



**LAW OFFICE OF  
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## **LABOR-HHS Appropriations Move in House**

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

On July 20, 2017, the House Appropriations Committee voted 28-22 to approve the FY 2018 appropriations package that includes funding for Occupational Safety and Health Administration, (OSHA), Mine Safety and Health Administration (MSHA), and the National Institute for Occupational Safety and Health (NIOSH). The bill, 3358, still awaits passage by the House and consideration in the Senate later this year before the new fiscal year starts on October 1, 2017. Congress will take up funding bills when it returns from recess, but it is likely that these agencies will operate under a continuing resolution for at least part of the next year.

While funding cuts were not as draconian as feared, these key safety and health offices do receive reductions under the House plan. There were 40 amendments to the overall package that were approved, but they do not affect any of the existing OSHA or MSHA final rules that were enacted at the end of the Obama administration (and which are currently in litigation), such as crystalline silica and electronic recordkeeping.

The main “riders” placed on the funding package that relates to safety and health are provisions dealing with funding for training institutes and laboratory testing programs, and continuation of the restriction on OSHA enforcement at farms or against employers with 10 or fewer workers (with certain exceptions), and on the MSHA side, allocations for the Mine Academy, purchase of equipment under the Coal Mine Dust rule, mine rescue activities, and funding for education and training through cooperative agreements with states, industry, and safety

associations (labor organizations are not included on this list for FY 2018).

The following are the key components of HR 3358, the House Labor-HHS Appropriations measure, at this time. Additional amendments could be added when the measure comes before the full House of Representatives, or when a companion bill is enacted by the Senate, or in conference to reconcile the spending packages.

### **Occupational Safety & Health Administration**

The Committee recommended \$531.470 million for OSHA, which is \$21.317 million less than the current year, and is \$11.787 million below President Trump’s budget request. In justifying the cuts, the Committee advocates a funding strategy that “more effectively balances enforcement with education, training, and compliance assistance.” The report notes that “overreliance on enforcement in recent years has fostered a toxic environment between the agency and employers that is undermining the agency’s goals for workplace safety and is at odds with Federal policies that support economic growth and job creation.”

The line item funding for OSHA includes:

- \$18 million for safety and health standards,
- \$194.25 million for federal enforcement,
- \$17.5 million for whistleblower programs (OSHA enforces whistleblower protections under the OSH Act, Sarbanes-Oxley, the transportation agency safety laws, and over a dozen environmental statutes),
- \$100.85 million for State programs,
- \$24.469 million for technical support,

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## **LABOR-HHS Appropriations, cont.**

- \$131.851 million for compliance assistance (including funding for state consultation grants) and
- No funding for training grants (Harwood Grants completely defunded).

### **Mine Safety & Health Administration**

MSHA would receive \$359.975 million in funding for FY 18, which is \$13.841 million below current FY 17 levels and is also \$15.197 million less than was sought by the President. The report says that it “continues to receive reports of inspectors exceeding necessary and appropriate levels of oversight to the point of significantly impeding mining operations [and] questions whether this strategy materially improves safety and if the costs outweigh the benefits of such additional oversight.” It encouraged MSHA to make reductions in force if necessary and realign its resources to match where mining activity is currently occurring.

### **National Institute for Occupational Safety & Health**

The House proposal would now provide NIOSH with \$325.2 million, which is \$10 million below the current FY 17 funding levels. By comparison, President Trump’s original budget plan would have cut NIOSH funding by \$135.2 million and would have eliminated all extramural programs, as well as cutting other programs where workers are at high risk. The appropriation supports surveillance, health hazard evaluations, intramural and extramural research, instrument and methods development, dissemination, and training grants.

There is little detail in the NIOSH budget (via the House Appropriations Committee report) but the National Occupational Research Agenda (NORA) would be allotted \$116 million, the Education and Research Centers would have \$25 million in funding, and Mine Safety Research would receive \$59.5 million, while other occupational safety and health research was set at \$99.6 million. There is also rider language permitting NIOSH to fund replacement of its underground and surface coal mining research capacity (replacement of the now-closed Lake Lynn facility).

