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OSHA NEWSLETTER

MAY 2016

Highlights from the 2016 Midwinter Meeting of the American Bar Association OSHA Committee

Matthew Thomas Deffebach and Punam Kaji

Matthew Deffebach and Punam Kaji attended this year's American Bar Association OSHA Committee Midwinter Meeting in Santa Barbara, California. One of the highlights included comments from Dr. David Michaels, Assistant Secretary of Labor for OSHA, who discussed some of the following issues:

- OSHA's focus will be on doing things "more and differently." Rigorous enforcement and compliance assistance will continue, but new programs will be introduced.
- More focus on ergonomics and Musculoskeletal Disorders ("MSDs") with more and clearer standards for employers to follow. For example, there will be a poultry focus in the "Chicken Belt," which includes parts of Dallas.[1]
- The Severe Violator Enforcement Program will continue to grow, with the most recent addition being upstream oil and gas.
- More negative press releases will be utilized. Sending a message and informing the public in many cases can have a greater effect than a fine, and OSHA plans to utilize this to its advantage. This will be expanded to include workers' compensation carriers to put pressure on the insurance system in addition to employers.
- OSHA will continue to address fissured workplace issues. By citing both the host and staffing company, OSHA maintains that greater safety outcomes have been achieved. These citations may also be expanded to include upstream companies if their suppliers and vendors are consistently problematic.
- OSHA will implement more specific campaigns, such as the recent heat campaign and safety fall protection safety stand-down.
- OSHA will be looking to capitalize on the Department of Justice partnership to increase criminal penalties and focus more on prosecution of individual managers. The DOJ will be looking to take on more criminal cases regarding safety violations.

[1] *See, e.g.*, **Prevention of Musculoskeletal Injuries in Poultry Processing**.

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Silica Final Rule Announced; Will Take Effect on June 23, 2016 with Staggered Compliance Dates Thereafter

Modinat "Abby" Kotun, Punam Kaji and Brendan Fradkin

On March 24, 2016, OSHA announced its final rule covering protections for workers exposed to respirable silica dust. The final rule will:

- Reduce the permissible exposure limit ("PEL") for crystalline silica to 50 micrograms per cubic meter of air, averaged over an eight-hour shift.
- Require employers to use engineering controls (such as water or ventilation) and work practices to limit worker exposure; provide respiratory protection when controls are not able to limit exposures to the permissible level; limit access to high exposure areas; train workers; and provide medical exams to highly exposed workers.
- Stagger compliance dates to ensure employers have sufficient time to meet the requirements, *e.g.*, extra time for the hydraulic fracturing (fracking) industry to install new engineering controls and for all general industry employers to offer medical surveillance to employees exposed between the PEL and 50 micrograms per cubic meter and the action level of 25 micrograms per cubic meter.[1]

The final rule, which will take effect on June 23, 2016 if challenges are unsuccessful, is written as two standards: one for the construction industry and another for general industry and maritime. The staggered compliance dates are as follows:

- Construction – June 23, 2017, one year after the effective date
- General Industry and Maritime – June 23, 2018, two years after the effective date
- Hydraulic Fracturing – June 23, 2018, two years after the effective date for all provisions except Engineering Controls, which have a compliance date of June 23, 2021

Industry groups have already begun to challenge the new final rule, which can be challenged for 60 days after its publication in the Federal Register.[2] An employer cited under the rule can also challenge the rule's validity through the Occupational Safety and Health Review Commission process.

Haynes and Boone, LLP previously published three articles on this subject, including an article last quarter foretelling of the standard's release.[3]

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[1] **OSHA National News Release** (U.S. Dep't of Labor, Office of Public Affairs), March 24, 2016

[2] *See, e.g., Associated Masonry Contractors of Texas v. OSHA*, No. 16-60208 (5th Cir. filed Apr. 4, 2016).

[3] See Haynes and Boone Publication, February 1, 2016, **New Silica Exposure Standard One Step Closer to Finalization**.

Fifth Circuit Rules that Global Hazard Assessments Without Confirmation of Similarity for Each Location Are Not Permissible

Matthew Thomas Deffebach and Modinat "Abby" Kotun

We previously **reported** on a divided Review Commission decision (*Wal-Mart Distribution Center #6016*) where the majority, in our opinion, failed to account for the reality of how sophisticated retailers conduct PPE assessments. As we noted, the case was being appealed to the Fifth Circuit Court of Appeals. Unfortunately, the Fifth Circuit adopted the Review Commission's faulty reasoning. In *Wal-Mart Distribution Center #6016 v. OSHRC*, the Fifth Circuit ruled that employers cannot apply the findings from one hazard assessment to other locations without confirming that the other locations are identical to warrant such application. No. 15-60462, 2016 WL 1376214 (5th Cir. Apr. 6, 2016). Wal-Mart's Searcy, Arkansas Distribution Center submitted an application to join OSHA's Voluntary Protection Program ("VPP"). As part of the VPP application process, OSHA audited the Searcy location in January 2008; during the audit, Wal-Mart informed OSHA that the Searcy hazard assessment would be applied to its

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other distribution centers. In February 2008, OSHA inspected Wal-Mart's New Braunfels distribution center and subsequently issued a citation for failure to conduct a hazard assessment (under 29 C.F.R. Section 1910.132(d)(1)) for that specific location.

