



Review Commission Examines Controlling Employer Responsibility

By Gary Visscher, Esq.

OSHA's multi-employer enforcement policy allows OSHA to cite the "creating" employer, the "exposing" or "correcting" employer, and/or the "controlling" employer when a violation of an OSHA standard is found on a multi-employer worksite.

The controlling employer's liability under the multi-employer policy results simply from its alleged control of the multi-employer worksite. OSHA's 1999 statement of the policy states, "Control can be established by contract, or in the absence of explicit contractual provisions, by the exercise of control in practice." OSHA generally considers a general contractor or the host employer to be a controlling employer.

Although in practice it often appears that OSHA will cite the controlling employer based on any violation of an OSHA standard occurring on the worksite, in fact the controlling employer's duty and responsibility for employees' safety on the worksite is supposed to be different than that of the employee's direct employer.

The controlling employer's obligation, according to the 1999 policy statement, is to exercise "reasonable care to prevent and detect violations on the site." The 1999 OSHA policy states that "The extent of the measures that a controlling employer must implement to satisfy this duty of reasonable care is less than what is required of an employer with respect to protecting its own employees."

Despite this acknowledgement that the controlling employer's obligation is different than that of the employee's direct

employer, the difference has rarely been examined or defined.

In a recent decision, Suncor Energy, the Review Commission examined the controlling employer's "reasonable care" obligation during construction work taking place at Suncor's refinery in 2012. As part of an extensive turnaround project at the refinery, contractors replaced large heater tubes, which involved working inside a confined space. One of the contractors erected scaffolding inside the confined space. Subsequently, another contractor's employees, while using the scaffolding to inspect welds inside the confined space, fell from the scaffolding and suffered severe injuries.

OSHA cited Suncor for a violation involving the lack of fall protection while employees were working on the scaffold. The ALJ upheld the citation. On review, the Commission unanimously reversed, finding that Suncor had met its obligation of "reasonable care" in this case.

The Commission, quoting language from David Weekly Homes (2000), said the controlling employer's obligation "depends in part on the 'nature, location, and duration of the conditions.'" Thus, in this case, it was significant that the defective scaffold and failure of the contractor employee to use fall protection was hidden from view because the work was inside the confined space, and no one from Suncor was designated to work inside the confined space during the turnaround.

The Commission went on to analyze whether Suncor had met its obligation of "reasonable care" by considering three factors: the nature of the work, the scale of the project, and Suncor's efforts to "hire only safety-conscious contractors." (continued, page 9)

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Pending Cannabis Legislation in Maryland

By Adele L. Abrams, Esq., CMSP

A number of legislative measures that would impact legalization/decriminalization of marijuana, as well as the rights of medical marijuana patients in Maryland are now pending before the Maryland legislature. Hearings on a number of these are scheduled in late February or March 2019 at the committee level, with additional hearings or full legislative action likely later this spring. For more information on these measures, or legal rights of employers and medical cannabis users, contact the Law Office at 301-595-3520 (eastern), 303-228-2170 (western), or at www.safety-law.com.

HB 350: Legislation prohibiting a driver of a motor vehicle from smoking or consuming marijuana in the passenger area of a motor vehicle on a highway and prohibiting an occupant of a motor vehicle from smoking marijuana in a passenger area of a motor vehicle on a highway. *HEARING held 2/19/19 at 1:00pm – House Judiciary Committee.*

HB 1239: Legislation prohibiting an employer, except under certain circumstances, from discriminating against an individual because of the individual's receipt of a written certification for the use of medical cannabis or the individual's positive drug test under certain circumstances, establishing that the provisions on non-discrimination do not require an employer to allow use of medical cannabis or make certain reasonable accommodations. *HEARING: 3/11/19 at 1:00 pm – House Economic Matters Committee*

SB 854: Legislation providing that a covered employee or dependent of a covered employee is not entitled to worker's compensation or benefits if a certain accidental personal injury, compensable hernia, or occupational disease was caused solely by the effect of medical cannabis on the employee, including medical cannabis in the medicine that an employer or its insurer is required to provide to the employee under certain circumstances. *HEARING held: 2/26/19 at 12:00pm – Senate Judicial Proceedings Committee*

