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OSHA NEWSLETTER

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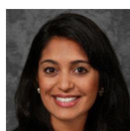

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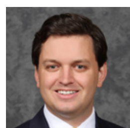

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OSHA Issues Guidance on Controversial Rule Regarding Drug-Testing and Safety Incentive Policies

Matthew Thomas Deffebach and Punam Kaji

On November 28, 2016, the United States District Court for the Northern District of Texas refused to preliminarily enjoin implementation of the part of OSHA's new recordkeeping rule regarding post-accident drug testing and safety incentive programs. This part of the rule went into effect on December 1, 2016, as stated in our recent **OSHA alert**.

OSHA has published **guidance** explaining these aspects of the rule. In the guidance, OSHA states that the language in the preamble of the recordkeeping rule that discusses disciplinary programs, mandatory drug testing policies, and safety incentive programs will not create new obligations on the employer. The guidance reminds employers that OSHA would still have to prove the elements of retaliation to show that any of these policies are unlawful. These three elements are: (1) the employee reported a work-related injury or illness; (2) the employer took adverse action against the employee (that is, action that would deter a reasonable employee from accurately reporting a work-related injury or illness); and (3) the employer took the adverse action because the employee reported a work-related injury or illness.

However, the guidance goes on to explain the scenarios in which a mandatory drug and alcohol testing policy or safety incentive program could present evidence of retaliation. For safety inventive programs, a benefit lost by the employee as the result of recording an injury or illness can be considered an adverse action if the "failure to receive the benefit could well dissuade a reasonable employee from reporting a work-related injury or illness." Thus, the elements of retaliation may not be particularly difficult to prove when a safety incentive program that rewards a low injury and illness rating is in place. Regarding drug and alcohol testing, OSHA explains that employers must have a rationale for drug testing beyond the occurrence of an accident or injury. Employers should document that rationale so as to prevent OSHA from arguing that an adverse action resulting from a positive drug test was a form of retaliation. The guidance also clarifies that state or federal law could require employers to drug test and those laws should still be followed. While the guidance states that these clarifications regarding enforcement of anti-retaliation provisions will not create new obligations on employers, employers are tasked with reviewing their policies to ensure compliance. It

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will ultimately be up to the Court to determine whether new obligations have been created, in which case these aspects of the rule would likely be enjoined.

OSHA's "Union Walk Around Rule" Challenged in Court

Matthew Thomas Deffebach and Punam Kaji

On September 8, 2016, a lawsuit was filed by the National Federation of Independent Business ("NFIB") seeking to enjoin and strike down the Occupational Safety and Health Administration's ("OSHA") Union Walk Around Rule.[1] This rule was created by an OSHA letter of interpretation issued in February of 2013, which states that non-union employees may elect anyone to accompany OSHA compliance officers as they inspect the employer's worksite.[2] In the past, a union has used the Union Walk Around Rule to accompany OSHA inspectors in non-union settings and have been accused of using the procedure as a means to intimidate employers into unionizing.

OSHA does have a rule allowing "a representative authorized by [the employer's] employees." 29 U.S.C. § 657(e). However, NFIB argues that there is nothing within the Occupational Safety and Health Act allowing a non-employee to accompany the compliance officer. NFIB argues that the letter of interpretation violates the Administrative Procedures Act ("APA") because it is in fact a standard that should have been subject to notice and comment rather than an interpretation of an existing rule. This litigation should be closely watched as the outcome will impact both the Union Walk Around Rule and the long debate over whether OSHA's "interpretations" are sometimes standards subject to notice and comment rulemaking under the APA.

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[1] *National Federation of Independent Business v. Dougherty, et* al., 3:16-cv-025688 (September 8, 2016) filed in the United States District Court for the Northern District of Texas.

[2] *See* **OSHA Standard Interpretation Letter**, February 21, 2013.

D.C. Circuit Court finds OSHA's Change to Process Safety Management Standard's Retail Exemption is Unlawful

Matthew Thomas Deffebach and Punam Kaji

Following the explosion at a fertilizer facility in West, Texas on April 17, 2013, which killed fifteen people, the Occupational Safety and Health Administration ("OSHA") took measures to address how to avoid similar catastrophes. OSHA issued a guidance memorandum revising the retail exemption to the Process Safety Management ("PSM") Standard, which had not previously applied to the fertilizer facility in West, Texas. Prior to the memorandum, the Retail Exemption related to "an establishment . . . at which more than half of the income is obtained from direct sales to end users."[1] This was the Agency's position since it issued the memorandum in 1992 explaining the Retail Exemption. This definition included facilities like the fertilizer facility in West, Texas, which although it stored mass quantities, sold the fertilizer to farmers who are the end users.

