



## OSHA & MSHA Hike Civil Penalties By Adele L. Abrams, Esq., CMSP

On January 15, 2019, a pre-publication version of an announcement by the U.S. Department of Labor became available, indicating significant hikes in the civil penalties imposed by both the Occupational Safety & Health Administration (OSHA) and the Mine Safety & Health Administration (MSHA), as well as other agencies within DOL (e.g., Employee Benefits Security Administration, Employment & Training Administration, and the Wage & Hour Division).

OSHA’s new penalties raise the maximum to \$132,598 for willful and repeat violations, up from the previous high of \$129,336. The mandatory minimum penalty for those elevated citation classifications is now \$9,472. Regular “serious” and “other than serious” citations, as well as failure to abate situations, will carry a new maximum fine of \$13,260 (up from \$12,934).

MSHA also announced its civil penalty increases, which will take effect as soon as the government shutdown ends and they can be published in the Federal Register. The new maximum for regular assessments is \$72,620, while the maximum for “flagrant” violations was raised to \$266,275. When Congress first created the “flagrant” classification in the 2006 MINER Act, the maximum penalty was \$224,000. Flagrant violations are those issued under Section 104(d) of the Mine Act (“unwarrantable failure” violations) that are classified as at least “reasonably likely” to cause “permanent disability” or to be fatal, with either a “high” or “reckless disregard” negligence classification.

The mandatory minimum fine for failing to report a fatality or serious injury within

15 minutes was hiked to \$6,052, while penalties for failing to abate a violation can now reach \$7,867 per day. Minimum penalties for unwarrantable failure violations under Section 104d1 of the Mine Act are now \$2,421, while Section 104(d)(2) infractions trigger minimum fines of \$4,840. The minimum penalty for Section 104(a) and 104(g) citations and orders is now \$135.

Unlike OSHA, MSHA can also issue personal penalties to miners for certain transgressions, such as smoking in an underground gassy mine or near flammables, and the new penalty for those violations is \$332. However, MSHA can also issue personal penalties to agents of management, including hourly trainers or workplace examiners, of up to the new \$72,620 maximum, under Section 110(c) of the Mine Act. This occurs where the miner knew or should have known of a violation (or personally participated in it, such as failing to wear PPE), failed to initiate corrective action, and has authority to direct the workforce in some manner.

All statutory penalty mandates are binding on the agencies at the first stage, when they propose their penalties as citations are issued. However, if a case is contested and litigated before the OSHRC or FMSHRC, those judges have “de novo” penalty review authority. This means they are not bound by what OSHA or MSHA has proposed, or what Congress mandated, but can decrease or increase the ultimate fines as they see fit, or as agreed upon by the parties in settlement.

Normally, the new penalties only apply to violations cited after the effective date for the increases but the agency’s stance on retroactive application hasn’t *(continued on page 8)*

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## Wellness Programs - Update

By Diana R. Schroeder, Esq.

Effective January 1, 2019, the EEOC's wellness program rules promulgated in 2016 were removed by the EEOC, an action that implemented a Court Order which would have vacated the rules absent action by the EEOC. Judge Bates of the Federal District Court for the District of Columbia in *AARP v. EEOC*, No. 16-2113, on December 20, 2017 vacated EEOC rules. On December 20, 2018, the EEOC issued final rules removing the incentive provisions from its earlier rule.

Wellness programs have been recognized in recent years as a valuable tool for employers and employees alike, but scrutiny over the incentives offered to employees for participating in wellness programs culminated in protracted Federal District Court litigation, leaving employers with little guidance on how to navigate the rules and remain compliant.

On May 17, 2016, the Equal Employment Opportunity Commission (EEOC) published its final rules under both the ADA (Americans with Disabilities Act) and under the GINA (Genetic Information Nondiscrimination Act of 2008). The rules provided guidance on the extent to which employers may offer incentives to an employee to provide his or her current health status information as part of a health risk assessment (HRA) administered in connection with an employee-sponsored wellness program. The HRA may have required the employee to respond to disability-related questions and/or undergo a medical examination. Controversy arose regarding the scope of the allowed incentives and whether 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.

