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OSHA NEWSLETTER

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No Time Limit on Look Back Period for Repeat Citations

Matthew Deffebach and Mini Kapoor Ph.D.

In *Triumph Constr. Corp. v. Sec'y of Labor*, the Second Circuit Court of Appeals upheld a look back period for a repeat violation beyond the Commission's "general" policy of three years to determine a repeat violation.[1]

In *Triumph*, an employee was injured in a cave-in at an excavation site. On February 13, 2015, Triumph was cited for violation of an OSHA excavation standard. The citation was classified as a repeat violation based on two previous citations, one in 2009 and another in 2011, issued for violation of the same standard. Triumph challenged the repeat classification of the citation on the basis that the Commission improperly looked beyond the three-year look back period allowed under its policy.

Specifically, Triumph contended that the OSHA Field Operations Manual in effect at the time of the citation dictated a three-year look back period for assessing repeat violations:

> Although there are no statutory limitations on the length of time that a prior citation was issued as a basis for a repeated violation, the following policy shall generally be followed.
>
> A citation will be issued as a repeated violation if ... [t]he citation is issued within 3 years of the final order date of the previous citation or within 3 years of the final abatement date, whichever is later.

The Court disagreed and held that the Manual did not limit the Commission to a three-year look back period. The Court found that the Manual explicitly noted that there were "no statutory limitations on the length of time that a prior citation was issued as a basis for a repeated violation" and that the policy was described as one that "shall *generally* be followed." The Court further noted that the Manual was only a guide for OSHA personnel to promote efficiency and uniformity, and was not binding on OSHA or the Commission, and did not create any substantive rights for employers. Thus, the Court affirmed the repeat citation of the standard.

What could employers takeaway from *Triumph*?

Because under *Triumph*, a serious violation may lead to a repeat citation potentially anytime in the future, it would be prudent for employers to consider the risks associated with simply accepting a serious citation. This is particularly true for employers in the Second Circuit (New York, Vermont, Connecticut), but would also be prudent if OSHA successfully advances this interpretation in other federal OSHA states. While accepting a citation and paying a penalty may appear insignificant at the time, before doing so the employers should consider the potential consequences. Accepting a citation opens the door to receiving a repeat citation and the enhanced penalties associated with repeat classification. Employers should also consider the potential for future citations to be categorized as "willful." In addition, employers should consider potential bad press that could result from repeat and/or willful citation and its impact on business relationships with the government and private parties.

Triumph is also a reminder that OSHA policies should be viewed by employers as general guidance only. The Court's view that the Commission was not limited by its general policies indicates that employers could be cited despite following this general guidance. Thus, mere conformance with OSHA policies with respect to any potential hazard is not a substitute for detailed analysis of the hazard under the specific circumstances.

[1] 885 F.3d 95 (2nd Cir. 2018).

DOL Corrects Implementation of "Improve Tracking of Workplace Injuries and Illnesses" Regulation

Matthew Deffebach, Mini Kapoor Ph.D., Jasmine Culpepper Tobias

In May 2016, OSHA published its final rule requiring employers with more than 250 employees and employers with 20-249 employees in industries that historically have high rates of occupational injuries and illnesses to electronically submit the OSHA 300A Log. In a correction to its initial implementation of the rule, OSHA has determined that the regulation requires all effected employers to submit injury and illness data even if the employer is covered by a state plan that has not completed adoption of a state rule. There will not be a retroactive requirement for employers in covered state plans that have not adopted a state rule to submit data for 2016.

Employers are required to submit their 2017 300A Log by July 1, 2018. Beginning in 2019, the due date for 300A Logs will be March 2. Notably, OSHA has clarified from the original rule that employers will no longer be required to submit the separate OSHA 300 or 301 log data.

OSHA to Begin Enforcement of Respirable Crystalline Silica Standards for General and Maritime Industries

Matthew Deffebach, Mini Kapoor Ph.D., Jasmine Culpepper Tobias

In March 2016, OSHA published the updated respirable crystalline silica rule for all industries. On June 23, 2018, OSHA will begin enforcement of most of the provisions of the standard for general industry and maritime businesses, including a new eight-hour time-weighted average (TWA) permissible exposure limit (PEL) of 50 µg/m3, an action level (AL) of 25 µg/m3, and associated ancillary requirements.