In response to the West, Texas explosion, OSHA issued the new guidance to apply the PSM Standard to facilities "organized to sell merchandise in small quantities to the general public." The memorandum replaced all previous letters of interpretation, memoranda, or policy documents regarding the retail exemption.

The D.C. Circuit Court of Appeals found that the change in the definition was a new standard and, thus, should have gone through notice and comment procedures. In making this finding, the D.C. Circuit disregarded OSHA's argument under the Administrative Procedure Act ("APA"), which allows agencies to issue interpretations of rules without notice and comment procedures. OSHA has previously relied on the APA's interpretive rule procedure – indeed, according to OSHA, the initial memorandum setting forth the fifty-percent retail exemption definition was an "interpretive memorandum." In making its decision, the Court of Appeals relied on the Occupational Safety and Health Act's own definition

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of a "standard" and the related case law. The OSH Act defines an occupational safety and health standard as "a standard which required conditions, or the adoption or use of one or more practices, means, methods, operations or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." *Agricultural Retailers Ass'n & Fertilizer Inst. v. United States Department of Labor*, No. 15-1326 (D.C. Cir. Sept. 23, 2016). The case law has further explained that information-gathering measures, enforcement measure or detection procedures are not standards.[2] Based on the OSH Act's own definition and the case law, the D.C. Circuit decided that the new definition of the retail exemption is a standard, designed to address the particular risk associated with sorting large quantities of highly hazardous chemicals for distribution. Because the OSH Act addressed the issue of whether the new definition was a standard, the D.C. Circuit declined to decide whether the rule would constitute an interpretive rule under the APA. This is because a standard under the OSH Act must be subject to notice and current rulemaking. This is statutory, such that the APA becomes irrelevant.

If the new definition had been implemented, up to 4,800 currently exempt facilities would be subject to the PSM standard. This decision is interesting both because of its impact on retail facilities subject to the previous exemption and also because the decision could prevent OSHA from using the APA's permissible interpretive rules to avoid notice and comment rulemaking when OSHA guidance is disguised as a standard; in other words, when OSHA attempts to correct a hazard, it cannot do so through guidance but must instead invoke formal rulemaking.

[1] See **OSHA Archive of Interim Memo** dated October 20, 2015.

[2] *Agricultural Retailers Ass'n & Fertilizer Inst. v. United States Department of Labor*, No. 15-1326 (D.C. Cir. Sept. 23, 2016) (*citing Workplace Health & Safety Council v. Reich*, 56 F.3d 1465 (D.C. Cir. 1995) and *Chamber of Commerce of the United States v. U.S. Dept. of Labor*, 174 F.3d 206 (D.C. Cir. 1999)).

OSHA Released New Recommended Practices for Safety and Health Programs

Punam Kaji and Modinat "Abby" Kotun

On October 18, 2016, the Occupational Safety and Health Administration ("OSHA") released a set of Recommended Practices for Safety and Health Programs ("Recommended Practices"), which replaces the former version published in 1989.[1] The Recommended Practices include seven core elements for a safety and health program: management leadership; worker participation; hazard identification and assessment; hazard prevention and control; education and training; program evaluation and improvement; and communication and coordination for host employers, contractors and staffing agencies. The recommendations are advisory only and do not create any new legal obligations or alter existing obligations created by OSHA standards or regulations. Thus, the guidelines alone should not be the basis for issuing a citation, including one under Section 5(a)(1), the General Duty Clause.

The Recommended Practices contain many of the topics OSHA has focused on in recent years. For example, the use of temporary workers and multiemployer worksites and the respective safety obligations are explained fully. The various responsibilities of the host employer, contractor, and staffing agency, as well as helpful definitions, are outlined by the Recommended Practices. In Dr. Michael's Foreword, he discusses how the workforce has changed since 1989; the workforce is less focused on manufacturing and increasingly more mobile. He states "there is a greater recognition that working industries some think of as safe (such as healthcare, lodging, retail, and transportation) face significant hazards." The new Recommended Practices address these changes since 1989. A comparison of the 1989 and 2016 Recommended Practices can be found **here**.

