



## LAW OFFICE OF ADELE L. ABRAMS P.C.



ISSUE 9  
DECEMBER 12, 2016  
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### OSHA/MSHA Forecast 2017: What Now!?!

By: Adele L. Abrams, Esq., CMSP

The dust has barely settled from the most contentious presidential election in history, and it is clear that big changes are in store for regulation and enforcement by the Occupational Safety & Health Administration (OSHA) in the next four years. Under President Obama, a number of regulatory initiatives were brought to fruition, including a crystalline silica rule, confined space in construction, and electronic submission of injury/illness data (and its companion provisions making retaliation against workers under Section 11(c) of the OSH Act an offense punishable by a maximum \$124,709 penalty).

Two of these 2016-issued final rules: crystalline silica and e-recordkeeping – are still in litigation. The question is whether a Trump justice department will defend the OSHA standards as vigorously as those attorneys currently engaged in the cases, and whether the agency will be quick to cut a deal, perhaps delaying effective dates or repealing some of the more onerous provisions.

After the election, on November 18, 2016, OSHA issued another final rule, setting new requirements for walking and working surfaces/fall protection in general industry. This rule, with an estimated economic impact of more than \$300 million per year, sets new specifications for portable and fixed ladders, scaffolds, and personal fall arrest systems, and takes effect on January 17, 2017 – just three days before President Obama leaves office.

Will this rule be rescinded by the next Congress under the Congressional Review Act (CRA), in the same way the OSHA ergonomics standard was killed by President Bush after similarly being issued as a “midnight rule” in the waning days of the Clinton administration? Stay tuned!

Several more rulemaking actions are at the final rule stage, including expansion of the statute of limitations for recordkeeping violations, which went to the Office of Management and Budget (OMB) for clearance on October 14<sup>th</sup>, and a new health standard for beryllium, which is also at OMB being cleared for publication. These could still be completed before the White House changes hands on January 20, 2017. In addition, there are quite a few other action items on the regulatory agenda (combustible dust, modification of process safety management requirements, infectious disease control, and I2P2) that were in progress, either just at or just passed the Small Business Regulatory Enforcement Fairness Act (SBREFA) review stage, but could not be completed during the Obama administration.

The once-shining star of the OSHA regulatory agenda – the “I2P2” rule (injury/illness prevention program) – had already been moved to the back burner according to the Spring 2016 regulatory agenda, and now has fallen off the stove entirely. In its place, OSHA recently finalized revised “Safety & Health Management Program” guidelines that are voluntary. However, historically, OSHA has often included adoption of these provisions as part of corporate-wide settlement agreements, which makes such programs an enforceable part of abatement requirements. Look to see more of these types of settlements in the next administration, since these deals are typically negotiated between employers and career OSHA personnel at the local area level.

Finally, the President had enacted numerous Executive Orders, some affecting workplace safety and health (e.g., E.O. 13650, which triggers the EPA Risk Management Plan update, the OSHA Process Safety Management, and ongoing rulemaking efforts for explosives standards), that President-Elect Trump has vowed to repeal within his first 100 days. In particular, the *Safe Workplace and Fair Pay* Executive Order especially affects construction contractors who perform federal public works projects, as it would

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## OSHA/MSHA Forecast 2017, cont.

debar federal contractors with a history of willful or repeated OSHA violations, or violations of employment/labor laws such as civil rights protections, wage/hour or Davis Bacon Act requirements. These regulations also are subject to possible rescission under the CRA, particularly if the Executive Order that serves as their underpinning is stricken.

What can we expect from OSHA under a Trump Administration? The short answer is “Expect the Unexpected.” While candidate Trump declared that, as president, for every new regulation adopted two old regulations would be rescinded, as a practical matter that may be easier said than done. Each employer could probably point to a few OSHA rules that they would like to see evaporate, but there may not be unanimity on which regulations are “excessive” and OSHA cannot easily repeal standards for which it documented a need without providing something else with equivalent protection. For years, OSHA has been engaged in a broad-ranging Standards Improvement Project, to update outmoded references in some rules or get rid of them entirely. Much of the low-hanging fruit may have already been plucked. Other initiatives, such as the 2015 “Request for Information” on methods of updating OSHA Permissible Exposure Limits (PELs), could gain strength if the regulated community sees an opportunity to get away from specification approaches toward a more flexible “control banding” system similar to that used in Europe for chemical hazard assessment and control.