On October 24, 2016, AARP filed suit against the EEOC in the U.S. District Court challenging the incentive provisions of the ADA and GINA rules. On August 22, 2017, the District Court concluded that the EEOC did not provide sufficient reasoning to justify the 30% incentive limit adopted in the ADA and GINA rules, and remanded the rules to the EEOC for further consideration without vacating them. Judge Bates concluded that the new rules amounted to potential coercion based on allowable incentives for employees who decide to participate. 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.

The AARP filed a motion to alter or amend the court's summary judgment order, and on December 20, 2017, the court issued an Order vacating the incentive section of the rules, effective January 1, 2019. Consistent with that decision, on December 20, 2018, the EEOC published its removal of the May 17, 2016 Rule and removed the incentive sections of the ADA and GINA regulations at 29 CFR 1630.14(d)(3) and 29 CFR 1635.8(b)(2)(iii), respectively.

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 and GINA, but also the Health Insurance Portability and Accountability Act (HIPAA) as amended by the Affordable Care Act (ACA, aka ObamaCare). The HIPAA rules prohibit discrimination in eligibility or premiums based on health-related factors, permits exceptions for certain wellness programs. The ACA amended the HIPAA rules to allow a 30% maximum limit, plus an additional 20% for tobacco cessation programs. These limits are not affected by the court's invalidation of the EEOC's (*con't on page 8*)

## Court of Appeals Adds New Twists for NLRB Joint Employer Rule

By Gary Visscher, Esq.

Previous articles (October, April 2018 newsletters) described the numerous twists and turns in the NLRB's path to defining "joint employer" under the National Labor Relations Act. A recent decision by the Court of Appeals for the D.C. Circuit added new twists, even as the NLRB attempts to settle the definition going forward through rulemaking.

To recap, in 2015, the NLRB overturned long-standing case law, and adopted a new definition in the *Browning-Ferris Industries (BFI)* case. While that decision was on appeal to the Court of Appeals, the Board, with new members, reversed the *BFI* definition, and reinstated the previous test, in the *Hy-Brand Industries* case. However, the Board's decision in *Hy-Brand* was subsequently vacated after a possible conflict of interest regarding one of the Board members came to light. The result was that the *BFI* test was reinstated, and *BFI* renewed its appeal of the Board's decision to the D.C. Circuit. The D.C. Circuit issued its decision in that case on December 28, 2018.

Meanwhile, in 2018 the NLRB announced that it planned to address the definition through a rulemaking. A proposed rule was issued in September 2018. The comment period on the proposed rule is (as of this writing) open to January 28, 2019.

The definitional issue is essentially over two questions – does the "control" necessary to find that a company is a "joint employer" (of another company's employees) include "the right to control" (even if not exercised) and, second, does "control" include "indirect" as well as "direct" control over the employees. The "traditional" NLRB definition said that, in order to find any employment relationship, the employer's control must be "actual" and "direct and immediate." In the Board's 2015 *BFI* decision, the Board changed that and said that joint employment could also be found where the control was "reserved" but not exercised, and "indirect" rather than direct. The NLRB's proposed rule would follow and adopt the NLRB's pre-*BFI* definition.

The Court of Appeals' decision (2-1) takes yet a third way. Some news reports portrayed the Court's decision as upholding the NLRB's *BFI* decision, and others said it "nixed" it, but almost every commenter agreed that the Court's decision added to the uncertainty and confusion surrounding the current state of the law.

First, the Court said that the definition of joint employer under the NLRA must be determined according

to the "common law of agency." The effect was that the Court said its review of the NLRB's definition was *de novo*, and that no deference was due the agency's definition. Going forward, the Court's ruling that the definition is one of common law rather than agency discretion may also limit what the Board may do differently from the Court's decision in the current rulemaking.

Second, the Court agreed with the NLRB's decision in *BFI* that "the right to control" and "indirect control" are "relevant" to whether an employment relationship exists. However, the Court reversed and remanded the case because in *BFI* the NLRB did not limit the inquiry of *BFI*'s "indirect" and "unexercised" control to control over "the essential terms and conditions of employment." The Board's test in *BFI*, the Court said, failed because it did not distinguish "between indirect control ... intrinsic to ordinary third-party contracting relationships, and indirect control over the essential terms and conditions of employment."

According to the Court, "[t]o inform the joint-employer analysis, the relevant forms of indirect control must be those that 'share or co-determine those matters governing essential terms and conditions of employment. By contrast, those types of employer decisions that set the objectives, basic ground rules, and expectations for a third-party contractor cast no meaningful light on joint employer status." The Court said that "some supervision is inherent in any joint undertaking and does not make the contributing contractors employees."