### **OSHRC and FMSHRC**

The two adjudicatory independent agencies that resolve OSHA and MSHA disputes were also included in this appropriations package.

The Occupational Safety & Health Review Commission, which adjudicates OSHA citation challenges, would receive \$12.875 million, which is \$350,000 below current levels

and is \$250,000 above the President’s FY 18 budget request.

The Federal Mine Safety & Health Review Commission, which adjudicates MSHA citation challenges, would get \$17.14 million for FY 18, about \$50,000 less than the current year and \$81,000 more than the Trump budget request.

It is significant in noting that MSHA litigation resolution is funded at a higher level than OSHA adjudication, even though (according to CDC data for 2015) there are about 13,300 active mining operations regulated by MSHA, whereas there are about 6 million companies in the US regulated by OSHA. It is not clear if the funding levels reflect existing caseloads or an anticipation that OSHA enforcement will be reduced more significantly than MSHA enforcement in the coming year. In related news, the Department of Labor recently announced the closure in October 2017 of its Denver “backlog” attorney office that prosecutes MSHA cases, so it may be anticipating a reduced workload for the coming year.

## **U.S. District Court Considers Legality of 2-for-1 Order By Gary L. Visscher, Esq.**

The May 2017 newsletter reported on President Trump’s “two-for-one” Executive Order (E.O. 13771), and litigation challenging the Executive Order which was filed in the U.S. District Court in Washington DC. E.O. 13771 requires that an agency or department which proposes or promulgates a new regulation must identify at least two existing regulations to be repealed, and requires that the cost of any new regulation must be off-set by repeal of other regulations, so that the “total incremental cost of all new regulations ... to be finalized this year shall be no greater than zero.” For fiscal years after 2017, the Executive Order requires that an agency issuing a new regulation identify offsetting costs from regulations that have been or will be repealed. According to the Executive Order, each agency will be issued an annual “regulatory budget” which will state the total amount of incremental costs that will be allowed the agency in issuing new regulations. The “incremental cost allowance may allow an increase or require a reduction in total regulatory cost” imposed by the agency’s regulations.

In April, the Office of Management and Budget issued guidance on the implementation of the Executive Order. Among other clarifications, the OMB guidance states that offsets will only be required for “significant regulatory actions,” which are generally items that have an annual incremental impact of \$100 million or have other substantial impacts on the economy. On the other hand, the OMB

## 2-for-1 Order, cont.

guidance allows any cost reductions from changes in regulations and guidance to count as off-set. Thus, for example, any costs saved by elimination of paperwork requirements may be counted.

The Executive Order was challenged in court shortly after it was issued, on the basis that it violates the Constitution's separation of powers by imposing factors on regulations that are in addition to and unrelated to the criteria set by Congress in enabling legislation. The plaintiffs also argue that the Executive Order violates the President's constitutional duty to "take care that the Law be faithfully executed," as well as the Administrative Procedures Act.

The Department of Justice, and proponents of instituting a regulatory budgeting approach as is embodied in E.O. 13771, have argued that the lawsuit challenging the Executive Order is premature (not "ripe" for judicial review), because no regulations have been rescinded or proposed for rescission, as a result of the Executive Order (though regulations may be reviewed for other reasons and counted for purposes of the off-set). Proponents of the regulatory budget approach have noted that such an approach have been used by other countries (though structured differently) to help to control the overall costs of regulations.

The District Court held oral argument in early August on the motion to dismiss by the Department of Justice, as well as a motion for summary judgment filed by the plaintiffs (Public Citizen, Natural Resources Defense Council, and the Communications Workers of America). The Court did not rule on the motions, but is expected to issue a decision soon. If the District Court grants either side's motion, an appeal is likely to the Court of Appeals.

## MSHA Issues Safety Alert for Metal/Non-Metal Check-in/Check-out

By Sarah Ghiz Korwan, Esq.

MSHA recently issued an alert to raise awareness of the critical importance of a meaningful, effective check-in/check-out system. The Alert notes that each tag represents a human life and lives can be lost if the system is not utilized. In day-to-day operations, MSHA noted that the check-in/check-out system allows underground blasting without exposing miners to the hazards inherent to such tasks. In underground mining, in the event of an emergency situation, the system provides an accurate account of workers, and critical information in the event rescue teams need to be deployed for missing miners.

