haynesboone

MATTHEW DEFFEBACH
PARTNER
matthew.deffebach@haynesboone.com
+1 713.547.2064

ALLAN GUSTIN
ASSOCIATE
allan.gustin@haynesboone.com
+1 949.202.3087

MINI KAPOOR, PH.D.
ASSOCIATE
mini.kapoor@haynesboone.com
+1 713.547.2261

JULIA PEEBLES
ASSOCIATE
julia.peebles@haynesboone.com
+1 713.547.2053

JASMINE TOBIAS
ASSOCIATE
jasmine.tobias@haynesboone.com
+1 214.651.5093

OSHA NEWSLETTER

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OSHA States that Most Instances of Workplace Drug Testing are Permissible

Matthew Deffebach and Mini Kapoor Ph.D.

In a memorandum dated October 11, 2018, OSHA clarified its position on drug testing under 29 C.F.R. § 1904.35(b)(1)(iv). Under the previous guidance from OSHA, employers were limited to post-accident drug testing to situations where there was a "reasonable probability" that drugs or alcohol consumption contributed to the work-related injury. In the October 2018 memorandum, employers have no such restriction:

The purpose of this memorandum is to clarify the Department's position that 29 C.F.R. § 1904.35(b)(1)(iv) does not prohibit . . . post-incident drug testing. The Department believes that many employers who implement safety incentive programs and/or conduct post-incident drug testing do so to promote workplace safety and health. In addition, evidence that the employer consistently enforces legitimate work rules (whether or not an injury or illness is reported) would demonstrate that the employer is serious about creating a culture of safety, not just the appearance of reducing rates. Action taken under a . . . post-incident drug testing policy would only violate 29 C.F.R. § 1904.35(b)(1)(iv) if the employer took the action to penalize an employee for reporting a work-related injury or illness rather than for the legitimate purpose of promoting workplace safety and health.

The memorandum provided a non-exhaustive list of circumstances where drug testing would not violate the standard:

- Random drug testing
- Drug testing unrelated to the reporting of a work-related injury or illness
- Drug testing under a state workers' compensation law
- Drug testing under other federal law, such as a U.S. Department of Transportation rule
- Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees. If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries.

To prevent potential issues that could arise due to conflict between OSHA's position in the October 2018 memorandum and its earlier position regarding drug testing policy, OSHA stated the October 2018 memorandum supersedes any OSHA interpretive documents that could be construed as inconsistent with the October 2018 memorandum.

In sum, the October 2018 memorandum indicates that drug testing will be viewed favorably by OSHA in most circumstances. Post-accident drug testing is permitted if employers test all employees whose conduct could have contributed to the incident. Employers may want to consider rewriting their drug policy to reflect this new guidance from OSHA.

California Extends Statute of Limitations on Recordkeeping Violations

Matthew Deffebach, Allan Gustin, Julia Peebles

Governor Jerry Brown signed a bill that expands the statute of limitations for issuing citations to employers for failing to record workplace injuries or illnesses.1 Previously, Cal/OSHA could only cite an employer for recordkeeping violations that took place within the six months prior to the issuance of a citation. Beginning January 1, 2019, California Labor Code will provide that a recordkeeping violation continues until the violation is corrected, the division discovers the violation, or the duty to comply with the requirement that was violated no longer exists. This change effectually extends the statute of limitations for recordkeeping violations to the length of time employers are required to maintain injury and illness records, which is five years. Employers should consider reviewing their injury and illness records to determine if any corrections are warranted.

[1] *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB2334.*

OSHA Petitioned to Adopt National Heat Standard

Matthew Deffebach and Allan Gustin

Public Citizen, a nonprofit consumer advocacy organization, and others petitioned OSHA this summer to adopt "the first federal standard that would protect outdoor and indoor U.S. workers from occupational exposure to excessive heat."1 The petition proposed adopting the National Institute for Occupational Safety and Health's latest iteration of its criteria for an occupational heat stress standard. Such a standard would require employers to provide (1) mandatory rest breaks depending on the workplace temperature and worker activity level, (2) personal protective equipment such as water-cooled garments or air-cooled garments, (3) shade, (4) hydration, (5) time to acclimate to high-heat environments, and (6) worker training to prevent and mitigate the risk of heat illness. Employers would also need to implement (1) heat exposure monitoring, (2) a medical monitoring program, (3) heat stress hazard notifications, (4) a heat alert program, (5) heat-related surveillance and recordkeeping, and (6) whistleblower protections for employees and supervisors that report violations of the heat stress standards.