SB 860: Legislation prohibiting certain persons from being subject to revocation of mandatory supervision, parole or probation for the medical use of or possession of medical cannabis. *HEARING held: 2/26/19 at 12:00pm – Senate Judicial Proceedings Committee*

SB 862: Legislation prohibiting a landlord from denying a patient a lease on the basis of possession of medical cannabis or the consumption of nonsmoked medical cannabis; prohibiting a landlord from denying caregivers a lease solely on the basis of possession of medical cannabis; and providing that tenants who possess medical cannabis or consume nonsmoked medical cannabis are not in breach of a lease solely on this basis. *HEARING held: 2/26/19 at 12:00pm – Senate Judicial Proceedings Committee*

SB 863: Legislation prohibiting certain employers from requiring an applicant for employment or an employee to disclose the applicant or employee's use of marijuana/cannabis and from taking certain other actions; requires resolution of certain issues informally or by mediation. *HEARING held 2/26/19 at 12:00pm Senate Judicial Proceedings Committee*

SB 418: Legislation prohibiting a driver of a motor vehicle from smoking or consuming marijuana in the passenger area of a motor vehicle on a highway, and prohibiting an occupant of a motor vehicle from smoking marijuana in a passenger area of a motor vehicle on a highway. *HEARING held: 2/26/19 at 12:00pm – Senate Judicial Proceedings Committee*

SB 676: Legislation authorizing a court to vacate a certain probation before judgment or judgment of conviction under certain circumstances, including if the PBJ or conviction were for possession of marijuana of Crim. Law Art. 5-601, or for drug paraphernalia for marijuana under Crim. Law Art. 5-619. *HEARING held 2/27/19 at 12:00pm – Senate Judicial Proceedings Committee*

HB 749/SB 97: legislation providing that a person cannot be denied the right to purchase, own, possess, or carry a firearm solely on the basis that the person is a qualifying medical cannabis patient, and establishing the intent of the General Assembly that medical cannabis should be treated as legal for certain purposes and the state should not penalize a qualifying patient for using the drug legally.

A Word About Firearms & Medical Cannabis Patients

Federal law bars medical cannabis patients from purchasing or possessing firearms. The Federal Gun Control Act, 18 U.S.C. § 922(g)(3), prohibits any person who is an 'unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)' from shipping, transporting, receiving or possessing firearms or ammunition. Marijuana is listed in the Controlled Substances Act as a Schedule I controlled substance, and there are no exceptions in Federal law for marijuana purportedly used for medicinal purposes,

Cannibus, con't

even if such use is sanctioned by State law.

Medical cannabis patient information contained in Maryland's patient registry is considered confidential, protected health information and held in compliance with federal HIPAA regulations by the Maryland Medical Cannabis Commission. However, the Maryland State Police query individuals who seek to purchase a gun about their status as a medical cannabis patient and bar those who disclose that they are medical cannabis patients from making the transaction. Individuals who provide false information by failing to disclose that they are a medical cannabis patient when purchasing a firearm, and completing ATF Form 4473 are in violation of federal statute, punishable by up to 10 years in prison and a fine of as much as \$250,000.

Maryland has not adopted a policy of actively seeking out or seizing currently owned firearms from patients. But in a situation with police where a person possesses a firearm and they have reason to know the individual is a cannabis patient, they may follow federal law and seize the firearm. It is unclear what the practical impact of the Maryland legislation will be (if enacted) given the current federal position on marijuana.

CalOSHA Proposes Rule Requiring Employee Access to Injury and Illness Prevention Programs

By Joshua Schultz, Esq., MSP

On February 1, 2019, the CalOSHA Standards Board published a proposal to require employers to provide access to their Injury and Illness Prevention Programs (IIPPs). The proposal requires the employer to provide access to the IIPP using one of two options. The first option requires the employer to provide a printed copy of the IIPP, free of charge, within five business days of receipt of the request. The second option allows an employee to request an electronic copy of the IIPP in lieu of a printed copy, giving the employer the option of providing the IIPP electronically.

CalOSHA's proposal would amend Title 8 of the California Code of Regulations section 3203, "Injury and Illness Prevention Program." This section requires employers to establish, implement, and maintain an IIPP. The IIPP regulations require employers to identify and correct workplace hazards, develop a means to communicate hazards to employees, ensure employee compliance with provisions of the IIPP, investigate injuries and illnesses, and provide training and

instruction to affected employees. The employer must also identify a person or multiple people with the authority and responsibility to implement the IIPP.

