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OSHA NEWSLETTER

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OSHA "Injury Tracking Website" Presents Issues as Employer Deadline for Compliance Looms

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On August 1, 2017, the U.S. Occupational Safety and Health Administration ("OSHA") launched the "Injury Tracking Application" for Electronic Submission of Injury and Illness Records to OSHA¹ in an effort to comply with its electronic record-keeping rule. OSHA's website offers three options for data submission: (1) users will be able to manually enter data into a web form; (2) users will be able to upload a CSV file to process single or multiple establishments at the same time; and (3) users of automated recordkeeping systems will have the ability to transmit data electronically via an API (application programming interface).

Shortly after the launch, OSHA temporarily suspended the Injury Tracking Application because of a purported security breach. On August 14, 2017, Homeland Security informed OSHA that the site's user information was potentially compromised. OSHA restored the site after a technology scan confirmed there was no data breach in the application. OSHA indicated that it will continue its security monitoring.

Although no information in the ITA was compromised at this time, the breach is of particular concern to employers that may provide an employee's private health information because such information could be vulnerable to exposure in the case of a future breach. Employers may find it necessary to take proactive measures to avoid providing information relating to their employees' medical conditions, injuries, or illness.

In late June 2017, OSHA set December 1st as the compliance date for electronic data submission, delaying its previous compliance date. At present, there is no indication that the security breach will impact or further delay the current compliance date.

Proposed budget cuts further complicate the issue. The Trump administration has proposed \$2.5 billion in cuts to the Department of Labor's budget for fiscal year 2018. The proposed cuts will shrink the Department's budget by 21 percent. It is unclear if the proposed cuts will impact implementation or upkeep of the Injury Tracking Application.

Despite the rocky rollout, employers should prepare for the December 1, 2017 Injury Tracking Application compliance deadline. Employers should also take steps to address any privacy concerns arising out of the security breach.

¹ OSHA Injury Tracking Application for Electronic Submission of Injury and Illness Records to OSHA

Hensel Phelps Decision Vacates Willful Citation Because Exposed Workers Were Not General Contractor’s Employees

Punam Kaji and Abby Kotun

In *Secretary of Labor v. Hensel Phelps Construction Co.*, Docket No. 15-1638 (June 1, 2017), the Occupational Safety and Health Review Commission (the “Commission”) held that due to longstanding Fifth Circuit precedent, OSHA could not hold Hensel Phelps liable for a safety violation based solely upon a subcontractor’s employees’ exposure.

In this case, Hensel Phelps had been contracted by the City of Austin to build a library. Hensel Phelps then subcontracted Haynes Eaglin Watters, LLC (“HEW”) who further subcontracted CVI Development, LLC (“CVI”) to perform excavation and other work. After a complaint was received, OSHA’s compliance officer conducted an inspection at the worksite and found that employees of CVI were working next to an excavated wall in intermittent rain without proper sloping or other protection from cave-in hazards. Hensel Phelps, as the general contractor, had instructed CVI to continue work in that area, even after some concerns had been raised.

The parties had agreed to a stipulated record; so, the *prima facie* elements necessary to establish the cave-in protection citation were proved. The sole issue before the ALJ was whether Hensel Phelps, “as the General Contractor for the library project, [could] be

held liable for the violation as a ‘controlling employer.’” *Id.* at 8. Hensel Phelps argued that based on Fifth Circuit case law, OSHA’s controlling employer policy had been “invalidated and is unenforceable.” *Id.*

Somewhat hesitantly, the Commission reasoned, “[t]he stipulated record clearly establishes that Respondent had sufficient control and authority over this jobsite, including subcontractor CVI and its employees, to reasonably be expected to prevent and/or correct the violation in this case. . . . Accordingly, [the citation] would be affirmed under applicable Commission case law.” *Id.* at 10. However, the violation occurred in Austin, Texas, within the geographical jurisdiction of the Fifth Circuit Court of Appeals, who unambiguously stated, “OSHA regulations protect only an employer’s own employees.” *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 711 (5th Cir. 1981). Because the Commission’s decision would be appealed to the Fifth Circuit, the Commission applied the precedent of the Fifth Circuit, holding Hensel Phelps “cannot be liable for a violation of the Act based solely upon a subcontractor’s employees’ exposure to the condition.” *Hensel Phelps*, Docket No. 15-1638 at 11. The Commission agreed with the ALJ’s decision, and Hensel Phelps’s willful citation was vacated.

OSHA has since appealed the decision to the Fifth Circuit, presumably in hopes that the Fifth Circuit will overrule its holding in *Melerine*. *Acosta v. Hensel Phelps Constr. Co.*, No. 17-60543 (5th Cir. filed Aug. 4, 2017). It remains to be seen whether OSHA’s “controlling employer” policy will live on in Texas, Louisiana, and Mississippi (the states within the Fifth Circuit) after the *Hensel Phelps* ruling.

Silica: Rule Enforced for Construction but 30-Day “Good Faith” Grace Period; Oral Arguments Heard on Challenge

Punam Kaji and Abby Kotun

Silica Construction Rule In Effect with 30-Day Good Faith Grace Period

OSHA began enforcing the Respirable Crystalline Silica construction standard, 29 CFR § 1926, on September 23, 2017.² Shortly before the enforcement date, Thomas Galassi, Acting Deputy Assistant Secretary of Labor for Occupational Safety and Health, issued a memo announcing, “[d]uring the first 30 days of enforcement, OSHA will carefully evaluate good faith efforts taken by employers in their attempts to meet the new construction silica standard.”³ During this time, OSHA will set out to assist employers with complying with the new standard per the memo. Galassi cautions, however, that if an employer is “not making any efforts to comply, [that employer] may also be considered for citation.”