Congress is likely to entertain regulatory reform legislation that could make it more difficult for OSHA to enact any new rules at all, as they might be required to undergo congressional review as well as OMB clearance (of course, this does raise some constitutional separation of powers issues!). Congress can also put strings called “riders” on OSHA funding, to preclude further work on selected standards (effectively killing them outright or delaying them until the next Democratic administration) or refusing to fund enforcement of specific rules already enacted (e.g., the e-recordkeeping rule). As a practical matter, there is unlikely to be a confirmed Assistant Secretary of Labor for OSHA for quite a while as that is not historically treated as a priority appointment for Senate confirmation and the Secretary of Labor must first be selected and confirmed. In the interim, a career OSHA official will likely serve as “acting” assistant secretary during the first year of the new administration and OSHA’s rulemaking agenda will be basically frozen in place until a new chief is on the scene and a four-year strategic plan can be developed.

More generally, in terms of how OSHA will operate, it is likely that we will see a shift away from prioritizing enforcement and standards-setting and back toward the alliances, partnerships, and compliance assistance outreach activities that were favored in the George W. Bush

administration.

Additionally, instead of discouraging employers from seeking Voluntary Protection Program (VPP) status (or finding ways to kick existing VPP sites out of the program), OSHA may restore funding to that program and encourage more small and medium sized employers to get involved. While the dozen or more National Emphasis Programs currently running will not be shut down immediately, there will likely be phase-out of the older NEPs, perhaps replacing them with new initiatives aligned with the priorities of the new OSHA leader.

Other things that could be affected include the scope of the “severe injury reporting” rule for that requires reports to OSHA within 24 hours of in-patient hospitalization, amputation and eye loss, to narrow the definition of “amputation.” The SVEP initiative (Severe Violator Enforcement Program), in place since 2010, which focuses on “employer shaming” through OSHA press releases and follow-up inspections of additional worksites of companies that are categorized as safety scofflaws, could also grind to a halt, or be retooled in a significant way.

Finally, aside from overall regulatory reform legislation or funding riders, any “OSHA Reform” legislation that could see action in 2017 will be quite different from the Democrat-sponsored “Protecting America’s Workers Act.” The PAW Act, technically still pending before Congress in the 2016 lame duck session, would have increased OSHA criminal penalties, strengthened whistleblower protections, and expanded OSHA’s jurisdiction to include public sector worksites (among other provisions). A Republican version is more like to see avenues for proactive initiative such as third party audits in lieu of OSHA inspections, or other incentives for employers to go beyond minimum compliance, or more use of negotiated rulemaking in the future, as well as a potential rollback of the recently hiked OSHA civil penalties.

On the Mine Safety & Health Administration (MSHA) front, the agency is likely to race to the finish line to complete its final rule making workplace examinations in metal/nonmetal mines more stringent for mine operators and for contractors who work at mines. The final rule went to OMB for final clearance on November 18, 2016, making it nearly certain to appear in the Federal Register before President Obama leaves office. Whether an MSHA rule would trigger CRA action remains to be seen, but this initiative was generally opposed by industry. MSHA spokespersons suggested at a recent conference that changes have been made to the proposal that should please its opponents.

The only other MSHA initiative that was at the final rule stage was the revision to its civil penalty provisions, which included a proposal to modify the form/categories on MSHA citations to reduce the choices that inspectors have

## OSHA/MSHA Forecast 2017, cont. (2)

when classifying negligence and gravity. Commenters had estimated that the MSHA plan could raise penalties by up to 1000 percent, due to the impact of the reclassification system, and could make most citations presumptively “significant and substantial.” It is unclear whether MSHA will try to finalize either of these pending actions before the administration change on January 20<sup>th</sup>.

The only thing certain, at this point, is that a change is going to come!

### Anti-Retaliation Provisions Move Forward

Employers Beware! OSHA’s Electronic Recordkeeping rule still takes effect on January 1, 2017. However, one controversial element of the rule - its prohibition on retaliation for reporting a work-related injury or illness took effect on December 1, 2016, according to a federal district court. The court issued a recent preliminary ruling that employers would not be irreparably harmed by allowing the new anti-retaliation provision from going into effect. This is challenging and confusing for employers.

First, there is little guidance for employers on whether post-incident drug or alcohol testing and incident-based safety incentive programs are retaliatory actions subject to enforcement. The court pointed out that the rule itself does not ban such practices directly, however, the Preamble to the rule discusses safety incentive and drug-testing programs as possible items for OSHA to investigate. The court found that each situation will need to be examined on a case-by-case basis which leaves employers with no guidance.

For guidance on how this ruling impacts your company or assistance reviewing your drug testing and safety incentive programs, contact the Law Office.

### Intro to the Chemical Safety Board

By: Sarah Ghiz Korwan, Esq.

The chairperson of the United States Chemical Safety Board (CSB), Vanessa Allen Sutherland, recently presented at a workshop sponsored by three industry groups, the West Virginia Chemical Manufacturers Association, the American Chemistry Council and the National Association of Chemical Distributors, in Charleston, WV. She discussed the CSB’s mission, goals and achievements, as well as its five-year Strategic Plan, and the Board’s most recent final investigation report of a chemical accident which occurred in Charleston on January 9, 2014.

