



## OSHA NEWSLETTER

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### **Things are Getting “Serious” for California Employers**

Matthew Deffebach, Mini Kapoor Ph.D., Christina Gad

At the end of August 2019, California Governor Gavin Newsom signed two bills, effective January 1, 2020, that revise California Division of Occupational Safety and Health’s (Cal/OSHA) reporting requirements for serious incidents and, in turn, change the method by which employers must report such incidents. Assembly Bill 1805 amends the definition of “serious injury or illness” and “serious exposure” under California Labor Code Section 6302 for reporting a serious occupational injury and illness to Cal/OSHA. The bill amends the definition of “serious injury or illness” by removing the 24-hour minimum time requirement for qualifying hospitalizations, excluding stays for medical observation or diagnostic testing. According to the bill analysis, by deleting the time frame and simply mandating reporting when a worker’s injury requires hospitalization, it allows employers more clarity in determining their reporting responsibilities. The bill also replaces “loss of any member of the body” with “amputation,” and explicitly includes the “loss of an eye” as a qualifying injury. The bill eliminates the exclusion of an injury or illness caused by certain violations of the Penal Code and narrows the inclusion of accidents on a public street or highway occurring only in a construction zone. Further, Assembly Bill 1805 revises the definition of “serious exposure.” Under the amended law, a “serious exposure” includes exposure of an employee to a hazardous substance in a degree or amount sufficient to create a “realistic possibility,” instead of a *substantial probability*, that death or serious harm could result from the “actual hazard created by” the exposure. This change is consistent with establishing when a “serious violation” exists, requiring a faster response from Cal/OSHA, under California Labor Code 6309.

California employers will also soon have a new method by which to report serious occupational injuries, illnesses and deaths to Cal/OSHA. Previously, under 6409.1(b) of the California Labor Code, employers had the option of reporting such serious incidents by telephone or email. Assembly Bill 1804 amends this law by requiring employers to report serious incidents by telephone or a “specified online mechanism established by the division.” According to the bill analysis, the change in law was prompted by complaints that emailed reports were incomplete and did not provide enough information about the incident. When Cal/OSHA receives incomplete information, it claims that its ability to

investigate is delayed. In hopes of fixing this problem, the new online portal will prompt employers to provide information specifically needed by the agency. While this online reporting mechanism is not yet available, employers can continue to report serious accidents by telephone or email. The amendment does not change the minimum \$5,000 penalty for failure to timely report.

Employers should re-evaluate their reporting procedures in light of these new obligations and monitor the Cal/OSHA website for announcements on when the new online reporting will be available.

### Where Auer we after Kisor v. Wilkie?

Matthew Deffebach, Mini Kapoor Ph.D., Christina Gad

On June 26, 2019, the Supreme Court issued its decision in *Kisor v. Wilkie*, holding that courts should continue deferring to an administrative agency's reasonable interpretation of its own ambiguous regulations, but only if certain conditions are met. While not an employment-related case, the decision in *Kisor* has the potential to impact employers and compliance with rules and regulations issued by OSHA.

In 1983, James Kisor, a Vietnam War veteran, was denied federal service-related disability benefits for post-traumatic stress disorder. On a motion to reopen his application in 2006, Kisor submitted new records of his disorder and was awarded partial benefits. The Department of Veterans Affairs (VA) later denied Kisor's benefits from 1983 to 2006, and an administrative judge found that the new records were not "relevant" under the applicable federal statute. Kisor appealed the VA's determination to the Court of Appeals. The Court of Appeals affirmed the administrative judge's holding by applying what is known as *Auer* or *Seminole Rock* deference. The *Auer* deference instructs courts to defer to an agency's reasonable interpretation of its own ambiguous regulation. Kisor sought review by the Supreme Court, arguing that *Auer* and *Seminole Rock* be overturned.