The current IIPP regulations do not explicitly require employee access to their employer's IIPP. CalOSHA states that the current proposal is designed to "ensure employee access to the IIPP by specifying who can request such access, what information is to be provided, and a timeframe for requests to be fulfilled."

The proposal allows the employer to charge for additional copies requested within one year of a previous request. Employers will be prohibited from charging for an IIPP which has been updated with new information since the last copy was provided, even if the request comes within one year of a previous request. Further, the proposal allows employers with multiple programs to provide only the IIPP(s) applicable to the employee requesting access.

In accordance with the proposed rule, employers must inform employees of their right to access the IIPP. The proposal also requires the employer to establish a procedure for providing such access.

The CalOSHA Standards Board will hold a public hearing on the proposed rule starting at 10:00 a.m. on March 21, 2019 in the Council Chambers, of the Pasadena City Hall, 100 North Garfield Avenue, Pasadena, California. Any person may present statements or arguments orally or in writing relevant to the proposed action at this hearing. Additionally, persons may submit written comments to the Board's office; the comment period closes at 5:00 p.m. on March 21, 2019. Written comments can be submitted by mail to Sarah Money, Occupational Safety and Health Standards Board, 2520 Venture Oaks Way, Suite 350, Sacramento, CA 95833; or by e-mail to oshb@dir.ca.gov.

Important Dates

Crane Standard: On 2/7/19 the requirement for employers to document their evaluation of their crane operators (see 29 CFR 1926.1427(f)(6)) took effect. OSHA announced that during the first 60 days of enforcement (until April 15, 2019), OSHA will evaluate good faith efforts taken by employers to comply with the requirement and thereby offer compliance assistance rather than enforce the requirement.

WOTUS: Comments for the replacement rule are due April 15, 2019. Submit comments at <http://www.regulations.gov> under Docket EPA-HQ-OW-2018-0149.

NLRB Resets Test for Independent Contractor

By Gary Visscher, Esq.

Our previous newsletter discussed the on-going rulemaking by the National Labor Relations Board on the Board's definition of "joint employers" under the National Labor Relations Act. Last month the Board also addressed the question of when individual workers will be considered "independent contractors," rather than "employees," under the NLRA, particularly in the context of a ride-sharing service.

The case involved operators of shared ride vans at the Dallas-Fort Worth airport. The airport contracted with Supershuttle DFW to provide shared ride transportation. The contract between the airport and Supershuttle set the terms under which Supershuttle will provide services, including the condition of the vans, the markings on the vans, vehicle maintenance, screening of drivers for criminal background, and drug and alcohol testing. The contract also required that operators of Supershuttle vans be dressed in a uniform that clearly identifies them as Supershuttle representatives.

Supershuttle, in turn, operates vans through franchise agreements. Franchisees pay an initial flat fee and a weekly "system fee" (to Supershuttle) to operate a Supershuttle van. The system fee covers the cost of providing a Nextel dispatch and reservation system and apparatus, as well as marketing the Supershuttle brand. Franchisees purchase or lease the van (which may be leased through Supershuttle), and franchisees pay for gas, vehicle maintenance, vehicle insurance, tolls and access fees. Franchisees may keep the vans at their personal residence and have unlimited personal use.

Franchisees set their own work schedules and have "complete control" over their schedules. A franchisee incurs no negative consequences from passing on a trip. However, if the franchisee accepts a bid, he is required to complete the pickup. A franchisee may be terminated for various conduct, including falsifying trip sheets or credit card receipts. Franchisees are required to be the principal driver of the vehicle, but are allowed to use a substitute or relief driver, if that substitute is "an employee, agent, shareholder or partner of the franchisee; the substitute completes the required training program; and the substitute driver meets Supershuttle's other criteria for driver eligibility."

In determining whether the franchisees were independent contractors or employees of Supershuttle, the NLRB said it was required to apply the "common-law

agency test." As the Board discussed, the common law factors test lists ten factors to be considered, but "the Board does not merely count up the factors that favor independent contractor status to see if they outnumber the factors that favor employee status, but instead it must make a qualitative evaluation of those factors based on the particular factual circumstances of each case."