Neither a regulatory nor an enforcement agency, the CSB is an independent federal agency charged with investigating serious chemical accidents. With a budget of \$11 million annually, a “rounding error” for agencies like the Environmental Protection Agency, Sutherland noted, the CSB investigates serious chemical accidents, looking at all aspects of the accident, including physical causes such as equipment failure as well as inadequacies in regulations, industry standards, and safety management systems. The CSB identifies root causes of the accident, it investigates and often provides recommendations on how the environmental consequences may be mitigated or may have been avoided. Sutherland is rightfully proud of the CSB’s accomplishments, and noted that her group was the first to discover the root cause of the Deepwater Horizon drilling rig disaster which occurred in April, 2010.

Sutherland also expressed her pride in the Board’s *2017-2021 Strategic Plan*, which was released on October 20, 2016. The Plan includes an updated mission statement, which is to: “Drive chemical safety change through independent investigations to protect people and the environment.” The updated strategic plan was developed in part using information provided by stakeholders in industry, labor, environmental, standard-setting and public health organizations, academia, and other government agencies. The three strategic goals are to prevent recurrence of significant chemical incidents through independent investigations; advocate safety, and achieve change through recommendations, outreach and education; and, create and maintain an engaged, high-performing workforce.

Finally, Sutherland discussed the CSB’s final investigation report related to the release of 10,000 gallons of methylcyclohexane methanol (MCHM) into Elk River from a chemical storage and distribution facility owned by Freedom Industries (Freedom) in Charleston, West Virginia. Once in the river, the MCHM flowed downstream to the intake of the West Virginia American Water (WVAW) water treatment facility, about 1.5 miles downriver from Freedom. WVAW’s water treatment and filtration methods were unable to remove all of the MCHM; as a result, the MCHM contaminated the drinking water and required WVAW to issue a Do Not Use order, which affected 300,000 residents across nine counties and was in place for ten days. Although the order only lasted ten days, it was an environmental, economic, and health nightmare for the affected residents and businesses for months.

The report noted that there were significant delays in notifying the public of the release by Freedom, which potentially put residents at risk. While there were numerous lessons learned from this accident, it is, unfortunately, a situation which is not atypical, as

## Chemical Safety Board, cont.

nationwide municipal water companies do not have a plan or program to determine location of potential chemical contaminants for water sources or plans in place to respond to chemical spills.

Sutherland highlighted some of the “Lessons Learned”, which included the recommendation that above-ground storage tanks (AST) should be regularly inspected. In addition, there needs to be more communication between AST owners, water utilities, and local emergency planning organizations to prevent a disaster. Finally, water utilities need to assess the capabilities of their water treatment systems to contain potential leaks for all potential sources of significant contamination within the zone of critical concern. Ultimately, the takeaway was, the best way to protect public is to not have an accident in the first place.

Sutherland concluded her workshop presentation by noting that, with all complex investigations, her agency is the preferred resource for chemical safety. Moreover, their recommendations should be followed more closely to avoid future catastrophes.

## Voters Make Marijuana a Big Winner in the 2016 Election

By: Jordan Posner, J.D.

Efforts to legalize recreational and medical marijuana across the country, were greatly improved with California, Maine, Massachusetts, and Nevada all passing adult recreational marijuana laws. These states join Alaska, Oregon and Washington who have already chosen to legalize marijuana for this use. Also, Arkansas, Florida, Montana and North Dakota all passed medical marijuana laws, bringing the total to 29 states who now have made medical marijuana legal. Arizona was the only state with a recreational marijuana referendum on the ballot, that didn’t pass.

California’s Prop 64, the Adult Use of Marijuana Act, enacted a set of rules which legalized marijuana for people ages 21 and older, and enacted sales laws and taxation regulations as well. Additionally, it would be legal for adults to possess up to an ounce of marijuana, purchase dried flower and cannabis products from licensed retailers and grow up to six plants for personal use. The plan also restricts on where cannabis can be consumed. Counties and municipalities have the ability to limit or ban commercial marijuana operations, and set their own local tax rates. The initial taxes imposed would be a 15% state excise tax on retail sales. Prop 64 will have effects on the workplace. The law enables employers to create policies against marijuana use during the workday. The Act went into effect November 9, 2016, but sale and taxation of recreational marijuana will not go into effect until January 1, 2018.

Massachusetts’ Question 4 states that adults 21 and older can possess up to an ounce of marijuana, keep up to 10 ounces of marijuana at home and grow up to six plants. Marijuana sold in licensed shops would be subject to an excise tax of 3.75% in addition to Massachusetts’ 6.25% state sales tax. The initiative allows for the creation of a 15-member cannabis advisory board to study and make recommendations on regulations and marijuana products. Individual counties, cities and towns would have the ability to enact additional taxes as well as bans on recreational marijuana operations. The use of marijuana would be restricted to private places. Massachusetts’ law also permits employers to prohibit marijuana use by employees in the workplace. This law is set to take effect December 15, 2016.