By a 5-4 vote, the Supreme Court declined to overturn its rulings in *Auer v. Robbins* (1997) and *Bowles v. Seminole Rock & Sand Co.* (1945), based on *stare decisis*. In the opinion written by Justice Elena Kagan, the Court noted *Auer* and *Seminole Rock*'s long-standing history and reasoned that to overturn these cases would be to overrule a "long line of precedents" which may "cast doubt on many settled constructions of rules." However, the Court limited the scope of the *Auer* deference and remanded the case back to the Court of Appeals to assess whether the agency's interpretation deserves such deference.

Under *Kisor*, an agency's interpretation will receive deference only if the regulation is "genuinely ambiguous," meaning ambiguity exists even after the court has gone through all the "traditional tools of interpretation." If genuine ambiguity remains, the interpretation must still be "reasonable." Even then, the agency's interpretation may not qualify for *Auer* deference, and the court must still conduct its own inquiry into whether *Auer* is applicable. The Court laid out the following guidelines:

- The agency's interpretation must fall within its "authoritative" or "official position."
- The interpretation must implicate the agency's "substantive expertise."
- The agency's reading must reflect "fair and considered judgment," while not creating "unfair surprise" to the regulated parties.

As a final note, Chief Justice Roberts and Justice Kavanaugh's concurring opinions made a special point of stating that while the *Kisor* decision referred to language in *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, its decision does not touch upon the issue of *Chevron* deference – the doctrine of judicial deference to an agency's interpretation of statutes enacted by Congress.

It is unclear if, and how, OSHA or other federal agencies will respond to *Kisor*. Generally, OSHA has relied on *Auer* deference in interpreting agency rules. It remains to be seen whether OSHA will publish updates or letters of interpretation to ensure deference of its interpretations.

## **Ninth Circuit Breathes Life into OSHA's Respiratory Protection Standard**

**Matthew Deffebach, Mini Kapoor Ph.D., Christina Gad**

On September 11, 2019, the Ninth Circuit issued its opinion in *Seward Ship's Drydock, Inc.*, holding that §1910.134(d)(1)(iii) of the OSHA Respiratory Protection Standard requires employers to evaluate what, if any, respiratory hazards exist in a workplace where there is a potential for overexposure to employees.

This case stems from OSHA citations to Seward Ship's Drydock, Inc. ("Seward") in 2009 for working conditions on the *Paula Lee*, a deck barge. Seward's business was repairing and performing welding work on marine vessels. Two welders made a complaint to OSHA regarding the welding smoke and lack of effective ventilation. OSHA issued a citation alleging violations of the OSH Act and §1910.134(d)(1)(iii). The Administrative Law Judge ("ALJ") vacated the citation because the level of iron oxide was below the threshold required to provide respirators. The Secretary of Labor ("Secretary") petitioned the Occupational Safety and Health Review Commission ("Commission") for review of the ALJ's decision. After several years of supplemental briefing requested by the Commission, the Commission held that 1910.134(d)(1)(iii) was unambiguous and required an evaluation of respiratory hazards only when respirators are necessary to protect the health of employees.

The Secretary petitioned for review to the Ninth Circuit. The issue before the Ninth Circuit was whether §1910.134(d)(1)(iii) required evaluation of respiratory hazards only *after* a determination was made that respirators were necessary or whether an evaluation of respiratory hazards was initially required to determine whether a respirator was necessary and then to select the appropriate respirator. The Ninth Circuit reversed the holding of the Commission and held that OSHA's Respiratory Protection Standard requires employers to evaluate potentially harmful atmospheres to determine whether respirators are required and in selecting the respirator, rather than performing this evaluation after a determination has been made that respirators are necessary. The Court found that the standard was not "genuinely ambiguous" after using

"all traditional tools of construction," looking at the standard's text, structure, purpose and regulatory history, as prescribed in the Supreme Court's recent opinion in *Kisor v. Wilkie*. Therefore, the Court adopted the Secretary's interpretation of §1910.134(d)(1)(iii) without resorting to *Auer* deference, which requires Courts to give deference to an administrative agency's reasonable interpretation of its own ambiguous rules.