MSHA's list of best practices includes:

- Every person entering the underground operations must ensure they have placed their personal tag on the tag board before descending underground.
- Someone should be designated to check the tag board to confirm everyone from the previous shift has checked out.
- Every miner that reaches the surface must ensure they remove their personal tag from the tag board.
- The supervisor in charge of blasting should ensure the check-in/check-out board is cleared before allowing the blast.

MSHA emphasized, "Your mine's check-in/check-out system cannot be taken lightly. Lives depend on the system being used accurately and consistently."

### OSHA Shuts Down Injury Reporting Portal Due to Potential Data Breach

After a notice from Homeland Security of a potential security breach of electronic data, OSHA has shut down their injury reporting webpage. At the time of publication of this newsletter, the injury reporting portal had a message stating "Alert: Due to technical difficulties with the website, some pages are temporarily unavailable." In June, the Agency proposed a delay in the electronic reporting compliance date from July 1, 2017, to December 1, 2017.

## OSH Review Commission Back in Business

By Gary L. Visscher, Esq.

Earlier this month the Senate confirmed two of President Trump's nominees to the Occupational Safety and Health Review Commission (OSH), Heather MacDougall and James Sullivan. As a result, the Commission, which has had only one member since the end of April 2017, will have all three commissioner positions filled for the first time since April 2015.

Under the OSH Act, contested citations or penalties go before the independent OSH Review Commission. Individual cases are assigned to an administrative law judge (ALJ) who oversees the pre-hearing process, conducts a hearing, and issues a decision. The ALJ's decision may be appealed to the Commission, but review

## OSH Review Commission, cont.

is discretionary. Any one Commissioner may direct a case for review, but in the absence of a quorum to decide cases, few new cases have been added to the Commission's caseload. So far in 2017 only three cases have been directed for review by the Commission. In all other cases, the decision of the ALJ became the non-precedential final order of the Commission.

Not only may having a full Commission membership result in more cases being directed for review by the Commission, but having three members to decide cases should help the Commission to decide the 25 cases currently pending Commission review, the oldest of which has been pending with the Commission for more than five years. The cases pending before the Commission include a number of significant issues, including cases addressing a healthcare employer's responsibilities under the general duty clause for preventing workplace violence, and the interpretation and application of OSHA construction fall protection standards.

### OSHA Launches E-Recordkeeping Data Submission Platform

By Adele L. Abrams, Esq., CMSP

On August 1, 2017, the Occupational Safety and Health Administration (OSHA) went "live" with the data submission platform that certain employers will need to use when submitting their injury and illness (I/I) data to the agency by the revised December 1, 2017, deadline.

The requirements arise under OSHA's electronic recordkeeping rule, which was promulgated in May 2016. The original data submission deadline had been July 1st, but was delayed to permit OSHA to develop its web-based program and for employers to gain familiarity with the new system. Left unanswered in OSHA's announcement is whether the agency still intends for the submitted data to be publicly searchable by establishment, which was the original intent of the rule. The Final Rule, issued under the previous administration, was intended to spur greater safety efforts through peer pressure and "public shaming," part of OSHA's effort to use behavioral economics to improve safety performance. The public disclosure of I/I data was among the controversial aspects of the rule, and prompted multiple groups to file suit against OSHA over the final rule. Under the e-recordkeeping standard, 29 CFR Part 1904 was modified to require all employers with worksites of 250 or more workers, as well as locations with between 20-249 employees in selected NAICS codes (mostly construction, manufacturing, and certain other high hazard sectors), to submit their I/I information to OSHA, for public

posting. In 2017, all covered employers will submit only data included on Form 300-A; in subsequent years, employers with 250 or more workers will also submit the data from Forms 300 and 301, while smaller companies will continue to provide only the summary data. The reporting deadline shifts to July 1 in 2018, and to March 2nd in subsequent years.

The rule also contains anti-retaliation provisions, protecting injured workers from disparate treatment in incentive, discipline and drug testing programs, and that portion of the rule became effective on December 1, 2016. The rule is currently in litigation before the US Court of Appeals, but the court declined to stay implementation while the case is pending.