The Fifth Circuit Court of Appeals found that "[w]hile 1910.132(d)(1) may not require an employer conduct a full-fledged hazard assessment of all identical workplaces, it is reasonable to interpret 1910.132(d)(1) to require an employer to confirm that workplaces are indeed identical before a hazard assessment for one workplace can qualify as the hazard assessment for another location." *Id.* at *3. In coming to this conclusion, the court first analyzed the ambiguity of the regulation. After looking at the regulatory language, the regulation's preamble, and the appendix accompanying the regulation, the Court found that all three sources failed to resolve the regulation's ambiguity as to whether Wal-Mart may use one location's hazard assessment as the hazard assessment of another location. As a result, the Fifth Circuit gave substantial deference to OSHA's own interpretation of the regulation and found that interpretation reasonable.

While the outcome is troublesome regarding future enforcement (if no further appellate action is taken) Wal-Mart prevailed on notice grounds. The Court found that by OSHA granting the Wal-Mart Searcy location VPP status, along with the fact that Wal-Mart notified OSHA during the VPP audit that it was using the Searcy hazard assessment for its other distribution centers, Wal-Mart had a fair expectation that its procedures were satisfactory and were not on notice of which practices, if any, were in violation of Section 1910.132(d)(1).

OSHRC Rules in Favor of Employer in Supervisor Misconduct Case

Brendan Fradkin , Punam Kaji and Modinat "Abby" Kotun

Employers may breathe a little easier following a recent decision regarding supervisor-based vicarious liability. In *Secretary of Labor v. S.J. Louis Construction of Texas*, the Occupational Safety and Health Review Commission's ("**OSHRC**") ruling potentially narrowed the scope of the constructive knowledge requirement in supervisor misconduct cases.[1] The decision, which vacated an Administrative Law Judge's previous ruling, focused on an incident where S.J. Louis Construction crew workers were killed after entering a manhole that emanated a strong odor. Despite 22 years of experience, a spotless safety record, and confined space entry training, the leader of the crew and another employee both entered the manhole, where they were asphyxiated by the gas within. The Secretary of Labor cited the organization with a serious violation under the General Duty Clause of the Occupational Safety and Health Act of 1970, Section 5(a)(1).

In order to get OSHRC to vacate the citation, S.J. Louis Construction had to demonstrate that despite being the employer, it had no knowledge of potential safety issues via its supervisor's conduct. OSHRC looked at several factors that supported this contention. First, the crew leader had abundant experience and a perfect safety compliance record. Second, the crew leader was instructed by supervisors and through training that a breathing apparatus should be used in confined spaces if necessary. Third, in a similar situation where odors emanated from a sewer line, the crew leader told his organization's area director and safety manager that he couldn't enter the sewer without a breathing apparatus, indicating that his previous training had been adequate. OSHRC believed that these factors demonstrated that S.J. Louis had sufficiently attempted to comply with applicable OSHA applicable regulations and that the organization should not be held responsible for the crew leader's action.

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Though OSHRC's decision is helpful to employers, in order to take advantage of this ruling, employers must continue comprehensive and effective safety training, oversight, and management. When a supervisor is directly responsible for the harm, employers are liable only if the supervisor's actions were reasonably foreseeable. By regularly assessing the competency of supervisors and ensuring that they are up to date with the latest safety standards, it is less likely that the OSHRC would find that the harmful conduct was foreseeable.

[1] 25 O.S.H. Cas. (BNA) 1892 (O.S.H.R.C. Feb. 5, 2016).

OSHA Issues Revised Whistleblower Investigations Manual

Punam Kaji, Modinat "Abby" Kotun and Brendan Fradkin

On January 28, 2016, OSHA released an updated Whistleblower Investigations Manual ("**Manual**"), which updated the April 21, 2015 manual.[1] The Manual outlines the procedures and other information related to handling whistleblower complaints under the many statutes delegated to OSHA.