The Court faulted the NLRB's decision in *BFI* for not clarifying "what counts as 'indirect control'" but the Court also declined to do so or to say whether "indirect control" alone (without evidence of direct control) could be dispositive. The dissent strongly criticized the majority decision on several grounds, including for issuing the decision in the midst of the NLRB's on-going rulemaking. The dissenting judge also criticized the majority's rather abstract analysis, which does not address the particular issues in business relationships. "The other source of the majority's errors is its failure to notice that the common law of joint employer may vary according to the nature of the business arrangement between companies, or between consumers and companies. The joint employer issue in franchising arrangements, for example, involves different considerations than those involved in the typical principal-independent contractor arrangement."

*BFI*, or the Board, could ask the D.C. Circuit for en banc review, or the Supreme Court could be asked to review the D.C. Circuit's decision. The NLRB has requested comments on the impact of the court's decision on its rulemaking, and will likely need to address it in a final rule. (*con't page 8*)

## Rising Suicides in the Workplace

By Sarah Ghiz Korwan, Esq.

The Centers for Disease Control (CDC) recently reported that from 2000 to 2016, the U.S suicide rate among working age adults ages 16 to 64 rose 34 percent from 12.9 per 100,000 population to 17.3 per 100,000. The CDC analyzed suicide deaths by Standard Occupational Classification (SOC) major groups for decedents aged 16 to 64 years from 17 states participating in both the 2012 and 2015 National Violent Death Reporting System, to better understand suicide among different occupational groups and better direct suicide prevention efforts.

The highest suicide rate among men in 2012 and 2015 was Construction and Extraction (43.6 and 53.2 per 100,000 civilian noninstitutionalized working men), respectively. The Arts, Design, Entertainment, Sports, and Media was the major occupation group which had the highest female suicide rate in 2012 (11.7) and 2015 (15.6).

The CDC reported that suicide rates varied widely across occupational groups in both 2012 and 2015, and rates among males and females increased. Many contributing factors lead to suicide and identifying the specific role that occupational factors might play in suicide risk is complicated since work and nonwork components are associated with suicide. The relationship between occupation and suicide might be further complicated by the availability of lethal means on the job and socioeconomic factors such as lower income and education.

The report noted that because many adults spend a substantial amount of time at work, the workplace has untapped potential for suicide prevention. In addition to efforts focusing on early detection and tertiary intervention through training of employees to identify those at risk, the CDC report also propounds that more research is needed in the area of the role of the workplace in primary suicide prevention, including improving working conditions and reducing stress.

The CDC stated that the study points to the need for a more comprehensive approach to suicide prevention, which includes workplace-based approaches. The CDC's website offers suicide prevention strategies, including:

- Identify and support people at risk of suicide.
- Teach coping and problem-solving skills to help people manage challenges with their relationships, jobs, health, or other concerns.

- Promote safe and supportive environments. This includes safely storing medications and firearms to reduce access among people at risk.
- Offer activities that bring people together so they feel connected and not alone.
- Connect people at risk to effective and coordinated mental and physical healthcare.
- Expand options for temporary help for those struggling to make ends meet.
- Prevent future risk of suicide among those who have lost a loved one to suicide.

## Sometimes the Right Answer is

### Simply "I Don't Know"

By Michael Peelish, Esq.

Prior notice of inspection violations alleged by MSHA have historically occurred in the underground coal mining sector. But don't assume this issue cannot arise at any mine on any visit by an MSHA inspector. A recent decision sets forth a fair analysis in a case decided by Judge Zane Gill involving an underground coal mine, but is instructive for all mines under MSHA jurisdiction. (see *Secretary v. Kenamerican Resources*). The ALJ ruled that the communication made by the dispatcher in this case to the miners underground did not constitute "advance notice of an inspection". The Secretary had argued that the mere asking of a question by a miner in the mine to the dispatcher, "Do we have any company outside" was enough to support a citation. The ALJ dismissed MSHA's mistaken assumption that the nature of the question triggered the alleged violation, but rather it was the response that completes any violation of advance notice.