The Board's decision was based on how much importance would be given in the evaluation to a non-factor: "entrepreneurial opportunity." The Board majority said that in factual situations like this one, the common law factors should be viewed through the "prism of entrepreneurial opportunity."

The majority denied the dissenting board member's allegation that the Board's decision made "entrepreneurial opportunity" a "super-factor" replacing the common law factors. Rather, the majority said, "entrepreneurial opportunity, like employer control, is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain."

The Board's decision in *Supershuttle* was intended to overrule the 2014 NLRB decision in *FedEx Home Delivery*. In that case the Board stated that "entrepreneurial opportunity" was "merely one aspect of a relevant factor," whether the putative contractor is rendering services as an independent business. The Board said the FedEx Home Delivery decision "impermissibly altered the Board's traditional common-law test for independent contractors by severely limiting the significance of entrepreneurial opportunity in the analysis."

The Board concluded that, "having considered all of the common-law factors, we find... that SuperShuttle established that its franchisees are independent contractors." The Board said three factors in particular – franchisees' ownership (or lease) and control of their vans, franchisees' control over their daily work schedule and working conditions, and the method of payment, where franchisees keep all fares they collect (after paying a weekly flat "system" fee) – "provide franchisees with significant entrepreneurial opportunity and control over how much money they make each month."

For more information on whether a worker is an employee or independent contractor, contact Gary Visscher at 301-595-3520.

Look, Up in the Sky. It's a Bird, It's a Plane ... It's OSHA! By Adele L. Abrams, Esq., CMSA

In December 2018, it was revealed via a Freedom of Information Act (FOIA) request that on May 18, 2018, the Occupational Safety & Health Administration (OSHA) issued an internal memorandum to its regional administrators directing the procedures for the use of "Unmanned Aircraft Systems" (UAS) – commonly referred to as "drones" – during its inspections.

The memorandum has now been in effect for a few months, but very little is known about its practical impact on enforcement activities, although they have reportedly been used so far on nearly a dozen worksite inspections. In order to protect yourself from unauthorized searches in violation of the Fourth Amendment to the U.S. Constitution, it is important to know the do's and don'ts when OSHA attempts to surveil your worksite.

It is critical to remember that OSHA does NOT have warrantless search authority. As a practical matter, it may not be wise to demand a warrant whenever OSHA shows up, because it will antagonize them, and also reduce the amount of discount you can receive on citation penalties. But there are certain situations where requiring them to obtain a warrant is justified, such as in a fatality case where you need to get your response team on site (safety officer, counsel, technical experts or manufacturers).

OSHA does not need to go to any court to get a warrant – this isn't Law and Order – and they have administrative warrants already issued in bulk back at their office. But the warrant request will slow down the train by anywhere from a half-day to a full-day. You need to decide if the risks and benefits are worth it.

Even without a warrant, you can limit the scope of an OSHA inspection depending upon the type: a hazard complaint-based inspection typically only allows OSHA to look at the equipment or area at issue. However, even during a limited scope inspection, if OSHA observes a violation "in plain view," it may justify them expanding the scope of the inspection. So if a drone is used, this makes a larger portion of your worksite available to them. If the inspectors observe something through a fence or from outside your property that is a problem, this can justify opening an inspection event, particularly if the condition presents an "imminent danger."

Imminent danger inspections are OSHA's top priority, even surpassing fatality or injury case responses. Normally, these plain view inspections have been

triggered by OSHA driving by a facility or worksite and seeing workers through a fence, in a roadway trench, or up on a roof or billboard working in an unsafe manner. For the warehousing or logistics sector, this could include observations in an outdoor storage or transport area, concerning the stability and height of stacks, the operation of forklifts, loading dock hazards, and use of fall protection and other PPE.

OSHA is currently exploring the option of obtaining a blanket Public Aircraft Operator (PAO) authorization, which would allow it to "fly missions that meet the governmental functions listed in the Public Aircraft Statute. They also have the option of seeking civil operator status under the Federal Aviation Administration's civil rules. It appears that the first route may be limited to federal OSHA inspections, whereas state OSHA agencies (in 22 states) would need to pursue the civil operator route.