Since the Recommended Practices draft was initially posted for public comment in 2015, OSHA added new language addressing other hot topics. Throughout the Recommended Practices, OSHA added language

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regarding the need to protect whistleblowers from retaliation and incentivize employee reporting and participation. The Recommended Practices also suggest that employers remove barriers to participation including safety incentive programs whereby employees jeopardize losing awards or bonuses based on accident or injury reporting, echoing OSHA's ongoing push against those types of safety incentive programs. OSHA also added language in a footnote regarding how mandatory drug testing following injuries can suppress reporting. Despite that OSHA's injury and illness reporting rule (29 CFR 1904) is currently subject to a lawsuit regarding these very drug testing and safety incentive policies, the Recommended Practices warn employers against their implementation. Since the 2015 draft version, OSHA also added language regarding workplace violence, criminal acts, and terrorist threats – instructing employers to identify those hazards and determine controls. While the Recommended Practices are only guidelines, they provide insight into what OSHA expects a robust safety program to resemble. Having a robust safety program could be helpful to establishing certain defenses against an OSHA citation such as the employee misconduct defense, or refuting employer knowledge.

[1] *See* **OSHA Press Release**, October 18, 2016.

Looking Back at the First Year of OSHA's Severe Injury Reporting Program

Punam Kaji and Modinat "Abby" Kotun

As of January 1, 2015, all employers have been required to report all work-related hospitalizations, amputations, or eye losses to federal OSHA within 24 hours, in addition to the long-standing requirement to report all work-related fatalities to OSHA within eight hours. In March 2016, OSHA issued a report detailing the results of the first full year of severe injury reporting, during which there were over 10,000 reports.[1] Manufacturing, with 57 percent of amputation reports and 26 percent of hospitalization reports, and construction, with 10 percent of amputation reports and 19 percent of hospitalization reports, were the top two most reported industry sectors.

OSHA praised the new reporting program for achieving its two principal goals: (1) enabling OSHA to better assist compliance and enforcement efforts; and (2) engaging more employers in identifying and eliminating serious hazards. The report gives examples of accident reports that led to "opportunities for employers to work with OSHA specialists to keep similar incidents—or worse—from happening again." For example, in one scenario where a worker's fingertip was severed during a loading incident, the employer created a new hands-free loading tool, alerted the manufacturer of the issue, and alerted other employers who were likely to use the same equipment.

Fifty-eight percent of amputation reports (and about a third of reports overall) were responded to with an on-site inspection by an OSHA compliance officer. OSHA commented that many employers go above and beyond OSHA's requirements in order to keep their employees safe. According to OSHA, these inspections inspire many employers to make changes to their overall safety programs to the benefit of their employees. However, not all reports resulted in an inspection. In fact, 69 percent of hospitalization reports (and 62 percent of reports overall) were referred to the Rapid Response Investigation process and investigated by the employer. In an investigation of this type, the employer identifies the causes of the injury and presents its findings, along with proposed abatements, to OSHA. According to OSHA, "we have found this process to be extremely effective in abating hazards while also using far fewer OSHA resources than are required for on-site inspections." In the southeast regional office, for example, OSHA noticed a trend of fingertip amputations among workers using food slicers in delis and restaurants. In response, the office contacted food service employers across the region and distributed a new fact sheet, "Preventing Cuts and Amputations from Food Slicers and Meat Grinders." The new reporting

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requirement enabled OSHA to spot a hazard and act quickly to prevent future injuries.

On the other hand, however, OSHA commented that some employers still try to hide hazards in order to avoid having to fix them, while others experience employee injuries in the workplace but still continue the practices that put employees at risk in the first place. Through the reporting program, OSHA is finding out about these incidents and about employers with recurring patterns of injuries. OSHA reminds employers that the unadjusted penalty for not reporting a severe injury can be as much as $7,000, with even higher penalty levels coming in the near future. Moreover, if OSHA learns that an employer knew about the requirement to report but chose not to, the fine can be much higher. Already, one employer has been assessed enhanced penalties of $70,000 for willfully failing to report.