Nevada’s Question 2 initiative includes limitations on the number of retail outlets in a specific county. For example, Clark County (where Las Vegas is located), can have up to 80 shops, while counties under 55,000 people can have no more than two recreational stores. Wholesale marijuana would be subject to a 15% tax. Cannabis consumption would be restricted to private premises, which could include a retail marijuana store. Nevada also specified that the State Department of Taxation would be required to address licensing procedures, qualifications, security of establishments, testing, labeling, and packaging requirements as well as advertising and civil penalties. Like those before it, Nevada’s law allows employers to enforce marijuana bans on employees. Nevada’s law takes effect January 1, 2017.

With regards to Arizona’s Proposition 205, the initiative stalled as approximately 51% or 1.3 million citizens voted to defeat the initiative. The current status of marijuana already includes legalized medical marijuana, which was passed in 1996. The 2016 initiative would have allowed people over 21 years old to possess and use one ounce or less of marijuana and grow up to six plants in their home. Sales tax would have been levied at 15%.

Initially, Arkansas proposed two separate laws. The Arkansas Medical Cannabis Act (Issue 6) and the Arkansas Medical Marijuana Amendment (Issue 7). Ultimately it was Issue 6 which made it onto voters’ ballots. Issue 7 was deemed illegal by the Arkansas Supreme Court based on invalid signatures. This amendment would have allowed up to eight grow facilities and up to 40 for-profit dispensaries statewide, which would be awarded by an independent commission. Home growing is not allowed. Issue 6 would allow for no more than one nonprofit “cannabis care center” per 20 pharmacies, which sponsor Arkansans for Compassionate Care, estimates at 38 dispensaries. The Arkansas Department of Health would provide program oversight, funded completely by taxes imposed on the

## Voters Make Marijuana a Big Winner, cont.

medical marijuana. People who have obtained a written recommendation from a physician and received a license from the state Department of Health can purchase from a licensed “cannabis care center.” Individuals who reside more than 20 miles from a cannabis care center could apply for a “hardship cultivation” certificate that would allow them to grow up to 10 plants. Issue 6 became effective November 9, 2016. Additionally, among other issues, the Department of Health has 120 days from November 9<sup>th</sup> to adopt rules regarding labeling and testing standards for distribution, applications and renewals of registry identification cards, requirements on oversight, recordkeeping, and security of dispensaries and cultivation facilities.

In Florida, Amendment 2, The Florida Medical Marijuana Legalization Act, allows medical use of marijuana for conditions as determined by a licensed Florida physician. Its design was to aid in the treatment of cancer, epilepsy, glaucoma, HIV, AIDS, PTSD, ALS, Crohn’s disease, Parkinson’s disease and Multiple Sclerosis. Caregivers will now be allowed to assist patients’ use of marijuana. Registration and distribution cards will be given to patients and their caregivers. Florida’s act goes into effect January 3, 2017. Additionally, the state department of health is required to set regulations on the issuance of identification cards, qualifications, and standards of caregiver registration within six months of January 3, 2017.

North Dakota’s Statutory Measure Number 5 also known as the the North Dakota Compassionate Care Act, provides for medical use of marijuana for medical conditions including cancer, AIDS, hepatitis C, ALS, glaucoma, and epilepsy. The Act also created provisions for monitoring, inventorying, dispensing, cultivating and growing marijuana. Further, a qualified patient could be dispensed up to three ounces of marijuana and can grow their own if they are located more than forty miles from the nearest registered facility. Measure Number 5 goes into effect on December 8, 2016.

For more information on your state’s marijuana laws, please contact our office.

## Cal/OSHA Enforcement Trends by the Numbers: Rise in Inspections and Violations, Continuing Decrease in Injuries

By: Joshua Schultz, Esq., MSP

Cal/OSHA statistics show that the agency’s total investigations, total alleged violations, and total alleged serious violations increased in the first quarter of 2016, according to *Cal-OSHA Reporter*. However, the incidence rates of nonfatal occupational injuries and illnesses in California during the 2014 and 2015 calendar years was at 3.8 cases per 100 workers for full-time employees, down from 6 cases per 100 workers in 2002.

The mining industry in California had recordable injury rates approximately 47% below the total rate for all industries, including state and local government, at 2 cases per 100 workers for full-time employees. The construction industry also experienced recordable injury rates below the total rate for all industries, with an incidence rate of 3.3 cases per 100 workers.

Cal/OSHA statistics also show a rise in incidence rates of nonfatal occupational injuries and illnesses for larger establishments. Across all industries, the incidence rate for establishments with 1 to 10 employees was 1.8, the incidence rate for establishments with 11 to 49 employees was 3.2, and the incidence rate for establishments with greater than 1,000 employees was 4.5 cases per 100 workers for full-time employees. These rates may be influenced by reporting disparities between smaller and larger companies.