Representative Judy Chu (D-CA) stated that she intends to introduce related legislation soon, but it is unlikely that such legislation would advance in the Republican-controlled Congress. OSHA has already delayed implementing several rules including the beryllium rule, silica dust rule, and electronic reporting rule. Although a national heat standard may not advance very far in the current regulatory environment, employers should be aware of the efforts by advocacy groups to introduce and petition for national heat stress standards.

[1] *https://www.citizenvox.org/wp-content/uploads/2018/07/180717_Petition-to-OSHA-on-Heat-Stress-Signed_FINAL.pdf.*

Eleventh Circuit Limits OSHA's Authority to Conduct Wall-to-Wall Inspections

Matthew Deffebach and Mini Kapoor Ph.D.

In *U.S. v. Mar-Jac Poultry, Inc.*,[1] the U.S. Court of Appeals for the Eleventh Circuit held that OSHA may not expand the scope of an injury-based inspection to a facility-wide inspection merely based on the employer's OSHA 300 injury and illness logs. Although *Mar-Jac* may only be relevant to the Eleventh Circuit states, Alabama, Florida and Georgia, employers nationwide should note this decision when defending against wall-to-wall inspections by OSHA.

In *Mar-Jac*, an employee was hospitalized after he was injured while working on an electrical matter. The employer reported the incident as required under OSHA regulations. During the subsequent OSHA inspection, the investigators requested an inspection of not only the alleged electrical hazards involved in the incident, but also inspection of the entire facility for additional hazards. The employer permitted inspection related to the incident but refused to allow inspection of any additional areas or hazards.

In its application for a judicial warrant, OSHA contended that probable cause existed to conduct a comprehensive search of the entire facility because the investigators had personally observed hazards relating to the electrical incident, and a review of OSHA 300 logs allegedly revealed six hazards common to poultry processing facilities.[2] The employer filed a motion to quash the warrant. A magistrate judge recommended that the employer's motion should be granted. The recommendation was adopted by U.S. District Court and employer's motion was granted. The Eleventh Circuit affirmed.

The appellate court stated that for a warrant to issue OSHA was required to "at least show that the proposed inspection is based upon a reasonable belief that a violation has been or is being committed" and that this requirement needed "a showing of specific evidence sufficient to support a reasonable suspicion of a violation." The court found that employer's 300 logs offered by OSHA were insufficient evidence to support a reasonable suspicion of a violation. Thus, there was no probable cause to justify a facility-wide inspection.

Specifically, the court noted that the existence of a hazard does not necessarily establish the existence of a violation. And, a violation needed to be established by reasonable suspicion in a warrant application. In turn, the court explained that the OSHA logs reveal work-related injuries not violations. The existence of injuries does not mean that an OSHA standard was violated. Further, the court analyzed the employer's 300 logs and did not find any "pattern" of injuries to support reasonable suspicion. For example, the court held that in the employer's workforce of more than 1100 employees, 25 "musculoskeletal illnesses" over a three-year period did not show a pattern as to location of the body part that was injured or any pattern as to the department where the injuries occurred, and therefore did not satisfy the reasonable suspicion requirement.

Employer Takeaway: *Mar-Jac* is significant for employers in that it limits OSHA's authority to expand an injury-based inspection to a wall-to-wall inspection based on the employer's OSHA 300 injury and illness logs. However, *Mar-Jac* should not be interpreted to mean that injury and illness logs can never be sufficient evidence for a warrant. Indeed, under this case, a pattern of injuries such as facility-wide or department-wide recurring injuries of a specific type to a specific body-part, could have been sufficient to create reasonable suspicion to justify a warrant. In light of *Mar-Jac*, employers may benefit from regularly monitoring the injury logs to identify any patterns that may support a wall-to-wall inspection and then working towards addressing those issues.

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[1] No. 16-17745, 2018 WL 4896339 (11th Cir. October 9, 2018).

[2] Not relevant to this note, OSHA also contended that probable cause existed to support a comprehensive inspection pursuant to Regional Emphasis Program for poultry processing facilities.

Preemptive Measures to Ensure Employee Safety During Emergencies

Matthew Deffebach and Julia Peebles

Hurricane season serves as a reminder that emergencies and disasters can strike at any time—threatening employee safety, and increasing the risk for workplace injuries and illnesses. Because employers are obligated to keep their employees safe during working hours, it is important to consider the health and safety of their employees *before* emergencies strike.

In preparing for an emergency, employers should be cognizant of 29 C.F.R. 1910.38, which requires all workplaces subject to a required OSHA standard, with over 10 employees, to create a written Emergency Action Plan ("EAP"). Under the standard, an EAP must include: 1. Procedures for reporting an emergency; 2. Evacuation policies; 3. Measures for employees to follow who stay to operate critical plant operations before evacuating; 4. Strategies for accounting for employees after evacuation; 5. Policies for employees to follow when performing rescue or medical duties; and 6. Names or job titles of all persons who can be contacted by employees who desire more information or further explanation about their duties under the EAP. In addition to the EAP, OSHA also requires that employers ensure they do the following: have and maintain an employee alarm system, which utilizes a distinctive signal for each purpose; designate and train employees to assist in safe evacuation; and review the EAP with each employee covered by the plan.