The burden of proof for an investigation to result in a claim has been modified. Previously, the whistleblower claim had to meet a "preponderance of the evidence" burden; now the burden has been lowered to "reasonable cause," meaning that OSHA can move forward after an investigation if it finds "reasonable cause." In order to show reasonable cause, "OSHA must believe, after evaluating all of the evidence gathered in the investigation from the respondent, the complainant, and other witnesses or sources that a reasonable judge *could* rule in favor of the complainant. . . . The evidence does not need to establish conclusively that a violation *did occur*."[2] This lower standard may result in more whistleblower claims making it to a judge's bench after an investigation. Whether a case is brought before a district judge or an administrative law judge depends on which statute the whistleblower claim is brought under and other procedural matters.

The Manual also includes a new chapter, Chapter 23 "Information Disclosure," which explains how OSHA's whistleblower documents can be disclosed to the public once a case is closed and how non-public disclosure can be made while a case is open in order to resolve the complaint. Interestingly, the Manual includes a disclaimer expressly stating that the Manual does not create or imply any duties, rights or benefits, because the Manual is intended to be an internal guidance document only, although, in practice, the changes to the way investigations are managed internally could result in more whistleblower claims. The new Manual comes after OSHA launched a new program in late 2015 allowing **alternative dispute resolution** for more efficient resolution of claims, signaling another administrative process aimed at making it easier for whistleblower claimants to prevail.

[1] **OSHA Whistleblower Investigations Manual**, January 28, 2016.
[2] *Id.* (emphasis in original).

Seventh Circuit Holds that General Safety Rules Alone are Not Enough for a Good Faith Defense to a Willful Classification

Modinat "Abby" Kotun, Punam Kaji and Brendan Fradkin

In *Stark Excavating, Inc. v. Perez*, the Seventh Circuit Court of Appeals shed some light on the applicability of the good faith defense to a willful classification and the type of evidence upon which employers must rely in order to prevail on the defense. In *Stark Excavating*, Stark was cited at two different worksites for willful excavation cave-in protection violations under 29 CFR § 1926.652(a)(1), among others.

At the worksite in question, Stark's crew was replacing a fire hydrant waterline. The Stark foreman arrived at the site, took a soil sample from the excavation site, and analyzed it to determine its soil type – Type B – and the type of cave-in protection to be utilized – 45

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degree sloping. With this information, the foreman completed the top half of a Daily Report form, but left the bottom half of the form blank, which had boxes for selecting the method of protection actually used. The foreman testified at the hearing on the matter that he "did not pay attention really how the hole looked." He stated, "I looked at it. I knew it was – I just wanted to get in there and get the hydrant on is really the bottom line." OSHA arrived on site and cited Stark Excavating for a violation of the cave-in protection standard, which required that the soil be sloped 45 degrees. (It was sloped to only 60, 70, 76, and 80 degrees at different points of the excavation according to the Compliance Safety and Health Officer.)

The employer asserted a good faith defense to the willful classification based on its efforts to comply with the regulations through safety rules, training, and inspections. However, OSHRC and the Seventh Circuit emphasized that Stark failed to effectively enforce its own rules and policies when violations were discovered, as evidenced by (i) a progressive discipline policy that did not allow verbal warnings, and (ii) supervisor testimony that they seldom issued written safety tickets and preferred to give verbal warnings. Moreover, the Court of Appeals found that Stark provided no evidence of any actions at the specific worksite to ensure cave-in protection. The ALJ, according to the Seventh Circuit, had held an erroneous belief that the employer took reasonable steps to slope the excavation site when in fact, the foreman admitted that he chose expediency over safety when he deliberately decided not to adequately slope the excavation.

From this decision, it is clear that according to the Seventh Circuit, general safety rules alone do not establish a good faith defense. Evidence of good faith efforts at the specific site at issue is, however, relevant to the willful classification determination.

The Department of Labor Files Suit against Lear Corp. for Retaliation and Names Individual Managers

Punam Kaji, Modinat "Abby" Kotun and Brendan Fradkin

Over the past several months, our OSHA Newsletters have covered a number of **retaliation/whistleblower claims** resulting in severe damages and penalties for the employer. A case of particular interest was *Perez v. Lear Corp.*, where a federal court granted a restraining order requested by the Department of Labor **preventing the employer from committing any retaliatory acts** before the OSHA investigation had been completed.[1] The investigation in that case is now complete, and the Department of Labor has filed a lawsuit against Lear Corp., doing business as Renosol Seating LLC, and three of its managers for suspending and terminating employees who reported workplace hazards.

In July 2015, we covered this case because of the rare injunctive relief sought; however, the case has taken yet another interesting turn as individual managers have been named in addition to the employer itself. The suit claims that the employer retaliated against employees by segregating complaining employees from their co-workers and denying them overtime. This case began when an employee complained to a key customer regarding various issues; the employee was suspended for violating company policy by interfering with the customer relationship and then terminated. The suit seeks back wages, interest, compensatory damages, and punitive damages. Additionally, the suit seeks an order directing Lear Corp. to remove all references to this matter from the employees' personnel records.