It is notable that the agency’s reported numbers are for alleged violations, which have not been adjudicated. The Law Office of Adele Abrams’ Denver Office defends and litigates Cal/OSHA matters involving mine operators (who are subject to dual jurisdiction with MSHA), construction companies, and other employers.

## MSHA Assertion of Jurisdiction at Construction Yard Upheld

By Gary Visscher, Esq. and Diana Schroeder, Esq.

As discussed elsewhere in this newsletter, a recent Department of Labor Inspector General’s report highlights that one of the management challenges facing the Mine Safety and Health Administration (MSHA) is “allocation of resources” in light of declining numbers of coal mines. (“DOL IG Cites OSHA and MSHA Management Shortcomings”). One way in which MSHA appears to be responding to its shrinking workload in coal mines is by finding new businesses, land areas, shops, and equipment to inspect as “mines,” even if those businesses, land areas, shops or equipment have little in common with traditional mining and mining activities.

A recent example is the operation described in a recent case, *H. Bittle & Son, Inc.*, (ALJ, Sept. 16, 2016). H. Bittle & Son, Inc. (“Bittle”) operates a small (26 acre) construction materials yard on Long Island, New York. Bittle purchases sand and gravel that has been excavated from construction sites in and around Long Island, as the sites are developed by land developers and construction companies. The material is delivered to Bittle’s site, and Bittle uses a power screen and portable stacker to screen the material and stockpile it for various uses, including use on Long Island roads for ice control.

In April 2014, an MSHA inspector visited Bittle’s yard and issued the company 7 citations. Subsequent inspections were conducted in February and June 2015, both of which resulted in additional citations.

## MSHA Assertion of Jurisdiction, cont.

Bittle contested MSHA's jurisdiction and eventually the company and the Secretary submitted the case for decision on joint stipulations and cross-motions for summary decision.

In his decision in the case, Judge Paez found that Bittle was "sizing" mineral material because Bittle had stipulated that it screens the material and separates it into "fine grain sand and two sizes of gravel." The Judge said that the 1979 Interagency Agreement between OSHA and MSHA lists "sizing" among the activities that are considered "mineral milling" and under MSHA's jurisdiction. Thus, despite how far removed Bittle's construction materials yard is from traditional mining, Judge Paez held that Bittle falls under MSHA's jurisdiction.

Bittle made several arguments. One was that, in the Program Policy Manual MSHA states that "MSHA does not have jurisdiction where a mineral is extracted incidental to the primary purpose of the activity." (PPM I. 4-1). Bittle argued that that language applied because the material itself was extracted by another company, and was also incidental to construction, not extracted for purposes of producing the mineral. The Judge rejected the arguments, citing case law to conclude that "activities undertaken to treat and process minerals for sale are independently subject to the Mine Act regardless of who performs the extraction of those minerals."

Bittle also argued that it had been singled out and that "no other similarly situated material supply business in its area has been inspected by MSHA or subject to the Mine Act." Although the federal courts have recognized similar "disparate treatment" arguments in other areas of government enforcement, the Review Commission and Commission judges have refused to consider comparative evidence. In this case, the Judge said that Bittle had not provided specific evidence regarding other similarly-situated businesses, and that in any event, it was MSHA's choice to inspect and cite Bittle (and not others), as the Secretary has "unreviewable discretion" in selecting whom to inspect and cite.

If you have questions about this decision or other jurisdiction or enforcement issues, or would like a copy of the *Bittle* decision, please contact the Law Office.

## NFIB Sues OSHA over Workplace Walk-Around Representative Rule

By: Jordan Posner, J.D.

On September 8<sup>th</sup>, 2016, the National Federation of Independent Business ("NFIB") filed a lawsuit in a Texas federal court requesting a permanent block on a 2013 OSHA issued memo challenging the interpretation of OSH Act section 29 CFR 1903.8(c). This portion of the law states that

The representative(s) authorized by employees shall be an employee(s) of the employer. However, if in the judgment of the Compliance Safety and Health Officer, good cause has been shown why accompaniment by a third party who is not an employee of the employer (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third party may accompany the Compliance Safety and Health Officer during the inspection.

This February 21, 2013 memo addressed two questions. First, may one or more workers designate a person who is affiliated with a union without a collective bargaining agreement at their workplace or with a community organization to act as their 'personal representative' and accompany the employee on an OSHA inspection in a non-unionized workplace? Second, may workers at a worksite without a collective bargaining agreement designate a person affiliated with a union or a community organization to act on their behalf as a walk-around representative?