OSHA has provided a secure website containing its Injury Tracking Application (ITA), which offers three options for data submission. First, users will be able to manually enter data into a web form. Second, users will be able to upload a CSV file to process single or multiple establishments at the same time. Last, users of automated recordkeeping systems will have the ability to transmit data electronically via an API (application programming interface). OSHA anticipates it will take 10 minutes to create an account, and then 10 minutes to input or upload the data. No paper submissions will be accepted for compliance, and employers who lack internet access are encouraged to do their submissions from public facilities such as libraries, which offer free internet access.

In launching its new system, OSHA clarifies that the size trigger is by establishment size, not firm size, because I/I records are maintained at the establishment level (defined as a single physical location where business is conducted or where services or industrial operations are performed). Firms, by contrast, are often comprised of multiple establishments. Data need only be submitted for those establishments within a firm that meet the submission criteria of size and NAICS. If an establishment is partially exempt from OSHA recordkeeping due to industry, then no data should be submitted for these establishments. Firms may submit establishment-specific data for multiple establishments, using a single account registration.

Third parties may also handle the submissions for the employer, but legal responsibility for the accuracy of the information remains with the employer. Furnishing false I/I data to OSHA can be criminally prosecuted. In addition, if the employer also gets an I/I data inquiry from the Bureau of Labor Statistics, it must still provide BLS with the requested data, even if it was previously submitted to OSHA.

## OSHA E-Recordkeeping Platform, cont.

For technical information on how to submit data and ancillary information about the final rule and OSHA requirements see the injury report [here](#).

### WOTUS UPDATE

Comments on the repeal of the Obama-Administration's Waters of the US rule are due September 27, 2017. Opponents of the rule argue that it exceeds the EPA's authority under the Clean Water Act making even "puddles" subject to EPA jurisdiction. The comments for repeal are a result of President Trump's Executive Order issued in February 2017. Pursuant to the Order, the EPA and Army Corp of Engineers issued a proposed rule to repeal WOTUS. If you need assistance drafting comments, please contact the Law Office.

### MSHA Appoints Acting Assistant Secretary of Labor By Adele L. Abrams, Esq., CMSP

Wayne Palmer has been named by the president to serve as Acting Assistant Secretary of Labor to Mine Safety and Health Administration (MSHA), a position that does not require senate confirmation. It is expected that a different individual will eventually be nominated to serve, following confirmation, but Palmer will lead the agency in the interim, likely through the remainder of 2017, and may continue on as the political deputy thereafter. Since the inauguration, MSHA had been headed by Patricia Silvey, a longtime agency official and career deputy.

An executive with expertise in management, policy and communications, Wayne Palmer has extensive experience in Congress, in the executive branch, and in the private sector. He joined the Trump Administration on Inauguration Day as Senior White House Advisor, leading the U.S. Department of Labor's beachhead team and served as Trump's chief of staff at the Labor Department.

Palmer's career also includes 13 years on Capitol Hill, where he served as Chief of Staff to Senate Republican Conference Chairman Rick Santorum (R-PA) and Legislative Director to Senator George Voinovich (R-OH). He graduated Phi Beta Kappa with a bachelor's degree in political science from Penn State. He also holds a master's degree in government administration from the University of Pennsylvania. He began his public policy career as a Presidential Management Fellow at the U.S. Department of Commerce.

## CalOSHA Proposes Increased Penalties as Inspections and Citations Rise

By Joshua Schultz, Esq., MSP

California OSHA (CalOSHA) has proposed increases in penalties for regulatory, general, willful and repeat violations, which follow increases to Federal OSHA penalties implemented last year.

Effective August 1, 2016, Federal OSHA increased civil penalties for violations of Federal OSHA regulations by 78%. All states with their own Occupational Safety and Health Administration plans are required to adopt maximum penalty levels that at least match Federal OSHA.

CalOSHA proposed changes to Title 8, Section 336 of the California Occupational Safety and Health Regulations, which outlines procedures for the assessment of civil penalties. California Governor Jerry Brown approved the changes on June 27, 2017 and the proposed increases are now under review by the California Office of Administrative Law before they are officially published in the California Regulatory Notice Register.