In a memorandum to the regional administrators, the acting Deputy Assistant Secretary announced that OSHA will assist employers that make a good faith effort to meet the new requirements with compliance in the first 30 days of enforcement.[1] The memorandum did not indicate the exact measures OSHA will take to help employers. OSHA will conduct air monitoring and consider citations for non-compliance if it appears that an employer is not making efforts to comply with the new requirements. Proposed citations related

to inspections conducted in the first 30 days will be reviewed by the National Office before being issued.

*Special thanks to 2018 Summer Associate Victor Noriega, student at Vanderbilt School of Law, for his assistance with this article.

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[1] ***Enforcement Launch for the Respirable Crystalline Silica Standard in General Industry and Maritme***, 29 CFR § 1910.1053, OSHA.Gov, (June 7, 2018).

Safe Practices for Robotics in the Workplace

Matthew Deffebach and Mini Kapoor Ph.D.

Use of industrial robots to perform repetitive activities such as material handling, assembly, loading and unloading product is common in many workplaces today. While robots promote efficiency, they may create new hazards in the workplace that require attention from employers. An appropriate robotic safety system is essential to protect employees who program, operate, maintain and repair robots, and others who could be exposed to hazards associated with a robot's operation.

Guidance for safe use of robotics is available from multiple sources. The standards of the American National Standards Institute, such as ANSI R15.06, provide guidelines for safe use of robots. While there are no OSHA standards that are specific to use of robotics in the workplace, the OSHA website provides abundant guidance on safely working with robots. See, *e.g.*, **Guidelines for Robotic Safety**. Employers might benefit from referring to these sources when implementing and using robotic equipment in the workplace.

To minimize potential for injuries to employees, employers should consider the following practices when using robotic equipment in the workplace:

Hazard analysis: Prior to using a robot in the work place, hazard analysis should likely be performed to identify potential safety hazards created by the robot. The hazard analysis should consider factors such as the tasks to be performed by the robot, the start-up and the programming procedures, the robot's work environment, possible malfunction, corrective actions needed to maintain normal operations and potential human errors in working with the robot. A robotic safety system should be developed based on the hazard analysis of the specific robot to be used in the workplace.

Guarding of robots: A robot's immediate work space, known as the robot's work envelope, may need to be physically segregated, such as with a fence, from areas where employees work. To ensure safety of employees, physical barriers should be coupled with guarding systems such as one in which all robotic operation automatically stops if a gate into the fenced area is opened. Another means of guarding could be use of pressure sensitive floor mats in the robot's work envelope that would detect a person's presence in the area and suspend all robotic operation. In addition, audible and visible warning systems may be used to alert employees if they enter the fenced area.

Control devices for robots: The main control panel of a robot should likely contain one or more emergency stops such that the robot can be fully stopped without the need to enter the work envelope. Ideally, there should be multiple means of stopping the robot, all of which should be readily accessible and in plain view. Emergency stops should be designed to override all other controls. Controls that energize or start the robot must be constructed in a manner that guards against accidental operation. All control systems must meet the OSHA standards for electrical equipment.

Robotic safety policy: Employers should consider a written robotic safety policy for working in the robotic environment. The policy could require regular inspection of the robots and training for all employees including periodic refresher training. Unauthorized/ untrained personnel should not be permitted to work in a robotic environment. Managers and supervisors should be knowledgeable enough to enforce the safety policy and procedures for safe work practices in a robotic work environment.

Training for working with robots: Employees should generally be familiar with the tasks the robot is expected to perform, potential malfunctions and appropriate response actions to ensure employees' safety. Such training should also include familiarity with emergency stops for the robot and the robotic system's potentially hazardous energy sources. To the extent an employee needs to enter a robot's work envelope while the robot is energized, training should be provided in the use of slow robot operation speeds and hazardous location avoidance until the work is completed. In addition to being trained in the proper operating and control procedures of the robot, the robot operators should likely be trained to recognize robotic malfunction, the resulting hazards and implementing the appropriate corrective/response actions to control/eliminate the hazard.

An employer's actual hazard analysis and specific robotic systems may change the above suggestions or require additional measures. The key is to at least consider how current safety regulations apply to an employer's use of robotics.

Update on Cal/OSHA's Workplace Violence Prevention Standards

Matthew Deffebach, Mini Kapoor Ph.D., Allan Gustin

You will recall from our last newsletter that the California Division of Occupational Safety and Health (Cal/OSHA) is in the process of drafting rules for workplace violence prevention that would apply to all California employers with the exception of certain healthcare providers and certain law enforcement agencies.