[1] Dr. David Michaels, ***Year One of OSHA's Severe Injury Reporting Program: An Impact Evaluation***, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (Mar. 17, 2016). In 2015, there were 10,388 incidents involving severe work-related injuries, including 7,636 hospitalizations and 2,644 amputations.

Long-Term Industry-Wide Effect of OSHA Special Emphasis Programs Questioned

Modinat "Abby" Kotun and Punam Kaji

According to the Department of Labor's Office of Inspector General ("OIG"), OSHA has no way of demonstrating whether its Special Emphasis Programs ("SEP") are effective long-term. SEPs—both National Emphasis Programs ("NEP") and Local Emphasis Programs ("LEP")—are used to direct enforcement resources toward high-hazard industries or occupations that pose greater risks of severe injuries or death.

The OIG conducted an audit to determine whether OSHA can demonstrate the effectiveness of SEPs in improving safety and health conditions for workers in high-hazard industries and occupations.[1] In concluding that OSHA cannot demonstrate the effectiveness of these programs, the OIG pointed out that OSHA does not have performance measurement strategies in place to gauge whether the SEPs reduce injuries, illnesses and fatalities, decrease levels of health exposure or reduce the frequency of catastrophic events. Instead, OSHA's output statistics from SEP reviews reflect one-time corrections of hazards instead of long-term impact. Moreover, the OIG found that OSHA does not have a documented way of assessing risks in order to ensure that NEPs proactively and consistently focus on high-hazard industries and occupations. The OIG's analysis revealed that NEPs included more low-injury and illness rate industries than high-rate industries. Moreover, eight high-rate industries were completely excluded from the list of NEPs and OSHA had no documentation to support the exclusion.

In response to the inspector general's report, OSHA's Dr. David Michaels stated that previous research and a "substantial body of evidence" have established that OSHA inspections have a causal effect on reducing injuries.

[1] ***OSHA Does Not Know If Special Emphasis Programs Have Long-Term Industrywide Effect***, U.S. DEPARTMENT OF LABOR, OFFICE OF INSPECTOR GENERAL—OFFICE OF AUDITS, Report No. 02-16-201-10-105 (Sept. 28, 2016).

OSHA Issued Guidance on Settlements with Whistleblowers

Punam Kaji and Modinat "Abby" Kotun

The Occupational Safety and Health Administration ("OSHA") took on another measure to ensure protection for whistleblowers. On September 9, 2016, OSHA issued guidelines to prevent "gagging" future whistleblowers in settlements between employers and employees.[1] OSHA already reviews settlement agreements between employees and employers to ensure that they are "fair, adequate, reasonable, and in the public interest, and that the employee's consent

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was knowing and voluntary." OSHA's new guidance explains that provisions that prohibit employees from exercising their rights as whistleblowers must be removed from the settlement agreements. Below are examples of problematic provisions per the guidance:

- restricting the complainant's ability to provide information to the government, participate in investigations, file a complaint or testify in proceedings based on respondent's past or future conduct.
- requiring a whistleblower to notify his or her employer before filing a complaint or voluntarily communicating with the government regarding the employer's past or future conduct.
- requiring the whistleblower to affirm that he or she has not previously provided information to the government or engaged in other protected activity or to disclaim any knowledge that the employer has violated the law.
- requiring a complainant to waive his or her right to receive a monetary award from a government-administered whistleblower program for providing information to a government agency.
- requiring complainant to transfer a monetary award from a government-administered whistleblower program to respondent to offset payments made to the complainant under the settlement agreement.
- Imposing liquidated damages that are disproportionate to the anticipated loss to the respondent, exceed the relief provided to the complainant or are more than a complainant would be able to pay.

OSHA may ask parties to add clear language that states that "nothing in the agreement prevents, impedes, or interferes with the complainant's non-waivable right, without prior notice to respondent, to provide information to the government, participate in investigations, file a complaint, testify in proceedings regarding Respondent's past or future conduct, or engage in any activities protected under the whistleblower statutes administered by OSHA or to receive and fully retain a monetary award from a government-administered whistleblower award program for providing information directly to a government agency."

Employers considering a settlement agreement with a complainant should ponder these limitations before entering into settlement discussions on the presumption that the complainant can waive some of these whistleblower rights.

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[1] **OSHA Press Release**, September 15, 2016.