The proposal will increase the maximum for regulatory and general violations from \$7,000 to \$12,471. The proposed regulations also increase the penalties for willful violations; the maximum penalty for willful and repeat violations will increase from \$70,000 to \$124,709 and the minimum penalty for a willful violation will increase from \$5,000 to \$8,908.

In addition to the proposed penalty increases, CalOSHA released statistics showing they increased both the number of inspections and the number of citations issued in 2016. The agency conducted 7,869 on-site inspections in 2016, the highest number since 2011, and issued 20,035 citations, the highest number since 2008.

## Fourth Circuit Rules EPA is Not Required to Report on Coal Jobs

By Joshua Schultz, Esq., MSP

In a June 29th ruling, the Fourth Circuit Court of Appeals held that the Clean Air Act does not require the EPA to report on how its Clean Air Act regulations affect employment in the coal industry.

Murray Energy Corp. filed the lawsuit in 2014, arguing that the report is required under a provision of the Clean Air Act (CAA) which directs the EPA to continuously evaluate the potential employment impact of CAA administration and enforcement. In 2016, a U.S. District Judge from the

### Fourth Circuit Rules, cont.

Northern District of West Virginia ruled in Murray's favor, ordering the EPA to conduct a coal job study. On appeal to the Fourth Circuit, in its decision issued on June 29, 2017 (amended on July 18th), the three-judge panel sided with EPA, finding that the Clean Air Act does not impose a specific duty, but instead, "a broad, open-ended statutory mandate." Sixteen States, including the State of West Virginia, had joined in the suit as Amici ("friend of the court") supporting Murray Energy.

Murray Energy indicated that it plans to appeal the decision. Murray may ask for an "en banc" rehearing, in which all active Fourth Circuit Judges rehear the case. If the Fourth Circuit denies the en banc hearing request, Murray can appeal to the U.S. Supreme Court.

Murray relied on CAA, Section 321(a) in its argument, which requires that "the [EPA] Administrator shall conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of this chapter and applicable implementation plans, including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement." Murray argued this provision required the EPA to issue a formal report. Murray filed suit under a provision of the CAA which allows individuals to commence civil actions against the EPA alleging a failure of the agency to perform a specific duty required by the CAA.

The EPA responded to Murray's suit by providing sixty-four documents to prove the agency's compliance with the CAA, including regulatory impact analyses, economic impact analyses, white papers, and other reports. The Fourth Circuit did not rule on whether these documents met the requirement to issue a jobs report, rather they ruled that the requirements of Section 321(a) do not impose a specific duty on the EPA, thus Murray was unable to invoke the CAA provision which requires the EPA to perform a duty. The Court concluded that "the EPA is thus left with considerable discretion in managing its Section 321(a) duty. . . . A Court is ill-equipped to supervise this continuous, complex process." The Court remanded with instructions to dismiss the case.

Two of the three judges who heard the case were appointed by President Barack Obama, and the third judge was appointed by President George W. Bush. Murray Energy may aim for a more favorable ruling in

front of the more conservative Supreme Court. For more information on this issue, or a copy of the decisions, please contact the Law Firm.

### How to Identify Your Competent Person Under the OSHA Silica Standard By Michael R. Peelish, Esq.

The OSHA silica rule ("Rule") for the Construction Industry becomes enforceable on September 23, 2017. In some state-plan-states, including Virginia and Oregon, the silica rule is already enforceable. While there are many new requirements under the silica rule, one that requires urgent attention is how to identify and train the Competent Person.

The Rule provides a definition, but applying the definition to a person, either currently employed or to be hired, requires assessment of the perceived expectations from OSHA given the requirements of the Rule. A Competent Person under the Rule (29 CFR 1926.1153(b)) is:

An individual who is capable of identifying existing and foreseeable respirable crystalline silica hazards in the workplace and who has authorization to take prompt corrective measures to eliminate or minimize them. **The competent person must have the knowledge and ability necessary to fulfill the responsibilities set forth in paragraph (g) of this section.**

Guidance is also provided under the Rule through the Written Exposure Control Plan ("WECP"), and the obligations of the employer as it relates to designating a Competent Person. 29 CFR 1926.1153(g)(4) states:

The employer shall designate a competent person to make frequent and regular inspections of the job sites, materials, and equipment to implement the written exposure control plan.