OSHA responded to the first question by stating that yes, the section of the act, the Secretary's regulations and OSHA's Field Operations Manual all allow for an employee representative for enforcement-related matters. These include filing complaints on behalf of the employee, requesting workplace inspections and participating in informal conferences to discuss issues related to citations, and contesting the abatement period in OSHA's citations, as well as participating in contest proceedings filed by an employer.

In responding to the second question, OSHA notes that yes, the act does authorize participation in the walk-around portion of an OSHA inspection by someone chosen as a representative who is authorized by the employee(s). OSHA also states that this does mean a union affiliated person can accompany the inspector on a walk-around, but OSHA compliance officers still have discretion over who participates in workplace inspections.

In the court case filed by the NFIB, they argue that an exception has been created to OSH Act by designating union representatives as individuals who are 'reasonably necessary to complete an inspection.' They further allege that OSHA did not, in practice, allow this to occur and did not establish the policy until it was included in OSHA's 2013 Field Operations Manual. However, OSHA contends that it has always been policy to allow union representatives and members of related organizations to be part of walk-arounds.

Believing that OSHA created a new rule based on this exception, the NFIB reasons that the OSHA rule should

## NFIB Sues OSHA, cont.

have been subjected to the notice and comment provisions of the Administrative Procedures Act. This would have provided the public a period of time to review the rule before it went into effect. In its response, OSHA argues that the memo is not a “final agency action” and is not subject to the Administrative Procedures Act. OSHA also argues that employers have other remedies, including challenging an OSHA warrant in court before the worksite is inspected, or challenging the conduct of the inspection in any subsequent administrative proceeding before the OSH Review Commission. For more information on this issue, please contact our office.

## DOL IG Cites OSHA and MSHA Management Shortcomings

By: Gary Visscher, Esq.

Along with the host of policy issues which will be addressed by new leadership at OSHA and MSHA after the Trump Administration takes office in January, a recent report by the Office of Inspector General (OIG) (“Top Management and Performance Challenges Facing the U.S. Department of Labor,” November 2016) found that OSHA and MSHA are among the principal management challenges for the Department of Labor’s new leadership.

The OIG cited OSHA’s lack of “outcome based data” on which to assess the effectiveness of OSHA’s programs. As it has done in previous reports, the OIG criticized OSHA’s reliance on outputs, such as the number of inspections and citations, on which to base decisions on how best to use its limited resources: “OSHA’s performance measures for federal and state enforcement have focused on output activities rather than outcomes.”

The OIG report references a recent multi-year study that OSHA undertook to assess the impact of the Site Specific Targeting (SST) program. The SST program, which has been in effect since 1999, uses injury information to target inspections at worksites with relatively high injury rates. According to the OIG, the SST study found that the impact of “program interventions” under the SST program on future employer compliance was not statistically significant. The recently completed study of the SST program follows on two previous studies by the OIG that found a lack of demonstrated effectiveness of the SST program (“OSHA’s Site Specific Targeting Program Has Limitations,” Sept. 2012) and OSHA’s Special Emphasis Programs (“OSHA Does Not Know if Special Emphasis Programs Have Long-Term Industrywide Effect,” Sept. 2016).

The OIG report on management challenges facing the Department of Labor also cites MSHA’s allocation of resources in light of the “significant decline in coal production and closings of coal mines” and the aging of

MSHA’s workforce. According to the OIG report, “64 percent of [MSHA’s] top leadership will be eligible to retire in 2018.” The OIG has issued previous warnings about MSHA’s workforce – in the 2015 report, the OIG stated that nearly “40% of MSHA’s health and safety personnel are eligible to retire by 2017.”

The OIG also addressed a concern that it has raised in previous reports, that accidents and injuries are underreported to MSHA (see, “MSHA Has Taken Steps to Detect and Deter Underreporting of Accidents and Occupational Injuries and Illnesses, But More Action is Still Needed,” Mar. 2014). The OIG’s new report states that “MSHA needs to continue taking action to further enhance its knowledge of the underreporting of accidents, injuries and illnesses by mine operators and use this knowledge to finalize its strategy to address mine operator programs and practices that discourage reporting.” With the new administration, the impact of the report may have a new target.

## MSHA Updates

By: Jordan Posner J.D.

### Mining Deaths Fall to New Low in Fiscal Year 2016

On November 17, 2016, MSHA reported its bi-annual update of mine safety data, which showed that the number of deaths caused by mine-related injuries in this fiscal year, were at an all-time low. The fiscal year, which ended on September 30, 2016, reveals that 25 miners died from mining-related injuries. Additionally, fatality and injury rates are the lowest ever recorded. MSHA’s data also indicates that the Calendar Year of 2015 was the safest in United States mining history.

### Winter Weather Hazard Reminder

MSHA recently issued their annual Winter Alert message urging all mine operators and miners to pay special attention to seasonal changes which could affect working environments. MSHA continues this campaign as a reminder that the risk of underground coal mine explosions increases in winter as well as hazards associated with ice and snow on surface facilities and preparation plants. MSHA’s campaign also focuses on stressing mine examinations, proper ventilation, and rock dusting. Remember to be safe this winter.