While FAA blanket approval of OSHA's use of drones is pending, the agency will require its regional administrators to have a remote pilot in command who passed an FAA test and obtain a UAS-rated license. All UAS will be registered, and logbooks kept (which may be accessible via a FOIA request, but that is not certain). More specifically, drones that will be used for OSHA inspections must weigh less than 55 pounds and be registered with the FAA if the UAS weighs more than 8.8 ounces. A regional representative will determine whether requests for UAS use and mission demands can be successfully fulfilled, including a cost/benefit analysis and a hazard assessment.

Critically, at this time, OSHA says it will "obtain express consent from the employer prior to using UAS on any inspection." Personnel on site must be notified of the aerial inspection prior to launching a UAS. The OSHA representative operating the drone must keep a visual line of sight with the UAS, only operate it during the day (sunrise to sunset), and flight speed cannot exceed 100 mph. The UAS must yield right of way to manned aircraft, such as planes and helicopters.

The UAS also cannot operate more than 400 feet above the ground, except when within 400 feet of a structure, and then it can hover up to 400 feet above the top of the structure. This allows for inspection of rooftops, for example, to see if skylights have proper covers when workers are exposed or to observe work performed by mechanical contractors in those areas. Drones are intended to be mainly used for inspection of areas that are deemed unsafe or difficult for inspectors to reach on foot.

Finally, OSHA says that the UAS will not operate over any persons not directly participating in the operation unless they are in a covered structure, or inside

Drones, con't

a stationary vehicle that can provide protection from a falling drone. Each UAS inspection will include at least three team members, tripling the sets of eyes looking at your workplace for hazards!

The OSHA memo also details the drone "deployment" kit, which includes two-way radios, binoculars, laptops and smart phones, and UV lenses for the UAS camera. After obtaining employer consent (similar to asking if they can videotape an inspection), and notification of personnel, OSHA will evaluate site-specific hazards such as cables, antenna and vehicles, perform a JHA of the hazards and mitigation for use of UAS on the specific worksite, determine a flight plan (in graphic form, such as a sketch), establish radio communication if needed, brief the team, verify with local law enforcement to ensure compliance (some areas are forbidden to have UAS operate for national security or other reasons, such as being too close to an airport). Then the agency inspection will commence using UAS.

So, is the use of drones by OSHA something to be concerned about? There are a number of factors to consider. If the employer denies the use of UAS, will they return with a warrant to use them anyway ... and risk becoming a target for a harsher inspection, a "bad faith" employer who will be denied 10% of the potential fine deduction (OSHA maximum penalties just rose to \$132,598 on January 23, 2019)?

Another concern is that OSHA drones will be shooting videotape, which can capture trade secrets, as well as employees caught in the act of doing something that constitutes a legal violation of OSHA rules. OSHA also cooperates with the EPA, so if the drone captures something in the environmental area that is improper (e.g. leaking oil drums in the back of the property), they can share the video and trigger an EPA visit. OSHA's memo also fails to detail how the information gathered might be protected, and with whom it would be shared. Will employees be concerned about being captured on drones without their consent, and do you need a policy?

While there may be more questions than answers at this point about the practical impact of drone inspections, it is wise to educate your supervisors and workers now, so that if an OSHA UAS team shows up, everyone will know their rights. You can also choose to adopt a policy in advance on whether a warrant will be required at all, only for UAS inspection activities, or for all OSHA inspections. The choice is yours ... at least for now!

Federal Court Finds in Favor of Employee in Arizona Medical Marijuana Act Case By Sarah Ghiz Korwan, Esq.

In a decision earlier this month, a federal court in Arizona found that Walmart violated the state's medical marijuana law and denied, in part, a summary judgment motion filed by Walmart in a Complaint filed by an injured employee and medical marijuana patient, who had been fired after failing a post-injury drug test. In doing so, the Court found that the state's medical marijuana law included anti-discrimination language which created an implied private cause of action, and which the company disregarded.