In practice, this decision puts employers on notice that (at least in the Ninth Circuit) they should be conducting an initial evaluation of workplace respiratory hazards and the effectiveness of their control measures - *i.e.*, proper ventilation - to determine whether respirators are required. It is yet to be seen how OSHA will use this new interpretation when issuing citations involving potentially harmful airborne contaminants.

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## **OSHA Submits RFI for Revisions to Silica Standard for Construction**

**Matthew Deffebach, Mini Kapoor Ph.D., Christina Gad**

In the August 15, 2019, *Federal Register*, OSHA released a Request for Information (RFI), seeking information which could assist OSHA in possibly revising its standards for respirable crystalline silica exposure. OSHA is interested in gathering information on the effectiveness of engineering and work practice controls not currently included for the tasks and equipment listed in Table I in its construction industry standard. The agency is also requesting information on tasks and equipment involving exposure to respirable crystalline silica that are not currently listed in Table 1, along with information on the effectiveness of engineering and work practice control methods in limiting worker exposure to respirable crystalline silica when performing those tasks. Finally, OSHA is requesting information and comment on whether there are additional circumstances where it would be appropriate to permit employers covered by the Respirable Crystalline Silica standards for general industry and maritime to comply with the silica standard for construction. This RFI requests comment and information, including exposure data, which could

assist the agency in assessing whether revisions to the standards may be appropriate. Submissions in response to the RFI are due October 15.

**OSHA Issues Final Rule for New Respirator Fit Testing Protocols**

Matthew Deffebach, Mini Kapoor Ph.D., Christina Gad

A final rule, that became effective on September 26, 2019, provides employers with two new fit testing protocols for ensuring that employees' respirators fit properly. The new protocols are the modified ambient aerosol condensation nuclei counter (CNC) quantitative fit testing protocol for full-facepiece and half-mask elastomeric respirators, and the modified ambient aerosol CNC quantitative fit testing protocol for filtering facepiece respirators. Both protocols are variations of the original OSHA-approved ambient aerosol CNC protocol, but have fewer test exercises, shorter exercise duration and a more streamlined sampling sequence.

The new protocols add to the four existing in Appendix A of OSHA's Respiratory Protection Standard, which contains mandatory respirator fit-testing protocols that employers must choose from to protect employees from hazardous airborne contaminants. The rule does not require employers in general industries, shipyard employment and construction to update or replace their current fit testing methods.

**Sullivan Sworn in as Chairman of the OSHRC**

Matthew Deffebach, Mini Kapoor Ph.D., Christina Gad

On July 22, 2019, James Sullivan was sworn in as Chairman of the Occupational Safety and Health Review Commission. Chairman Sullivan was nominated by President Trump and unanimously confirmed by the U.S. Senate on August 3, 2017. Sullivan was previously a shareholder with Cozen O'Connor with a practice focused on labor and employment law and workplace safety and health matters. Sullivan is currently the only commissioner left on the panel, following the resignation of Chairwoman Heather MacDougall and term expiration of Commissioner Cynthia Attwood.

The last Chairwoman, Heather MacDougall, resigned from the Commission in March 2019 to become Amazon.com Inc.'s Vice President of Worldwide Employee Health and Safety. Commissioner Cynthia Attwood's second term expired in April 2019.

**U.S. Department of Labor Selects Ketcham as OSHA's DOC**

Matthew Deffebach, Mini Kapoor Ph.D., Christina Gad

On September 16, 2019, the Department of Labor announced that Scott Ketcham is the new director of the Occupational Safety and Health Administration's (OSHA's) Directorate of Construction (DOC). Since February 2017, Ketcham has served as the deputy director of DOC. Prior to this, Ketcham worked for 19 years as an OSHA acting deputy regional administrator, area director, assistant area director and compliance officer and manager in the Seattle, Dallas and Philadelphia regions. Prior to joining OSHA, Ketcham was a staff industrial hygienist with the U.S. Army Medical Activity at Bassett Army Hospital. He retired from the U.S. Army after 24 years of active and reserve service. The DOC provides workplace safety standards and regulations to ensure safe working conditions for the nation's construction workers.

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.