### December 6<sup>th</sup> is National Miners Day

As a day to honor mine workers and the contributions that have been made to help contribute to the fabric of America, December 6<sup>th</sup> honored both the contributions and the sacrifices made while working in the mining industry. This year marks the 99<sup>th</sup> year in support of National Miners Day.

## Federal District Court Rejects OSHA's Effort to Expand Inspection

By: Gary Visscher, Esq.

We previously reported (October 2016 newsletter) on an important case in federal court in Georgia regarding the permissible scope of an OSHA inspection when the inspection is triggered initially by a report of an employee injury or an employee complaint.

The case involved poultry processor, Mar-Jac Poultry, Inc. In February 2016, a maintenance employee suffered arc flash burns while repairing an electrical panel. Pursuant to OSHA's injury reporting rule, Mar-Jac reported the injury to OSHA. In response, OSHA attempted to conduct a comprehensive inspection of Mar-Jac's facility. Mar-Jac demanded a warrant to expand the inspection beyond the immediate area and activities where the injury occurred, and, after OSHA secured an administrative warrant, filed a motion to quash in federal district court.

The case was assigned to a magistrate judge, who, after conducting a hearing, found that the warrant authorizing a comprehensive inspection of Mar-Jac's facility violated the Fourth Amendment's protections against unreasonable search and seizure.

OSHA filed objections to the magistrate judge's report and recommendation with the federal district court. Following further briefing of the issue by both sides, on November 2, 2016, Federal District Judge William O'Kelly approved and adopted the magistrate judge's report, and granted Mar-Jac's motion to quash.

The Court found that each of the bases presented by OSHA as justifying the expanded inspection failed to meet the "administratively neutral" criteria required for "probable cause." First, the Court found that a provision in the Regional Emphasis Program (REP) on poultry processors that gave the OSHA area manager discretion to expand any unprogrammed poultry processor inspection to a programmed inspection covering all REP hazards "tainted the neutrality of Mar-Jac's selection. A significant risk of abuse remains where the decision to expand to a comprehensive inspection is left to a manager's sole discretion." Second, the District Court rejected OSHA's argument that it could rely on evidence stated in the REP of "industry-wide hazards allegedly prevalent in the poultry industry" as a basis to expand the inspection beyond the hazards related to the specific injury at Mar-Jac.

OSHA also claimed that Mar-Jac's 300 logs provided sufficient basis of specific hazards present to justify a comprehensive inspection. The District Court rejected that argument as well, stating that "The fact that an injury or illness is recordable does not show that it was the result of a violation of an OSHA standard."

As discussed in our previous article on this case, Fourth Amendment "probable cause" requirements with

regard to OSHA inspections were set forth in the U.S. Supreme Court's decision in *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978). The District Court found that OSHA did not meet those requirements in seeking to expand the accident inspection to a comprehensive inspection. OSHA could appeal the District Court's decision to the 11<sup>th</sup> Circuit Court of Appeals.

## What Does Safety Management Really Look Like?

By: Michael Peelish, Esq.

Safety Management is perceived differently by various departments within a company. The legal department requires disclaimers from visitors, attorney-client privilege stamped on a broad array of audit and inspection-type documents, a strict document retention policy, and very little reduced to writing except that which supports the company's position in legal actions. The site/division/corporate safety persons responsible for safety oversight want written Safety Policies and Programs in place and implementation of those programs. This person wants to recognize good safety performance and report safety results to senior leadership that makes them proud. The site operating leadership wants as little intrusion from the outside unless it helps them and does not cost anything. But one thing is true, employees want fellow employees going home at the end of the work shift safe and healthy.

So, to an operations person, safety management looks like:

- Receiving solicited and unsolicited advice on safety regulatory issues that could affect operations' productivity along with possible solutions, and
- Participating in an internal safety best practices forum

And, to a lawyer representing the company, safety management looks like:

- A cooperative safety audit or inspection process at the direction of legal counsel that provides meaningful feedback on how to improve safety, and
- Good record keeping regarding compliance and training records, exposure monitoring, and medical surveillance data to the extent appropriate.

And, to corporate person(s) having safety oversight, safety management looks like:

- A safety program that is manageable, meaningful and, where necessary, flexible, and
- A proactive approach to directing the actions of third-parties through involvement in trade associations and participating at the table of discussion.

## Safety Management, cont.

So how does one manage this difficult process to address each internal clients' needs and concerns? Sometimes it is difficult to maintain these differing relationships between legal, operations, and corporate safety. However, our firm stands in a unique position of being able to provide the skills and knowledge to cover a host of safety matters addressing the needs of the various clients within the same company. The firm has experienced attorneys with other qualifications: three of the attorneys are certified as Mine Safety Professionals and MSHA Part 46/48 trainers, one attorney is a mining engineer and former head of corporate safety for a multi-national mining company, and one attorney is a certified industrial hygienist, as well as other non-attorneys with CSP and CIH designations.