OSHA's Guidance on Protecting Workers from Zika Virus

Modinat "Abby" Kotun and Punam Kaji

Zika virus is primarily spread through bites from infected mosquitoes. Mosquitoes can become infected when they bite infected persons and can then spread Zika to other people they subsequently bite. There have been more than 100 locally transmitted cases of Zika in Florida since the end of July 2016,[1] and all US states, with the exception of Alaska, have had travel-associated cases of Zika. Outdoor workers may be at the greatest risk of occupational exposure to Zika. As a result, OSHA has issued guidance to employers in order to help protect workers.[2]

OSHA recommends that employers train workers about their risks of exposure to Zika through mosquito bites and direct contact with infectious blood and other bodily fluids and how to protect themselves. Employers should also provide information about Zika virus infection, including modes of transmission and possible links to birth defects, to workers who are pregnant or may become pregnant or whose sexual partners are or may become pregnant.

Infection and Transmission

During the first week of infection, Zika can be detected in the blood and is capable of being spread from

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an infected person to a mosquito that feeds on that person. Infected mosquitoes can then spread the virus to other people through bites. In some instances, having direct contact with infectious blood or other bodily fluids (such as through sexual transmission) of an infected person may result in transmission of the virus. Zika can also be spread from a pregnant woman to her fetus and has been linked to a serious birth defect of the brain called microcephaly in babies of mothers who had Zika while pregnant.

OSHA has communicated the below recommendations through their article *Interim Guidance for Protecting Workers from Occupational Exposure to Zika Virus*.

OSHA Recommended Employer and Employee Actions

- Employers should ensure that supervisors and all potentially exposed workers are aware of the symptoms of Zika, which include fever, rash, muscle or joint pain, headache (especially with pain behind the eyes), and pink or red eyes.
- Employers should provide insect repellents and encourage their use.
- Employers should provide workers with, and encourage them to wear, clothing that covers their hands, arms, legs, and other exposed skin. In warm weather, workers should consider wearing lightweight, loose-fitting clothing and/or hats with mosquito netting to protect the face and neck.
- Employers and employees should get rid of sources of standing water *(e.g.,* tires, buckets, cans, bottles, barrels) whenever possible to reduce or eliminate mosquito breeding areas.
- If requested by a worker, employers should consider reassigning anyone who indicates she is or may become pregnant, or who is male and has a sexual partner who is or may become pregnant, to indoor tasks to reduce their risk of mosquito bites.
- Employers should train workers to seek medical evaluation if they develop symptoms of Zika.
- Employers should consider options for granting sick leave during the infectious period, which is typically during the first week of illness. During this time, infected workers should protect themselves and others from mosquito bites.

OSHA Guidance on Use of Insect Repellents

- Always follow label precautions when using insect repellent.
- Use insect repellent containing an EPA-registered active ingredient. Research suggests that repellents containing DEET or picaridin typically provide longer-lasting protection than other products, and oil of lemon eucalyptus provides longer-lasting protection than other plant-based repellents. Permethrin is another long-lasting repellent that is intended for application to clothing and gear, but not directly to skin.
- Choose a repellent that provides protection for the amount of time that the worker will be outdoors. In general, the more active ingredient (higher concentration) a repellent contains, the longer it will protect against mosquito bites. Studies suggest that concentrations of DEET above approximately 50 percent do not offer a marked increase in protection time against mosquitoes; DEET efficacy tends to plateau at a concentration of approximately 50 percent.
- Do NOT spray aerosol or pump products in enclosed areas.
- Do NOT spray insect repellent on skin that is under clothing.

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[1] *See* Debra Goldschmidt, ***Hurricane Matthew could help Zika fight***, CNN (last updated Oct. 8, 2016).

[2] ***Interim Guidance for Protecting Workers from Occupational Exposure to Zika Virus***, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (last visited Oct. 11, 2016).

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Starting January 1, 2017, New California Law Requires Cal/OSHA to Notify State Contractor Licensing Board of Citations Issued to Contractors

Modinat "Abby" Kotun and Punam Kaji

California Governor Jerry Brown signed state Senate Bill 465 into law in September 2016, which requires the California Division of Occupational Safety and Health (Cal/OSHA), after consultation with the California Contractors' State Licensing Board (the Board), to transmit to the Board copies of any citations or other actions taken by Cal/OSHA against a contractor.[1] The bill also requires the following with respect to California contractors: (1) contractors must self-report to the Board within 90 days construction-related criminal convictions; (2) the Board is to study judgments, arbitration awards, and settlements of construction defect claims and report back to the legislature on whether requiring licensees to report such information would aid in better protecting the public; and (3) the state's Building Standards Commission is to review balcony and outdoor structure building codes for potential revisions.