[1] *Sec'y of Labor v. Lear Corporation Eeds and Interiors and Rensol Seating, LLC*, Civ. A. No. 15-0205-CG-M (S.D. Ala. May 7, 2015).

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New Guidance for OSHA Hazardous Communication Standard

Brendan Fradkin, Punam Kaji and Modinat "Abby" Kotun

OSHA has issued guidance related to the new Hazard Communication Standard.[1] On June 1, 2016, all employers are mandated to update their hazard communication programs and train their workforces as necessary on the updated system per the last implementation deadline of the new standard. The new guidance is in the form of a 432-page document titled "Hazard Classification Guidance for Manufacturers, Employers, and Importers" and a 32-page draft document titled "Guidance on Data Evaluation for Weight of Evidence Determination."[2]

The purpose of the hazard classification guidance is to aid manufacturers and importers of chemicals in identifying chemical hazards, classifying chemicals as hazardous as necessary, and determining the degree of the hazard as appropriate, which all feeds into the hazard information displayed on chemical SDSs and labels. The document includes a detailed discussion of the different types of classifications of health and physical hazards along with classification procedures and guidance for each type. The draft weight of evidence guidance is intended to help employers in conducting a weight of evidence evaluation under the Hazard Communication Standard in order to assess the potential hazards of a chemical and determine what information must be disclosed on the chemical's label and SDS under the standard. Comments on this draft guidance are due by May 2, 2016.

The primary group affected by this new guidance will likely be consulting firms and organizations who aid chemical manufacturers and importers in crafting their hazardous chemical policies and completing hazard identifications. A senior consultant from one such organization suggested that although the guidance won't contain many surprises, it will help to clarify existing guidance and correct misinformation.

[1] 29 CFR § 1910.1200. See Haynes and Boone's prior alert discussing the changes to OSHA's Hazard Communication Standard, **Think Globally, Act Locally (in Your Workplace): Changes to OSHA's Hazard Communication Standard**.

[2] **Hazard Classification Guidance for Manufacturers, Employers, and Importers. Guidance on Data Evaluation for Weight of Evidence Determination** is open for public comment until May 2, 2016.

List of Small Businesses Exempt from Inspection Updated

Modinat "Abby" Kotun, Punam Kaji and Brendan Fradkin

OSHA has updated its list of employers who are exempt from programmed safety inspections.[1] Effective January 29, 2016, if an employer has 10 or fewer employees and is represented on the updated list, OSHA will not make a programmed safety inspection. Inspections can still be prompted by injuries, complaints and deaths.

When updating the list, OSHA looked at industries with a Days Away, Restricted or Transferred (DART) rate that was less than the national average rate of 1.7 for 2014. Companies with a North American Industrial Classification System ("**NAICS**") code corresponding to these industries with 10 or fewer employees are exempt from programmed safety inspections. This list is updated each year based on injury and illness rates calculated by the Bureau of Labor Statistics ("**BLS**").

Each year, based on the rates published by the BLS, industries are added and removed from the exemption list. Below are some notable new additions and removals:

Industries New to the Exemptions List

- Natural gas distribution companies (NAICS 221210)
- Plastic bottle manufacturing (NAICS 326160)
- Metal can manufacturing (NAICS 332431)
- Passenger car rental (NAICS 532111)

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Industries Removed from the Exemptions List

- Medicinal and botanical manufacturing (NAICS 425411)
- Fruit and vegetable markets (NAICS 445320)
- Beer, wine and liquor stores (NAICS 445310)
- Nail salons (NAICS 812113)

[1] The list of exemptions for low-hazard small businesses – formally known as the Enforcement Exemptions and Limitations under the Appropriations Act – is mandated annually by Congress in the appropriations bill for OSHA.

In Other News

Employers should also be aware of this other recent development:

- OSHA reports that during its first full year of the new Severe Injury Reporting Program, employers reported 10,388 severe injuries, including 7,636 hospitalizations and 2,644 amputations. 62 percent of reported injuries resulted in a Rapid Response Investigation ("RRI"), including 69 percent of hospitalization reports. The RRI allows employers to analyze the incident to identify the causes, presents to OSHA its findings and proposed abatements, and confer with OSHA regarding implementation of those abatements. 38 percent of reported injuries, and 58 percent of reported amputations, resulted in a worksite inspection. According to OSHA, the majority of first year reports were filed by large employers. OSHA warns that in the second year of the requirement, it will be more likely to cite employers for non-reporting violations, which carry a penalty of $7,000 or $70,000 for a willful failure to report. (These amounts will increase when the recently approved higher penalties go into effect.)

If you have any questions, please visit the Haynes and Boone Occupational Safety and Health Act (OSHA) and Workplace Disasters page of our website or contact one of the lawyers listed in this newsletter.

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