The facts involved an investigation of a 103(g) hazard complaint at an underground coal mine operated by Kenamerican that was occurring several hours after the afternoon shift had entered the mine. The MSHA inspectors requested escorts and transportation into the mine which required the dispatcher to call down to the mine to have someone come back up to rendezvous with and transport the MSHA inspectors. While the dispatcher made this request, the MSHA inspector listened on the mine phone. Someone in the mine asked the question "Do we have any company outside?" When faced with a situation like this, the dispatcher testified he had received training to say, "I don't know" or "I can't say." In this case he testified that he said, "I don't know" which is the more neutral response in my opinion. In court, there was a disagreement between the dispatcher and the inspector as

## **“I Don’t Know, con’t.**

to the precise language used. The ALJ credited the testimony of the dispatcher based on his training and experience with handling many situations like this since this mine had 735 inspection days over a 15-month period with an E01 inspection nearly every work day, usually involving multiple MSHA inspectors.

Also, the Secretary made unsupported statements about advance notice of inspections being pervasive in the underground coal mine industry, however the ALJ was clear that without supporting evidence that he would not consider sweeping and unsupported statements made by the inspector or Secretary’s legal counsel as evidence.

This ALJ decision is applicable to all mine sites regardless of the type or size of mine or material mined/processed, the first task is to train dispatchers or assistants or supervisors or anyone who might be in the situation where something they say could be construed as providing advanced notice. For instance, an MSHA inspector arrives at a mine trailer or office and says I need a ride into the mine or the pit or someone to accompany me to the plant. The supervisor or assistant picks up the mine phone and calls for another supervisor and says, “hey an MSHA inspector is here and needs a ride.” Or they may call the miner’s representative “to come to the mine office to accompany an MSHA inspector.” Both instructions could be construed as giving advance notice of an inspection. Instruct these individuals to say “can you come to the mine office or mine trailer.” If a question is asked why, then the response should be “I don’t know” or “I cannot say”.

## **Supreme Court to Review When Deference is Due Agencies By Gary Visscher, Esq.**

The most impactful court case this year to future OSHA and MSHA litigation may be one that doesn’t mention either agency. Last month the U.S. Supreme Court granted review in the case of *Kisor v. Wilkie*, and specifically on the issue raised by the appellants, “whether the Court should overrule” the Court’s decisions in *Auer v. Robbins*, 519 U.S. 452 (1997) and *Bowles v. Seminole Rock & Sand*, 325 U.S. 410 (1945). The so-called “*Auer* deference” has meant that as a general rule courts must defer to an agency’s reasonable interpretation of its own regulations as long as the regulation is ambiguous and the agency’s interpretation is neither plainly erroneous nor inconsistent with the regulation.

*Auer* deference is sometimes thought of as the administrative agency counterpart to the better known “*Chevron* deference,” (from the Supreme Court’s decision in *Chevron v. NRDC* (1984)) which applies to agency interpretations of ambiguous provisions in statutes written by Congress. However, *Auer* deference has received particular criticism, because the agency which wrote the regulation is also given deference for its interpretation of ambiguities in the regulation (which generally come up in the context of an enforcement action). In *Decker v. Northwest Env’tal Defense Ctr.* (2013), former Justice Scalia (who, ironically, was the author of the *Auer* decision) criticized *Auer* deference, which he said creates an “incentive [for agencies] to speak vaguely and broadly, so as to retain flexibility that will enable clarification with retroactive effect.” Justice Scalia wrote that such deference to the interpretation by the same agency that wrote the regulation “violate[s] a fundamental principle of separation of powers – that the power to write a law and the power to interpret it cannot rest in the same hands.”

In *Kisor v. Wilkie*, the Federal Circuit applied *Auer* deference to rule in favor of the Veteran Administration. The Court found that the term “relevant” in the applicable VA regulations was ambiguous, and the VA’s interpretation was neither plainly erroneous or inconsistent with the VA’s regulatory framework. *Kisor* appealed and the Supreme Court agreed to review. Several current Justices of the Court have either questioned or expressed disagreement with *Auer* deference as it has developed, and this case presents an opportunity to revisit and possibly overrule *Auer*.