Plaintiff, Carol Whitmire, had worked at two Wal-Mart stores since 2008, having received training on the store's alcohol and drug-abuse policy that was consistent with federal laws banning marijuana as a controlled substance. By 2014, she had obtained a medical marijuana card, pursuant to the Arizona Medical Marijuana Act of 2010 ("AMMA"), to help her sleep and to relieve pain associated with her arthritis and prior shoulder surgery. Apparently, she did not disclose to her employer, Walmart, that she had been issued a medical marijuana card.

On May 16, 2016, Ms. Whitmire hurt her wrist while leveling bags in the ice machine. She reported this incident to management and filed an Associate Incident Report that same day but did not seek any medical attention. Walmart's Associate Incident Report reflected that she was not responsible for the accident. In fact, the report stated that the incident "could have just as easily happened to a customer".

About a week later, on May 23, 2016, Ms. Whitmire notified Human Resources of continued pain and swelling in her wrist and was sent to an urgent care facility. As part of Walmart policy, her visit with an urgent care facility included a drug screen, which showed levels of marijuana in her urine at the highest recordable levels, according to court records. She admitted that she had smoked marijuana at 2 a.m., 12 hours before her 2 p.m. shift at the store on the day of her accident.

Less than a month after she was sent for medical attention, Ms. Whitmire received a letter from the Industrial Commission of Arizona alerting her "that her employer's insurance carrier had been notified of her workers' compensation claim." That same month, she received two "Notices of Claim Status from the Industrial Commission of Arizona regarding her workers' compensation claim, both of which were

Marijuana, con't

dated June 22, 2016. One of these letters indicated that Plaintiff's claim was accepted, but that no compensation would be paid. The other letter stated that Plaintiff's injury had not resulted in permanent disability and indicated that temporary compensation and active medical treatment terminated on May 24, 2016, because 'claimant was discharged,'" documents state.

On July 22, 2016, Walmart terminated Ms. Whitmire citing her positive drug test as the reason for her termination. In 2017, she dual-filed a charge of discrimination with the Equal Employment Opportunity Commission and the Arizona Attorney General's Office, Civil Rights Division. After receiving her Notice of Right to Sue from the Arizona Attorney General's Office, Plaintiff filed a complaint alleging that she was wrongfully terminated and/or discriminated against in violation of the Arizona Medical Marijuana Act and the state's civil rights laws.

Walmart filed a series of motions, including a summary judgment, which was granted relating to plaintiff's discrimination and retaliation claims and denied in part relating to the state's medical marijuana statute.

On February 5, 2018, Defendant responded to Plaintiff's First Set of Interrogatories, stating that "Defendant did not contend Plaintiff was employed in a safety-sensitive position". However, Defendant thereafter filed a Motion for Summary Judgment which argued, in part, that Plaintiff was in a safety sensitive position and supplemented its interrogatory to reflect the same. Plaintiff disputed the untimely discovery response and ultimately the Court precluded Walmart from any argument that Plaintiff was in a safety sensitive position.

In denying the motion for summary judgment, the Court found that Arizona's medical marijuana statute includes anti-discrimination language. Accordingly, terminating a registered qualifying patient who tests positive for marijuana "regardless of whether the employee possesses a medical marijuana card and regardless of the level of marijuana detected" constitutes a "complete and bright line disregard for the Arizona Medical Marijuana Act's antidiscrimination provisions."

Furthermore, the Court held that, (parts of the) AMMA protects qualifying registered patients, like Plaintiff, who merely test positive for marijuana metabolites. Without any evidence that Plaintiff "used,

possessed or was impaired by marijuana" at work on (the day of her accident), the Court concluded that Defendant discriminated against Plaintiff in violation of the AMMA by suspending and then terminating Plaintiff solely based on her positive drug screen. For more information on employer drug policies, contact the Law Office at 301-595-3520.

Protecting America's Workers Act: HR 1074

Summary of 2019 Legislation

By Adele L. Abrams, Esq., CMSP

On February 7, 2019, Rep. Joe Courtney (D-CT) introduced the 2019 version of the "Protecting America's Workers Act" (PAW Act), as HR 1074. The 58-page bill was introduced with 27 original Democratic co-sponsors. This legislation has been introduced in the past several Congressional sessions, without action in the House or Senate, but with the shift to democratic control, it is highly likely that the House Education & Labor Committee will advance this measure during the current session. Prospects for passage in the Senate are remote, and no companion bill has been introduced to date.