Senate Bill 465 was spurred by a catastrophic balcony collapse that occurred in June 2015 where six students were killed and seven others were seriously injured in Berkeley, California. There, the contractor who had constructed the apartment complex had a history of construction defect settlements and had paid more than $26 million in settlements in the previous three years. The Board said that if they had known, they would have initiated an investigation into suspending the company's contracting license.

This new collaboration between Cal/OSHA and the Board (and potentially other state organizations) could create new difficulties for contractors. With the new rule, if a contractor receives a citation, Cal/OSHA may hand over the citation to the Board regardless of whether the contractor is guilty of a violation. The Board may, as a result, initiate its own investigation into the contractor, putting the contractor's license in jeopardy. It is, therefore, even more essential that contractors remain vigilant with respect to their safety and health efforts.

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[1] See Bea Karnes, ***Bill Spurred By Berkeley Balcony Collapse Signed Into Law***, BERKELEY PATCH (Sept. 15, 2016).

OSHA's Proposed Changes to Lockout/Tagout Rule Issued

Punam Kaji, Modinat "Abby" Kotun, and Henson Adams

The Occupational Safety and Health Administration ("OSHA") has proposed a controversial revision to the lockout/tagout rule.[1] OSHA made its proposed revisions to the rule, and many others, under OSHA's Standards Improvement Project-Phase IV ("SIP IV"), a collection of 18 OSHA rule revisions changed to "remove or revise outdated, duplicative, unnecessary, and inconsistent requirements" in OSHA's standards.[2]

The current lockout/tagout standard applies to servicing and maintenance operations "in which the *unexpected energization* or startup of the machine or equipment, or release of stored energy could harm employees."[3] OSHA intends to revise the lockout/tagout rule by removing the word "unexpected," such that the standard would apply to any energization, not just unexpected ones.

In 1996, the Sixth Circuit Court of Appeals interpreted "unexpected energization" in the landmark decision, *Reich v. General Motors Corp.*, 89 F.3d 313 (6th Cir. 1996). The court concluded that "the plain language of the lockout standard unambiguously renders the rule inapplicable where an employee is alerted or warned that the machine being serviced is about to activate."[4] There, the court reasoned that "'energization' of the machine cannot be said to be 'unexpected' since the employee knows in advance that machine startup is imminent and can safely evacuate the area."[5]

OSHA believes, however, that the Sixth Circuit interpreted the standard incorrectly in *General Motors* when it fundamentally misconstrued the "unexpected

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energization" language of the lockout/tagout rule by allowing employers to use warning and delay systems as alternatives to following the requirements of the standard. As a result, "OSHA is proposing to remove the term 'unexpected' from the standard to revert to its original understanding of the standard. The proposal is intended to make clear that the lockout/tagout standard covers all equipment servicing activities in which there are energization, startup, or stored energy hazards."[6]

In the SIP IV Proposed Rule, OSHA cites other cases where courts have supported OSHA's reading of the lockout/tagout standard. For example, in *Otis Elevator Co. v. Secretary of Labor*, the court held that although a servicing employee had warning that a machine would start when unjammed, the energization was still "unexpected" because the employee could not predict when the machine would become unjammed.[7] However, on balance, the majority of Occupational Safety and Health Review Commission decisions have agreed with the Sixth Circuit and adopted the *General Motors* more narrow construction of "unexpected energization."

A change in the language of the lockout/tagout rule will certainly affect employers. Removal of "unexpected" from the standard limits employers' ability to use alternatives to lockout/tagout that provide warning to employees that a machine is about to start. For instance, OSHA's proposal would make it more difficult for employers to show that automated controls that eliminate unexpected energization are an effective substitute for lockout/tagout. The fact that the proposed changes do not align with existing precedent makes OSHA's proposal a substantive change rather than a change to remove "outdated, duplicative, and inconsistent requirements," making OSHA's use of the Standards Improvement Project process questionable, particularly in light of the recent decision regarding changes to the Process Safety Management standard, where the D.C. Circuit Court decided that a new "interpretation" was a standard under the OSH Act.[8] Employers have the right to publicly comment on the proposed rule through December 5, 2016.[9]

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1 29 C.F.R. § 1910.147.