This case is of great significance for litigation with all administrative agencies, including OSHA and MSHA. Deference to OSHA’s and MSHA’s interpretations has often been cited by courts and the Review Commissions (OSHRC and FMSHRC) in enforcement cases that are based on ambiguous provisions in standards and regulations. Overruling *Auer* deference would also likely give OSHRC and FMSHRC a greater role in determining how standards are applied and enforced, and would help to “level the playing field” when employers are cited under unclear and ambiguous regulatory provisions.

## **BLS Reports Decline in Fatalities, Injuries By Gary Visscher, Esq.**

As it has done each year since 1992, last month the Department of Labor’s Bureau of Labor Statistics published the results of the national Census of Fatal Occupational Injuries (CFOI) which counts the number of workplace fatalities that occurred during the previous year. BLS

## **BLS Reports Decline, con't**

reported that the number of workplace fatalities in 2017 was 5,147. The total number was a decrease from 5,190 in 2016, and the first year-to-year decrease since 2013. The lowest number of workplace deaths was recorded in 2009, with 4,551.

BLS noted the impact of workplace deaths from drug and alcohol overdoses, which have risen by at least 25% each year for the past 5 years. In 2017 BLS reported there were 272 workplace deaths due to unintentional overdose. Deaths from workplace violence (homicides), which rose to its highest level in 2016, decreased from 500 to 458, but were still above the average over the past 7 years.

Another factor impacting the overall number of workplace fatalities is the growing number of older workers in the workforce. BLS reported that in 2017, 15% of workplace fatalities were workers over age 65, the highest percentage since the Census began in 1992. Workers over 65 had twice the fatality rate of the next highest age group, which was workers age 55 to 64. Transportation accidents remain the largest cause of workplace fatalities, followed by falls, slips and trips. The number of deaths from fires and explosions increased from 88 in 2016 to 123 in 2017.

The overall fatal injury rate for all workers was 3.2 per 100,000 full time workers, but BLS noted 10 occupations for which the fatality rate was 6 or more times the overall rate, led by fishers and related fishing workers, whose fatality rate was 99.8 per 100,000 workers.

In addition to the December report on workplace fatalities, in November BLS reported on workplace injuries and illnesses occurring in 2017, based on its survey of about 200,000 employers. BLS found that both the number and rate of nonfatal injuries reported by employers declined in 2017. The total recordable case rate (per 100 full-time workers) has steadily declined, from 5.0 in 2003 to 2.8 per 100 full time equivalent workers in 2017. Whereas in some years there has been a divergence between the direction of "total recordables" and more serious injuries, as identified as "days away from work, job transfer, or restriction," or DART, case rates, in 2017 both rates declined.

Overall, both reports show small but persistent progress in reducing the number of workplace fatalities and injuries. Both the CFOI Report and the BLS Report on Employer-Reported Injuries and Illnesses (which are available, along with charts, tables and additional backup

information on the BLS website, BLS.gov) include a wealth of data and information which persons involved in safety and health in every industry will find interesting, informative, and useful.

## **OSHA Releases Compliance Assistance & Outreach Initiatives** **By Adele L. Abrams, Esq., CMSP**

OSHA may still be without a confirmed Assistant Secretary as it moves into the second half of the Trump Administration, but that hasn't stopped the agency from going forward with ways to assist employers with their safety and health compliance obligations. A recent document outlines the key ways in which OSHA plans to put into action its proactive programs during 2019.

OSHA plans to conduct outreach to foster compliance with a number of the agencies newer standards, including: Respirable Crystalline Silica, Beryllium, E-Recordkeeping, and the new mandates for crane operator certification. The agency has web pages already in place for a number of these topics with links to additional resources, including those provided by NIOSH.

A number of national outreach initiatives are planned for 2019. The centerpiece of OSHA's outreach events has been the Safety Stand-Down to prevent falls in construction, which will be held May 6-10, 2019. While it began with a construction emphasis, employers and workers in other industry sectors are now encouraged to participate. This year, on August 12-18, OSHA will again sponsor its Safe + Sound Campaign for safety and health programs, to promote the effectiveness of programs with key core elements such as: worker participation, management leadership, and a systematic way to find and fix hazards.

Other OSHA initiatives include a trench safety initiative (to launch in June 2019), in conjunction with the National Utility Contractors Association, and this will include a Trench Safety Stand-Down as well. Planned activities include full day training sessions, classroom training, live outdoor demonstration, and a mock trench rescue. OSHA also plans an emphasis on health and illness prevention, with a #WaterRestShade campaign later this year.