Among the key provisions in HR 1074 are the following:

- Deters high gravity violations by increasing civil monetary penalties to a new maximum of \$250,000 for willful violations resulting in a fatality, and \$50,000 for serious violations resulting in a fatality. Other penalty provisions conform with the recent (1/23/19) increase in maximum OSHA penalties to \$132,598 for willful/repeated violations, \$13,260 for failure to abate, failure to post, serious and OTS violations. The legislation specifically adds that when considering repeat violations, OSHA and OSHRC are to consider the employer's history of similar violations in state-plan states as well as federal OSHA states.
- Authorizes felony penalties against employers who knowingly commit OSHA violations. Knowing violations resulting in the death of a worker would carry a \$250,000 individual penalty (\$500,000 for organizations) and up to a 10-year prison term. Knowing violations resulting in "serious bodily harm" would result in the same maximum financial penalties, plus up to 5-years in prison, or both. "Serious bodily harm" includes conditions with a "substantial risk of death, protracted unconsciousness, obvious physical disfigurement, or loss or impairment (permanent or temporary) of the functions of a body member, organ, or mental facility." Officers and directors of a corporation would be parties liable for criminal violations. The bill expressly states that nothing preempts state or local law enforcement agencies from conducting criminal prosecutions in accordance with their laws.

PAW Act, con't

- Amends the “advance notice” provisions by replacing strict liability with a requirement that a person must knowingly provide advance notice with the intent to impede, interfere with, or adversely affect the results of an OSHA inspection. The penalty for violations would increase to 5 years in prison and up to a \$250,000 individual or \$500,000 organizational penalty.
- Require OSHA to investigate all cases of death or serious injuries, specifically all fatalities and incidents resulting in the hospitalization of two or more workers. The employer must both notify OSHA and also take “appropriate measures to prevent the destruction or alteration of any evidence that would assist in investigating the incident.” Action can still be taken to prevent injury to workers or substantial damage to property, but the employer must notify OSHA of such action in a timely manner.
- Expands the General Duty Clause (Section 5(a)(1) of the OSH Act) to cover not only the employer’s own “direct hire” employees, but also any other workers performing work at the employer’s establishment, where the employer exercises control over workplace conditions. This would include temporary workers from staffing agencies, for example.
- Expands OSHA coverage to state and local government employees in 25 states.
- Requires correction of hazardous conditions while a citation is being contested, for serious, willful or repeated violations. The bill includes provisions to request a stay of abatement, but the employer would have to show it is likely to succeed in challenging the merits of the citation or the length of the abatement period, and that a stay will not harm the health or safety of workers.
- Reinstates an employer’s obligation to maintain accurate injury/illness records and reverse a Congressional Review Act resolution (HR 83), which had rescinded OSHA’s 2016 “continuing violations” rule. That rule had permitted enforcement of recordkeeping requirements beyond OSHA’s six-month statute of limitations, for the full 5-year record retention period. The legislation also would codify the severe injury reporting requirements and the e-recordkeeping rule provisions barring policies that discourage accurate recordkeeping or discrimination against employees who report work-related injuries and illnesses.
- Enhances whistleblower protections, by increasing the statute of limitations on Section 11(c) complaints from 30 days to 180 days, and adding rights of temporary reinstatement for workers where OSHA initially finds “reasonable grounds” indicating discrimination occurred. Moreover, if OSHA declines to investigate/prosecute, the employee can seek a de novo hearing before an ALJ. In addition, the legislation calls for including information about OSHA’s whistleblower rights in the mandatory employer posters.
- Establishes rights for families of workers who were killed on the job, by informing them about OSHA’s investigation before final decision on whether to issue citations. Copies of citations and reports would have to be provided to the families or victims at the same time they are provided to the employer, and families/victims would have the right to meet with OSHA and submit statements prior to reaching a settlement between OSHA and the employer. They would also be notified of any contests and OSHRC proceedings, provided with copies of all pleadings and decisions, and be given the opportunity to appear and make a statement before OSHRC at a contested case hearing.
- Gives employees and their representatives the right to challenge the severity of a citation and the amount of penalty proposed.
- Include prejudgment interest on citation penalties, from the date of contest to the date of final order, at the rate charged by the IRS (post-judgment interest is already permitted for those who do not pay their final penalties on time).

