

OSHA Quarterly Newsletter, December 2016

December 15, 2016 Matthew Deffebach, Henson Adams

PRACTICES Labor and Employment, OSHA

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

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.

[Read more.](#)

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

On September 8, 2016, a lawsuit was filed by the National Federation of Independent Business seeking to enjoin and strike down the OSHA Union Walk Around Rule. 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.

[Read more.](#)

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

Following the explosion at a fertilizer facility in West, Texas on April 17, 2013, which killed fifteen people, the Occupational Safety and Health Administration took measures to address how to avoid similar catastrophes. OSHA issued a guidance memorandum revising the retail exemption to the Process Safety Management Standard, which had not previously applied to the fertilizer facility in West, Texas.

[Read more.](#)

OSHA Released New Recommended Practices for Safety and Health Programs

On October 18, 2016, the Occupational Safety and Health Administration released a set of Recommended Practices for Safety and Health Programs, which replaces the former version published in 1989. 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.

[Read more.](#)

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

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 8 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.

[Read more.](#)

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

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

[Read more.](#)

OSHA Issued Guidance on Settlements with Whistleblowers

The Occupational Safety and Health Administration 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. 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 was knowing and voluntary."

[Read more.](#)

OSHA's Guidance on Protecting Workers from Zika Virus

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, and all US states, with the exception of Alaska, have had travel-associated cases of Zika.

[Read more.](#)

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

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.

[Read more.](#)

OSHA's Proposed Changes to Lockout/Tagout Rule Issued

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

standards.

[Read more.](#)

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 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 Boone [Occupational Safety and Health Act \(OSHA\) and Workplace Disasters page](#) of our website or contact one of the lawyers listed in this newsletter.