2 Department of Labor, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, Standards Improvement Project-Phase IV at 4 (Oct. 4, 2016) [hereinafter SIP IV Proposed Rule], available **here**.

3 29 C.F.R. § 1910.147(a)(1)(i) (emphasis added).

4 Id. at 315.

5 Id.

6 SIP IV Proposed Rule, at 13.

7 762 F.3d 116 (D.C. Cir. 2014).

8 *See Agricultural Retailers Ass'n & Fertilizer Inst. v. United States Department of Labor*, No. 15-1326 (D.C. Cir. Sept. 23, 2016).

9 Comments can be submitted online via the Federal eRulemaking Portal at www.regulations.gov and should reference Docket No. OSHA-2012-0007.

In Other News

OSHA's Top Ten Cited Standards: Each year in October, OSHA releases its top 10 cited violations of the year. The 2016 list closely resembles last year's list, as the top cited standards remain the same:

- Fall Protection, 1926.501(c) – 6,929 citations
- Hazard Communication, 1910.1200 – 5,677 citations
- Scaffolds, 1926.451(c) – 3,906 citations
- Respiratory Protection, 1910.134 – 3,585 citations
- Lockout/Tagout, 1910.147 – 3,414 citations
- Powered Industrial Trucks, 1910.178 – 2,860 citations
- Ladders, 1926.1053(c) – 2,639 citations
- Machine Guarding, 1910.212 – 2,451 citations
- Electrical Wiring, 1910.305 – 1,940 citations
- Electrical, General Requirements, 1910.303 – 1,704 citations

OSHA Settled with Minnesota Security Hospital on Workplace Violence Violation: Minnesota Security Hospital houses mentally ill patients who are particularly dangerous. The Hospital recently signed a settlement agreement with the Occupational

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Safety and Health Administration after 2014 and 2015 Workplace Violence citations, resulting in a combined $71,960 fine. The settlement allows the Hospital to pay $20,000 in fines and use $35,980 to improve employee safety training. Workplace violence in the healthcare industry continues to be a focus for OSHA.

Lear Corp. Settles Whistleblower Claims with Department of Labor: After an interesting battle regarding whistleblower claims arising from employee complaints regarding the safety of the worksite and alleged retaliation, Lear Corp. has settled the claims[1]. As we have covered before, **here** and **here**, this case was particularly interesting as it involved OSHA's first preliminary injunction ever sought under the whistleblower provisions. The case also involved the naming of individual managers. As a result of the settlement agreement, Lear Corp. must dismiss a defamation lawsuit it filed against an employee, whom the company had fired, and reinstate the employee. The settlement agreement further states that Lear Corp. must compensate employees who were suspended without pay, purge the disciplinary actions from their personnel files, post an OSHA Fact Sheet regarding whistleblower rights, and allow OSHA to come to the worksite to provide annual training regarding protected rights for three years. Interestingly, the settlement agreement barely discusses the alleged safety issues or violations, simply stating: "[Lear Corp.] has made substantial upgrades at the Selma plant to the health and safety conditions in work facility spaces where employees are exposed to chemicals used in the foam-making process."

[1] OSHA Press Release, October 11, 2016, **available here**.

Cal/OSHA "Repeat Violation" Redefined to Conform with Federal Standard: Cal/OSHA has revised its definition of "repeat violation" (effective January 1, 2017). Employers with fixed locations can now be cited for repeat violations occurring across multiple establishments. And employers without fixed locations can be cited for repeat violations occurring across multiple California regions. The revision also broadens the scope of what kinds of violations are considered repeats. In citing repeat violations, Cal/OSHA will now look for "violation of a substantially similar regulatory requirement" rather than violation of an identical standard. This conforms the Cal/OSHA definition of repeat violation to the "substantially similar condition or hazard" language of the federal definition. Although the broader scope of the new definition apparently gives Cal/OSHA more flexibility to cite employers for repeat violations, it may make the standard less onerous in one aspect. Under the federal standards, employers can argue that multiple violations of an identical standard are not repeat violations if the underlying workplace conditions or hazards are not substantially similar. But, it is not certain if this defense would be available under the Cal/OSHA definition of repeat violation.

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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