Oral Arguments Heard on Silica Rule Challenge

In 2016, industry groups challenged the new silica final rule.⁴ In *North America’s Building Trade Unions v. OSHA*, No. 16-1105 (D.C. Cir. filed Apr. 1, 2016), oral arguments were heard on September 26, 2017, specifically on the industry petitioners’ arguments regarding whether (1) the rule is justified by significant risk from silica, (2) whether the rule is technologically feasible, and (3) whether the rule is economically feasible. The D.C. Circuit’s scheduling order for the hearing gave the parties a total of 90 minutes for arguments. A decision is forthcoming.

² The silica rule does the following:

- Reduces the permissible exposure limit (“PEL”) for crystalline silica to 50 micrograms per cubic meter of air, averaged over an eight-hour shift.
- Requires 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.

- Staggers 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.

³ **OSHA Standard Interpretation, Launch of Enforcement of the Respirable Crystalline Silica in Construction Standard**, 29 CFR § 1926.1153, Sept. 20, 2017

⁴ **OSHA Standard Interpretation, Launch of Enforcement of the Respirable Crystalline Silica in Construction Standard**, 29 CFR § 1926.1153, Sept. 20, 2017

Haynes and Boone has previously published articles on this subject, including an article last year announcing the final rule’s release.⁵

⁵ See Haynes and Boone Publication, May 5, 2016, *Silica Final Rule Announced; Will Take Effect on June 23, 2016 with Staggered Compliance Dates Thereafter*, available [here](#).

James Sullivan Confirmed and Sworn In to Last Seat on Occupational Safety and Health Review Commission

Punam Kaji and Abby Kotun

Management-side labor and employment attorney James Sullivan was sworn in as an OSHRC Commissioner on August 28, 2017 after his Senate confirmation. Immediately prior to being appointed by President Donald Trump, Sullivan was a shareholder with Cozen O’Connor. Sullivan’s practice focused on labor and employment law and workplace safety and health matters.⁶ Sullivan’s term expires in April 2021.

Sullivan joins OSHRC Chairman Heather MacDougall, who was sworn in on August 16, 2017 and was former acting chairman and member of the Commission. MacDougall too is a former management-side labor and employment attorney, most recently with Akerman LLP in Florida. MacDougall’s term also expires in April 2021. The last Commissioner is Cynthia L. Attwood, first appointed by President Barack Obama. Attwood

spent 30 years in the Federal government as a lawyer and judge. Her term expires in April 2019. For the first time in over two years, the OSHRC will have each of its seats filled. Chairman MacDougall said the following upon being sworn in: “With a quorum restored and a full complement of commissioners for the first time in over two years, our first order of business is the cases awaiting Commission consideration.”⁷

¹ **Occupational Safety and Health Review Commission**, Current Commissioners, (Oct. 5, 2017 12:51 PM)

⁷ **Occupational Safety and Health Review Commission**, Press Release, Heather MacDougall and James Sullivan Confirmed as Commissioners and MacDougall Appointed as Chairman (Aug. 16, 2017)

In Other News

Fall Protection Again Tops OSHA’s Top 10 Cited Safety Violations: OSHA recently revealed its list of the top 10 most commonly cited OSHA work safety standards for Fiscal Year 2017. For the sixth consecutive year, Fall Protection – General Requirements was the most frequently cited workplace safety violation. This year’s list remains relatively unchanged from previous years, with the exception of Fall Protection – Training Requirements citations, a new addition to the list. Employers and employees should remain vigilant in these areas. The full top 10 list of frequently cited violations is below:

- Powered Industrial Trucks (29 CFR 1910.178; 2,162 violations)
- Machine Guarding (29 CFR 1910.212; 1,933 violations)
- Fall Protection – Training Requirements (29 CFR 1926.503; 1,523 violations)
- Electrical – Wiring Methods (29 CFR 1910.305; 1,405 violations)
- Fall Protection – General Requirements (29 CFR 1926.501; 6,072 violations)
- Hazard Communication (29 CFR 1910.1200; 4,176 violations)
- Scaffolding (29 CFR 1926.451; 3,288 violations)
- Respiratory Protection (29 CFR 1910.134; 3,097 violations)
- Lockout/Tagout (29 CFR 1910.147; 2,877 violations)
- Ladders (29 CFR 1926.1053; 2,241 violations)

Trump Administration Nominates Scott A. Mugno to Head OSHA: The White House recently announced the nomination of Scott A. Mugno to serve as Assistant Secretary of Labor for OSHA. Mugno most recently served as the Vice President for Safety, Sustainability and Vehicle Maintenance at FedEx Ground and previously served as the Managing Director for FedEx Corporate Safety, Health and Fire Protection. In his roles at FedEx, Mugno’s responsibilities included developing, promoting, and facilitating the safety and health program and culture. Prior to FedEx, Mugno was a regulatory attorney both in-house and at law firms. He also served in the Army JAG corps. If confirmed, Mugno will join an administration focused on deregulation and that seeks to cut OSHA’s enforcement budget. It remains to be seen how Mugno will steer the agency and if he will focus as heavily on enforcement as the previous administration.