With this unique set of skills, the firm continues to provide services to include: safety and health consulting and auditing, training, program development, and other occupational and mine safety and health consulting services, while maintaining legal privilege for many critical documents. The firm recently worked on behalf of an industry trade association to assist its

members with developing written exposure control plans and programs that will comply with the new OSHA respirable silica standard.

This effort culminated in a 2-day workshop with over 300 attendees and vendors. One day focused on training and the second day was set aside for a trade show allowing vendors to demonstrate various products as engineering controls. Ongoing, the firm is providing services to its clients as it relates to the OSHA crystalline silica standard such as developing written exposure control plans, training plans and presentations, and developing sampling strategies including a sampling kit with instructions.

We are the proverbial one-stop shop when it comes to providing safety and health management services, including workshops and webinars. Indeed, these roles and responsibilities are all important and a cooperative attitude and approach amongst the various persons makes them manageable. Our firm can assist your company and its managers and hourly employees in defining what "safety management looks like".



**Wishing you a Beautiful Holiday Season  
and a New Year of Peace and Happiness**

**From all of us at the**

**Law Office of Adele L. Abrams, P.C.**

## SPEAKING SCHEDULE

### **ADELE ABRAMS**

11/29/16 Northern Region Association of Safety Professionals, Fargo, ND, Keynote address  
 12/1/16 BLR Webinar on Multi-Site Employer Safety, [www.blr.com](http://www.blr.com)  
 12/2/16 Chesapeake Region Safety Council, OSHA's New Silica Standard (full day workshop presented by Adele Abrams and Michael Peelish), Baltimore, MD  
 12/5/16 BLR Webinar on OSHA's New Walking-Working Surfaces Rule, [www.blr.com](http://www.blr.com)  
 12/13/16 Oregon Independent Aggregates Assn, Safepro Mine Safety Institute, Albany, OR  
 12/15/16 ClearLaw webinar on OSHA e-Recordkeeping rule  
 12/16/16 ASSE National webinar on OSHA's New Walking-Working Surfaces Rule, [www.asse.org](http://www.asse.org)  
 12/19/16 ASSE NOVA & NCC Chapters webinar on OSHA's New Walking-Working Surfaces Rule  
 12/21/16 BLR Webinar, OSHA 2017 Forecast and Hot Topics, [www.blr.com](http://www.blr.com)

1/9/17 Lorman, webinar on Legally Effective Discipline  
 1/11/17 Penn State Mine Safety Conference, OSHA/MSHA Forecast 2017, Allentown, PA  
 1/18/17 Chesapeake Region Safety Council & Associated Builders and Contractors, full day workshop on OSHA's New Silica Rule, Norfolk VA (Adele Abrams and Michael Peelish)  
 1/19/17 Minnesota Concrete Council, Presentation on OSHA's Crystalline Silica rule, Roseville, MN  
 1/24/17 PA Electrical Contractors, State College, PA  
 1/25/17 Mechanical Contractors Assn of America Safety Conference, Clearwater Beach, FL  
 2/8/17 BLR Webinar on OSHA inspection management, [www.blr.com](http://www.blr.com)  
 2/13/17 Progressive Business Executive Education, webinar on OSHA's General Duty Clause  
 2/14/17 Chesapeake Region Safety Council & Associated Builders and Contractors, full day workshop on OSHA's New Silica Rule, Richmond VA (Adele Abrams and Michael Peelish)  
 2/23/17 ASSE Region IV PDC, speak on Crystalline Silica rule, Baton Rouge, LA  
 3/1/17 Indiana Safety Conference, speak on OSHA's e-Recordkeeping rule, Indianapolis, IN  
 3/9/17 NWPCA Annual Leadership Conference, present OSHA update, Tucson, AZ  
 3/15/17 National Business Institute, Employment Law Seminar, Baltimore MD  
 3/21/17 MCA conference, speak on Silica rule, Chicago, IL  
 4/4/17 BLR Safety Summit, present on OSHA's Walking-Working Surfaces rule, Austin, TX

### **MICHAEL PEELISH**

12/2/16 Chesapeake Region Safety Council, OSHA's New Silica Standard (full day workshop with Adele Abrams), Baltimore, MD  
 12/07/16 Kentucky Crushed Stone Association, 21<sup>st</sup> Annual Underground Stone Safety Seminar

### **TINA STANCZEWSKI**

12/15/16 MSHA Law School, MSHA Update, North Carolina  
 4/15/17 Mid-Atlantic Safety Construction Conference, OSHA Update, Greenbelt, MD