Further, we find parameters for identifying this person by examining how a competent person is defined through other standards, such as trenching, 1926.32(f)), which states the Competent Person is:

- one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees;
- AND who has authorization to take prompt corrective measures to eliminate them.

## Competent Person, con't.

OSHA maintains that “[b]y way of training and/or experience, a competent person is knowledgeable of applicable standards, **is capable of identifying workplace hazards relating to the specific operation**, and has the authority to correct them.”

What do the definitions really mean when it comes to the job site and real-life situations? Let’s start with a management tool that I have used throughout my career referred to as “RAA”. Responsibility, Authority, and Accountability. RAA is a way to think of the duties of a Competent Person. They need to fully understand what is expected of them, and then given the authority to correct what is not right, and then to be held accountable if they do not fulfill their duties.

Now, let’s define “Responsibility”, which means establish the expectations. The Competent Person must:

- Continuously be at job site to implement/manage the written exposure control plan (“WECP”). An implementation tip - Use the Job Board at your job site and post the name of Competent Person for each work shift.
- Know which equipment/tasks involve exposure to silica, anticipate necessary controls.
- Conduct frequent and regular inspections of the work site to ensure the WECP is being fully and properly implemented. You cannot visit occasionally, but must be at job site. This duty will vary depending on the job tasks and each employee’s exposure to silica.
- Ensure proper use of engineering controls and work practices.
- For tasks requiring respiratory protection, ensure the employee has been fit-tested; the correct respirator is provided; and the respirator is properly worn and maintained.
- Coordinate activities with other contractors to eliminate/reduce silica exposure.
- Ensure correct housekeeping measures are deployed to reduce exposure.
- Identify Restricted Access Areas and enforce procedures to restrict access to work areas with potential silica exposure.
- Be able to identify situations that could result in high exposures.

(e.g. – equipment failure, repositioning employees)

- Have a copy of and understand OSHA’s silica standard including the Action Level (25 µg/m<sup>3</sup>) and Permissible Exposure Limit (50 µg/m<sup>3</sup>) requirements.
- Understand health hazards of silica, routes of exposure of silica, and signs/symptoms of silica exposure.
- Understand medical surveillance program and when an employee is required to enter the program.

The second critical area is “Authority” which looks like:

- Employer’s designated Competent Person will have responsibility, authority, and accountability for implementing its WECP at all active, affected worksite(s).
- Competent person must take action if they “observe increases in visible dust (81 FR 16723) as compared to the expected as determined through general observation”.
- Competent Person must be ready to step into a situation and make decisions to reduce or eliminate silica exposures to employees caused by its employer’s work activities and other employers’ work activities.

Once, the first two elements of RAA are in place, then the final element of “Accountability” ties it all together. A Competent Person must be committed to the process of reducing employees’ silica exposures. The evidence of this commitment is:

- A fully and properly implemented WECP.
- A workplace examination record of frequent and regular inspections.
- A job board posted at the job site so employees know who to reach out to if they have questions about a silica exposure related matters.
- Employees proper use of respirators.

Employers and Employees have and will continue to have questions related to the OSHA silica rule and what is required for full and proper implementation. Our firm stands ready to assist along your journey as you implement the silica rule. Please call if you require assistance.

## Court Orders the EEOC to Revisit Wellness Program Rules

By Diana R. Schroeder, Esq.

On August 22, 2017, Judge Bates of the Federal District Court for the District of Columbia ordered the EEOC to revise its wellness regulations. The EEOC issued the new regulations on May 17, 2016 and litigation ensued. In October 2016, the AARP filed suit against the EEOC, urging the Court to find that the EEOC failed to explain how employee participation in a wellness plan could be “voluntary” given that employers could offer up to a 30% discount on health care costs for wellness program participants. The discount for participants could translate to a ‘penalty’ for non-participants. AARP also argued that the 2016 rules represent a reversal of the EEOC’s previous position -- that in order for a wellness plan “to be ‘voluntary,’ employers could not condition the receipt of incentives on the employee’s disclosure of . . . protected information.” As a result, Judge Bates concluded that the new rules amounted to potential coercion based on allowable incentives for employees who decide to participate.