The measure also authorizes the Secretary of Labor to assess the adequacy of other federal agencies’ workplace safety and health standards, where they are asserted in lieu of OSHA jurisdiction (e.g., the Federal Aviation Administration, and Department of Energy nuclear facilities). However, the assessment specifically excludes evaluation of protections afforded to workers under the Mine Safety & Health Administration’s laws.

For more information on HR 1074, or assistance with OSHA citations or compliance, contact the Law Office at 301-595-3520.

Review Commission, con't

Regarding the nature of the work, the Commission disagreed with the ALJ that the duty to monitor contractors on the worksite included inspecting inside the heater itself. The Commission cited language in OSHA's 2015 Confined Space in Construction standard (which was not in effect at the time of the inspection) that explicitly states that the host or controlling employer is not required to enter a confined space unless its own employees are working in that space.

OSHA argued that Suncor also failed to exercise reasonable care by not reviewing safe work permits for confined space entry, but the Commission pointed out that both the general industry standard and the 2015 confined space standard require only an annual review. Second, regarding "scale of the project," Suncor showed that it had an extensive compliance auditing program during the massive turnaround project. The Commission found that "Suncor's safety efforts were more than commensurate with the size, complexity, and the short time frame associated with this project."

Third, the Commission cited Suncor's efforts to hire safety conscious contractors and to train and enforce safety rules by contractor employees. "It is undisputed that before a contractor is hired to work at the refinery, it must pass a screening by a third party...that examines the contractor's safety policies, training program, OSHA and MSHA records, OSHA recordable rate, and insurance rate information. Suncor also extensively trains contractor employees on safety and its own work rules, and it has a policy that provides for punishing safety violators that the Secretary does not dispute is strict."

The *Suncor* decision is significant in that it does show that the controlling employer's duty is different – and "lesser" – than that of the employee's direct employer. It also, however, maintains a pretty high bar for the controlling employer's duty of "reasonable care."

Suncor was able to avoid liability because it was able to show that it had an extensive and well documented project safety and compliance auditing program and contractor qualification policies.

For more information on joint employer doctrine, contact Gary Visscher at 301-595-3520.



Law Office President Adele Abrams, Esq., CMSP, (center) was among the "speed mentors" who gave presentations at the February event of the American Society of Safety Professionals, Central Florida Chapter. The event was co-sponsored by Women in Safety Excellence (WISE).



2019 SPEAKING SCHEDULE

ADELE ABRAMS

2019 Speaking

Feb. 28: Indiana Safety & Health Conference, Indianapolis, IN, Presentation on Safety in the "Gig Economy"
March 6: Florida Mine Safety Conference, Bartow, FL, Presentation on Medical Marijuana & Safety
March 11: OIAA MSHA part 46 training, Roseburg, OR (with Josh Schultz)
March 12: OIAA MSHA part 46 training, Albany, OR (with Josh Schultz)
March 14: NWPCA, San Diego, CA, presentation on OSHA enforcement update
March 19: AGC-OR, Portland, OR, presentation on Legal Considerations for Safety Professionals
March 27: Portable Sanitation Association International, Mobile, AL, presentation on OSHA/MSHA Enforcement
April 2-3: National Business Institute, Employment Law Seminar, Baltimore, MD
April 8: BLR Master Class on OSHA Recordkeeping, Austin, TX
April 9: BLR Safety Summit, Austin, TX, presentation on Joint Employer Laws & Safety
April 11: ASSP Conference, Grapevine, TX, presentation on Medical Marijuana & Safety
April 16-17: South Central Mine Safety Conference, Dallas, TX, presentation on Workplace Exams

2019 Webinars

March 19: ClearLaw, OSHA E-Recordkeeping Update
March 21: BLR, Environmental Audits
April 4: Progressive Business Conferences, Opiates and Workplace Safety
April 12: ClearLaw, Joint Employers & Safety

MICHAEL PEELISH

2/15 – AHMP-AIHA Professional Development Seminar Speaker – Johns Hopkins
3/4 – Silica Competent Person Training – Chesapeake Regional Safety Council, Maryland
4/19 – Silica Competent Person Training – Langley Air Force Base, Virginia