OSHA has identified the following industries and topics as outreach priorities for this year: trenching and excavation, oil and gas, telecommunications towers, temporary workers, construction, healthcare, small businesses, young workers, and grain handling. Several of these also overlap with OSHA National Emphasis Programs on the enforcement side of the agency. For more information on OSHA compliance, contact Adele Abrams at [safetylawyer@gmail.com](mailto:safetylawyer@gmail.com).

## Cal/OSHA Issues 50K Fine After Explosion Injures Cannabis Industry Worker

By Adele L. Abrams, Esq., CMSP

In one of the first major occupational safety and health incidents involving the cannabis industry, Cal/OSHA has cited a manufacturer of products for multiple violations and imposed a \$50,470 penalty, after an explosion seriously injured one of its workers at its Watsonville, CA, facility. Last summer, a worker at Future2 Labs Health Services was inside a portable storage container, using propane to extract oil from the cannabis leaves, when the propane ignited and exploded. The worker was badly burned and required hospitalization.

All employers in the cannabis industry, including those who cultivate, manufacture, distribute, sell, and test marijuana products, must take steps to protect their employees from all health and safety hazards associated with their work. Cal/OSHA targeted the employer for failing to test the atmosphere inside the 128 sq.ft. confined space, which could have revealed flammable vapors or gases, before allowing the worker to enter and perform work. The equipment used by the worker created a spark that triggered the gas explosion. A total of 10 violations were cited, including regulatory, general and serious. In addition to the confined space issue, the company was cited for failing to protect workers around flammable vapor, lack of hazard identification and personal protective equipment, and failure to maintain equipment in safe operating condition. Other citations were issued for violations related to inadequate training, failing to establish an emergency action plan and a hazard communication program, as well as for failure to notify Cal/OSHA of the incident in a timely manner.

A Cal/OSHA official noted that the process itself is dangerous, because highly flammable gas is involved, and recommended that in order to prevent future injuries, the cannabis industry needs to establish and implement effective Injury and Illness Prevention Programs (IIPP), train workers, and comply with the safety and health standards.

California runs its own OSHA program and has a mandatory IIPP standard, which is similar to the safety and health management system programs advocated, but not mandated, by federal OSHA. A rule to mandate such programs at the federal level was a priority during the Obama administration but has since fallen off the OSHA regulatory agenda. Voluntary consensus standards, including the ANSI Z10 standard, can also be

useful tools in assisting employers to develop effective injury and illness prevention strategies.

Cannabis industry workers include those in the agricultural production side, as well as persons who work in distribution, laboratories that test quality, manufacturing, and retail sales. The key risk areas for workers in this sector are:

- Slips, Trips and Falls, and Ladder Hazards,
- Electrical Hazards,
- Exposures to Airborne Contaminants,
- Flammable Liquids and Gases,
- Hazard Communication,
- Hazardous Energy-Lockout/Tagout,
- Heat Illness Prevention,
- Machine Hazards,
- Personal Protective Equipment,
- Point of Operation Hazards,
- Pressure Vessels,
- Ergonomic Hazards,
- Sanitation and Pest Control, and
- Workplace Violence.

*For assistance in risk assessment and mitigation in the cannabis industry and other sectors, contact the Law Office's safety and health professionals in Maryland, Colorado and West Virginia. We assist employers with OSHA compliance and proactive solutions in all 50 states. The Law Office is a member of the National Cannabis Bar Association.*

## U.S. Mine Fatalities in 2018: Second Lowest on Record By Adele L. Abrams, Esq., CMSP

Despite perceptions that mining is one of the United States' most dangerous industries, injury and fatality rates in surface and underground coal and metal/nonmetal mines have continued to improve in recent years. The Mine Safety & Health Administration (MSHA) announced that, for calendar year 2018, there were a total of 27 mining fatalities – the second lowest number ever recorded in this country.

Of these deaths, 18 occurred at surface operations, while 9 occurred at underground mines. The leading cause of death was powered haulage, which accounted for just under half of these fatalities (13 deaths, or 48 percent of the annual total). There are currently 250,000 miners working at 12,000 metal/nonmetal mines such as quarries and cement plants, and 83,000 miners working at the nation's 1,200 remaining coal mines.