The EEOC defined “wellness programs” as “health promotion and disease prevention programs and activities offered to employees as part of an employer-sponsored group health plan or separately as a benefit of employment. Many of these programs ask employees to answer questions on a health risk assessment (HRA) and/or undergo biometric screenings for risk factors (such as high blood pressure or high cholesterol). Other wellness programs provide educational health-related information or programs that may include nutrition classes, weight loss and smoking cessation programs, onsite exercise facilities, and/or coaching to help employees meet health goals.” Wellness programs must be voluntary, and cannot result in loss of group health coverage for employees who choose not to participate. Employers may not take any adverse action against non-participants or employees who fail to achieve certain health goals or outcomes, or take any adverse action against an employee because of a disability or health condition that may be revealed. The employer must provide notice to employees explaining what medical information will be obtained, how the information will be used, who will have access to the information, and the restrictions on disclosure of the medical information.

Any time medical information is requested by an employer, laws protecting use and disclosure of this information are triggered. The employer and its wellness program must conform to the laws that protect employees’ medical information from dissemination, and that protect

employees from discrimination or retaliation, based upon that medical information. Those laws include not only the ADA, but the Genetic Information Nondiscrimination Act (GINA), and the Health Insurance Portability and Accountability Act (HIPAA) as amended by the Affordable Care Act (ACA, aka ObamaCare). The Judge acknowledged the tension between the “laudable goals” of employer-sponsored wellness programs, and the “equally important interests” promoted by the ADA and GINA. HIPAA considerations are also triggered, as wellness programs are regulated in part by HIPAA.

The Court held that the EEOC had not provided a “reasoned explanation” for its interpretation of “voluntary” as the (maximum) 30% incentive level “is too high to give employees a meaningful choice regarding whether or not to participate” in wellness programs that require disclosure of their medical information. New EEOC Rules and any further developments will be reported in the Newsletter.

**SPEAKING SCHEDULE****ADELE ABRAMS**

08/31/17 Clearlaw Webinar on OSHA Electronic Recordkeeping & Injury Reporting Rules  
 09/13/17 Northern White Sands Conference, OSHA/MSHA Regulation of Crystalline Silica, Denver, CO  
 09/21/17 BLR Webinar on Legally Effective Accident Reporting  
 09/22/17 ASSE Region VI PDC, speak on OSHA/MSHA Update: Will Safety Be Trumped?  
 09/25/17 NSC Annual Congress, Multi-Generational Workforce Training Issues Indianapolis, IN  
 09/26/17 NSC Annual Congress, OSHA's Electronic Recordkeeping Rule & Anti-Retaliation Requirements, Indianapolis, IN  
 10/02/17 Progressive Business Conferences webinar on Confined Spaces for General Industry  
 10/11/17 Chesapeake Region Safety Council Annual Conference, OSHA's Crystalline Silica Rule Update Laurel, MD  
 11/06/17: Progressive Business Conferences webinar on Disciplining Unsafe Workers  
 11/15/17 SafePro Inc. Mine Safety Institute, MSHA legal issues, Savannah, GA

**DIANA SCHROEHER**

09/13/17 Penn State Delaware Mine Safety Seminar, Woodside, DE

**TINA STANCZEWSKI**

09/19/17 North Carolina Law Seminar, NC Mine Safety & Health Law School, Castle Hayne, NC  
 10/18/17 California Joint Technical Symposium, "Environmental Law Update" The Carson Center, Carson, CA

**MICHAEL PEELISH**

08/25/17 Chesapeake Regional Safety Council, Competent Person Training, Baltimore, MD  
 09/06/17 Chesapeake Regional Safety Council, Competent Person Training, Dulles, VA  
 09/15/17 Chesapeake Regional Safety Council, Competent Person Training, Baltimore, MD

**JOSHUA SCHULTZ**

10/10/17 BLR Cal/OSHA Summit, "Multi-State Worksites: Mastering Safety Compliance Across State Lines,"  
 Costa Mesa, CA