair testing but a proposal was published on September 10, 2020.

Other legislation has directed HHS to issue guidelines for hair testing as a method of detecting the use of controlled substances as an alternative to urine tests. There would be exemptions included for CMV operators who have established religious beliefs that preclude cutting or removal of hair. The comments and findings are included in Docket FMCSA-2022-0127, at www.regulations.gov.

Bureau of Labor Statistics

BLS Data Show 9 Percent Jump in Workplace Deaths

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

Workplace fatalities in 2022 rose nearly 9 percent over 2021, for a total of 5,190 deceased workers – or one employee death every 101 minutes, according to data released by the US Dept. of Labor in December 2022.

The Bureau of Labor Statistics' National Census of Fatal Occupational Injuries reported that deaths among black workers rose to an all-time high of 653 fatalities, while Latino workers also had disproportionately high fatality rates compared to Caucasian co-workers. Women made up 8.6 percent of workplace fatalities but represented 14.5 percent of intentional injuries by a person in 2021. Fatalities among older workers also rose, a 13.9 percent hike in one year for workers between the ages of 45 and 54. Fatalities due to violence on the job was up by 7.9 percent and accounted for 761 of the annual fatalities.

The fatal injury rate in 2021 was 3.6 fatalities per 100,000 FTE workers, up from 3.4 in 2020 and above the 2019 pre-pandemic high of 3.5.

Workers in transportation and material moving occupations were the occupational group with the highest number of fatalities, up 18.8 percent over 2020, and transportation incidents remain the most frequent type of fatal event (1,982 deaths), up 11.5 percent from 2020. Transportation accounted for 38.2 percent of all work-related fatalities in 2021.

Construction and extraction occupations had the second highest number of workplace deaths (951) although that was a 2.6 percent decline from 2020.

Protective service occupations (fire, police, sheriffs etc.) suffered nearly a 32 percent increase in fatalities in 2021, nearly half due to homicides and suicides, with another third resulting from transportation incidents.

Installation, maintenance and repair occupations also had a notable increase in fatalities (21 percent) and many of those deaths were related to vehicle and mobile equipment service workers.

The full BLS data set is available at www.bls.gov/iif/fatal-injuries-tables.htm.

Federal Trade Commission

FTC Seeks to Ban Noncompete Employment Agreements

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

In early January 2023, the Federal Trade Commission released a proposed rule that would significantly restrict employers' ability to impose "noncompete" restrictions on workers as part of their work agreements.

Noncompete clauses are fairly widespread in certain industries – ranging from doctors to hairdressers, warehouse workers to top-level executives. The agreements typically prevent workers from going to work for a competitor within a specified geographic area and for a specified period of time.

The FTC rulemaking is triggered by the agency's preliminary finding that noncompete agreements constitute unfair competition in violation of Section 5 of the Federal Trade Commission Act. The agency notes that unequal bargaining power may force workers to agree to the noncompete terms that eventually block them from pursuing better

employment opportunities. They also prevent employers from hiring the best available talent.

The proposed rule would make it illegal for employers to:

- Enter into or attempt to enter into a noncompete with a worker;
- Maintain a noncompete with a worker; or
- Represent to a worker, under certain circumstances, that the worker is subject to a noncompete.

The rule, once finalized, would also apply to independent contractors and anyone working for an employer, paid or unpaid. It would additionally call for rescission of existing noncompete clauses and employers would have to notify affected workers that old agreements were no longer in effect. Other times of restrictions, such as non-disclosure agreements, would not be included in the FTC rule.

The FTC has already taken some actions under Section 5 of the FTC Act against employers with onerous noncompete requirements, including against US glass container manufacturers and a security guard company.

There is a 60-day public comment period, ending March 10, 2023. The proposed rule can be reviewed at, and comments submitted to: ***www.regulations.gov/document/FTC-2023-0007-0001***.

LAW OFFICE OF
ADELE L. ABRAMS P.C.

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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Don't Miss These Events in 2023!

Adele L. Abrams, Esq., Firm President, CMSP

Adele Abrams, Esq., ASP, CMSP

Feb. 2: BLR – OHS Update webinar

Feb. 21: North American Frac Sand Conference – Presentation on OSHA/MSHA Silica Rules, Houston, TX

March 1: Society of Mining Engineering – Presentation on MSHA Crystalline Silica Rules, Denver, CO

March 7: OIAA – Annual refresher training, Albany, OR

March 8: OIAA – Annual refresher training, Roseburg, OR

March 9: Artex Conference, Speak on Psychological First Aid & Workplace Mental Health, Grapevine, TX

March 16: ASSP/AIHA OHS Conference – Presentation on OHS Update 2023, Laurel, MD

April 17: National Business Institute – Maryland Employment Law Seminar (virtual)

April 26: Maine Aggregates Association – MSHA/OSHA Enforcement Update, Portland, ME

May 4: National Waste & Recycling Assn. Legal Symposium, Presentation on OHS Legal Update, New Orleans

May 18-19: Psychological First Aid & Workplace Mental Health, NSC Spring Safety Conference & Expo, Indianapolis, IN

June 13: SAFEPRO Mine Safety Law Institute, Savannah, GA

Nov. 8: ASSP/AIHA PDC, Presentation on OHS Update, Rochester, NY

Michael Peelish, Esq. Senior Counsel (CO, WV, PA)

Michael Peelish, Esq. Senior Counsel (CO, WV, PA)

March 1: NWPCA – OHS Government Affairs Update, Fort Worth, TX

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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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. Before re-entering the legal profession, he had company oversight for safety and health for 19 years and during that time served as a senior executive for over 14 years for multiple publicly traded mining companies with oversight for human resources, environmental affairs, purchasing, government affairs, training, natural gas production JV and methane capture operating unit, and continuous improvement. Throughout his career, he has worked with mine operators and OSHA general industry facilities on 5 continents to implement safety and health programs, to audit operations against their safety and health programs, and to seek improved ways of protecting employees' safety and health. He regularly performs safety and health audits and exposure assessments for his clients.

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