MSHA recently closed the record on its request for information on powered haulage safety improvements, and

## Mine Fatalities, con't

and input on the powered haulage RFI can be found at [www.regulations.gov](http://www.regulations.gov). Powered haulage encompasses not only mobile equipment such as haul trucks and loaders, but also belt conveyors. Part of the emphasis focuses on large vehicles hitting smaller equipment, and the use of seatbelts, which is also one of MSHA's "Rules to Live By" in the campaign started during the Obama administration. In recent years, powered haulage incidents have been linked with roughly half of all mining fatalities in the U.S.

MSHA provides the following information on these key aspects for prevention:

- Large vehicles versus smaller ones: Surface mining vehicles can be several stories tall and are capable of destroying smaller vehicles that cannot be seen by the operator. Traffic controls, training, and avoiding distractions are key to enhancing safety. Collision warning and avoidance systems can also help.
- Seatbelt Use: MSHA engineers estimate that three to four miners' lives could be saved each year if adequate seat belts were provided and worn. Warning systems such as chimes can remind drivers to buckle up, while interlock systems can prevent the vehicle from moving if the belt is unbuckled.
- Conveyor Safety: Belt conveyors and their components pose serious risks to miners working on or around them. It's important to install adequate guarding to prevent contact, provide and use crossovers and cross-unders, and lock out energy sources and block motion whenever performing maintenance.

For more information on injury and illness prevention, contact the mine safety professionals at the Law Office at 301-595-3520. MSHA's resource pages on powered haulage safety is at <https://www.msha.gov/news-media/special-initiatives/2018/05/31/powered-haulage-safety-initiative>.

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## Penalties, con't

been made clear at this time, and the pre-publication notice states that "the increased penalty levels apply to any penalties assessed after the effective date of this rule." This suggests that, for example, if a violation occurred in December 2018 but is not cited (with a proposed penalty) until May 2019, after the new penalties take effect, the 2018 violation could be sanctioned at 2019 rates. This issue may have to be addressed by the courts in the future.

For more information on OSHA/MSHA defense, contact the Law Office at 301-595-3520 (DC area) or 303-228-2170 (Western).

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## Wellness Programs, con't

30% maximum in the AARP v. EEOC litigation, but this complicates matters for programs that are subject to both the ADA and HIPAA rules.

Additionally, the HIPAA-ACA incentive limits apply only to "health-contingent" wellness programs, which are programs that require employees to attain a specified health-related outcome. No limits on incentives apply to wellness programs that are only participatory but do not require attainment of a specified outcome.

The EEOC has not issued a Notice of Proposed Rulemaking on this issue as of the date of publication. Given the uncertainty on the question of allowable incentives, employers who offer or are considering offering wellness programs will want to examine their programs to ensure compliance and seek guidance on this complex issue. For more information on wellness programs, please contact the Law Office.

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## Joint Employer, con't

The court decision and the NLRB rulemaking apply only to issues arising under the National Labor Relations Act, but may be useful as guidance in cases under other laws and agencies. Please feel free to contact the Law Firm with any questions or for more information.

## 2019 SPEAKING SCHEDULE

### ADELE ABRAMS

#### 2019 Speaking

Jan. 23: Mechanical Contractors Association of America Safety Director's Conference, Lake Buena Vista, FL, Presentation on Traversing Marijuana and Post Accident Drug Testing Traps

Feb. 12: ASSP Northwest Safety Conference, Minneapolis, MN, Presentation on Medical Marijuana and Workplace Safety

Feb. 13: NSSGA Annual Meeting Legal Forum, Indianapolis, IN, Presentation on Sexual Harassment & Workplace Violence Issues

Feb. 26: Society of Mining Engineers, Denver, CO, Presentation on Legal & Ethical Considerations for Mine Safety Professionals

Feb. 28: Indiana Safety & Health Conference, Indianapolis, IN, Presentation on Safety in the "Gig Economy"

#### 2019 Webinars

Feb. 4: ClearLaw Webinar, OSHA Walking/Working Surfaces Rule

### MICHAEL PEELISH

February 14: BLR Webinar Independent Contractor and Worker Safety

### GARY VISSCHER

Feb. 14: Post incident Drug Testing Webinar

### BRIAN YELLIN

Feb. 11: Worker Safety Conference for the Meat & Poultry Industry, Respirator Protection Fit Testing Protocol