The workplace violence prevention rules are currently in the pre-rulemaking stage, with Cal/OSHA having held two advisory meetings in January of 2017 and 2018. The minutes and public comments from the January 2018 meeting will likely be posted in the next month. Cal/OSHA staff anticipates another advisory meeting in the coming fall or winter, where employers will have the opportunity to weigh in on the proposed regulation. After the next advisory meeting, Cal/OSHA staff expects the regulation to enter the formal rule-making stage. Implementation of the regulation is expected approximately one year later.

In the meantime, California employers should be aware that Cal/OSHA broadly addresses violence in the workplace using Section 3203, which mandates an Injury and Illness prevention Program. Health Care Workers in California are governed by Section 3342, which contains healthcare specific workplace violence prevention standards. On the federal level, OSHA relies on its General Duty Clause established by Section 5(a)(1) of the Occupational Safety and Health Act of 1970, to cite employers for hazards that involve workplace violence.

Cal/OSHA Aims to Ensure Electronic Submission of Injury and Illness Records

Matthew Deffebach, Mini Kapoor Ph.D., Allan Gustin

This past February, Assembly Member Thurmond introduced Assembly Bill 2334, addressing employer electronic reporting requirements for occupational injuries and illness.[1]

AB 2334 was originally intended to create a California-specific injury and illness database, requiring employers to submit their electronic forms to the California Division of Occupational Safety and Health.[2] The Bill however was significantly amended last month, resulting in a more deferential approach to the federal regulations.

The current Bill would not require employers to comply with any new California-specific requirements or regulation. Instead, it defers to Federal OSHA's "Improve Tracking of Workplace Injuries and Illnesses" rules regarding electronic submission of workplace injury and illness. In the event, however, that Federal OSHA eliminates their federal submission requirements, Cal/OSHA would be required to adopt new regulations *that mimic the federal submission rules currently in place.*

The Bill is in the late stages of approval, and legislative staff expects it to pass and become effective January 1, 2019. California employers can prepare for AB 2334 by ensuring that their electronic submission practices are up to date with the federal "Improve Tracking of Workplace Injuries and Illnesses" rules.

[1] The act will add Sections 6410.1 and 6410.2 to the California Labor Code, relating to employment.

[2] The link to the **Assembly Bill** redlined with amendments.

Fifth Circuit to Hear Oral Arguments in Hensel Phelps Case in August 2018

Matthew Deffebach, Mini Kapoor Ph.D., Jasmine Culpepper Tobias

In June 2017, the Occupational Safety and Health Review Commission (the "Commission") applied Fifth Circuit precedent and determined that employer Hensel Phelps could not be liable for a violation of the Occupation Safety and Health Act (the "Act") based solely upon a subcontractor's employees' exposure to the condition, and vacated a citation issued by OSHA.

The case arose from a complaint relating to an unprotected excavation at a construction site. Hensel Phelps was the general contractor on the site, but the employees at issue were employed by a secondary subcontractor, CVI Development, LLC (CVI). Following a complaint, an OSHA compliance officer conducted an inspection that uncovered the CVI employees were working next to an excavated, vertical, wet soil wall that was not properly sloped or otherwise protected from cave-in hazards, in full view of Hensel Phelps' management.

The parties stipulated to facts necessary to establish a *prima facie* violation of the cited regulation, 29 CFR 1926.652(a)(1). The sole issue remaining before the Commission was if Hensel Phelps could be held liable for the conduct as a "controlling employer." Under the Fifth Circuit precedent, OSHA regulations protect only an employer's own employees. Accordingly, the Commission held that Hensel Phelps could not be held liable for CVI employees' exposure to the hazard, and vacated the citation.

OSHA appealed the decision to the Fifth Circuit in *Melerine. Acosta v. Hensel Phelps Constr. Co.*, No. 17-60543. The case has been fully briefed and oral arguments are tentatively scheduled for August 8, 2018.

The Fifth Circuit's decision could have far reaching implications on the applicability of OSHA's multi-employer policy. The longstanding policy allows OSHA to cite an employer that creates a hazard, even if the employees exposed to the hazard are those of other employers.[1] If the ALJ decision is upheld, OSHA's multi-employer policy would continue to be unenforceable in the Fifth Circuit as to other employer's employees.

[1] ***Multi-Employer Citation Policy***, OSHA.Gov (Dec. 10, 1999).