Finally, OSHA provides a list of suggested emergency preparedness actions to further protect employees. Some suggested policies include: arranging training drills for responders and employees; posting emergency numbers in the workplace; and appointing staff to be responsible for inventorying and maintaining emergency equipment and supplies.

Leveling the Playing Field: Clarifying OSHA's Burden for Proving Repeat Violations

Matthew Deffebach, Mini Kapoor Ph.D., Julia Peebles

In July 2018, the Occupational Safety and Health Review Commission issued its decision in *Secretary of Labor v. Angelica Textile Services, Inc*., providing employers guidance on rebutting repeat violations and clarifying the defenses that employers may have in combating repeat violations. No. 08-1774.

The Commission utilized the *Angelica* case to clarify *how* an employer can successfully rebut the "substantial similarity" element for proving a repeat violation. For a repeat violation to be characterized as such, there must be: "a Commission final order against the same employer for a *substantially similar* violation." *Secretary of Labor v. Potlatch Corp*., 7 BNA OSHC 1061, 1063 (No. 16183, 1979). Traditionally, OSHA asserted that the "substantial similarity" element was met merely by illustrating that the same type of equipment, process or regulation that was present in the current violation was also involved in a prior final citation. In *Angelica*, the Commission provided a means for employers for rebutting this standard for substantial similarity by a prima facie showing of "evidence of the disparate conditions and hazards associated with these violations of the same standard." *Id*. Thus, evidence of substantial similarity can be rebutted when employers demonstrate different conditions and hazards present between the original violation and the subsequent violation.

Additionally, the *Angelica* decision explained defenses that employers have to combat repeat violations. Specifically, the Commission noted that employers can defend repeat citations by illustrating the abatement actions they took after the issuance of the initial citation. In *Angelica*, the prior citation described "critical deficiencies" in the employer's compliance program. The employer responded to the prior citation by actively addressing and eliminating similar hazards, which included developing a permit required confined space program, specific to the condition cited. The subsequent citation, while involving violations of

the same standard, did not involve a comprehensive failure. Instead, the subsequent citation specifically addressed two individualized deficiencies in the employer's adopted program. Thus, the employer's procedures, combined with other evidence, including the Secretary's prior acceptance of the employer's abatement method, persuaded the Commission to find that the employer "took affirmative steps to achieve compliance and avoid similar violations in the future." Thus, there was no basis for issuing a repeat violation.

Protecting Worker Information: Proposed Changes to OSHA's Recording and Reporting Requirements

Matthew Deffebach and Allan Gustin

In July 2018, OSHA published a Notice of Proposed Rulemaking (NPRM) to eliminate much of the still-existing electronic reporting obligations for establishments with 250 or more employees. Specifically, the proposed rule seeks to revoke requirements that mandate applicable establishments to electronically submit information from OSHA Forms 300 and 301. However, the proposed rule would not omit the requirement that applicable establishments submit the OSHA Form 300A—summaries of work-related injuries and illnesses—and would add a requirement that covered establishments submit their Employer Identification Number (EIN) with submissions.

In its NPRM, OSHA notes that the purpose of the amendment is to protect sensitive information by reducing the risk of disclosure under the Freedom of Information Act. Further, OSHA acknowledges that the current recording and reporting system has "uncertain benefits," and that the risk of disclosure, the costs associated with collecting such information, and the reporting burden on employers, are unjustified. The NPRM preamble explains that the reduction in requirements is likely to lead to more effective identification and efficient targeting of workplace hazards. Finally, the NPRM submits that the amendment will not impact worker safety and protection but will achieve the same goals of the current requirements, while also reducing the burden currently imposed on employers.

OSHA's Extension for Beryllium Rule Compliance Extended to December

Matthew Deffebach and Julia Peebles

OSHA issued a final rule extending the compliance date to December 12, 2018 for specific requirements of the general industry beryllium standard. The provisions effected by this extension include those for methods of compliance, beryllium work areas, regulated areas, personal protective clothing and equipment, hygiene facilities and practices, housekeeping, and communication of hazards and recordkeeping. According to OSHA, the extension does not affect the compliance dates for other requirements of the general industry beryllium standard. OSHA stated that this extension for certain requirements will maintain essential safety and health protections while it prepares a Notice of Proposed Rulemaking (NPRM) to clarify certain provisions of the standard.

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.