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New DOT Drug

Testing Rules Take Effect 1/1/18

By Adele L. Abrams, Esq., CMSP

The US Department of Transportation (DOT) recently enacted a final rule that amends employer's obligations to test for synthetic opioids, and the new requirements take effect on January 1, 2018. The new regulations are intended to harmonize with the Department of Health & Human Services' (HHS) mandatory guidance for federal workplace drug testing programs, which were published on January 23, 2017, and the DOT published a proposed rule the same day. The final rule amending the drug testing requirements was issued on November 13, 2017 (82 FR 52229).

DOT regulations require drug testing, using urine tests, for workers classified as being in certain safety-sensitive positions in the transportation field, including commercial drivers, airline pilots, and specified railroad workers. The original drug testing regulations were promulgated by the DOT in 1988, and were based on HHS guidelines, which required cocaine and marijuana to be screened by federal agencies, and also authorized the testing of federal employees for the use of PCP, amphetamines and opiates.

As a result, in 1989, the DOT published a final rule incorporating the HHS guidelines of that time, and establishing the 5-panel test that included all of the drugs for which HHS tested. Therefore, prior to the new requirement, the drug testing laws covered marijuana, cocaine, amphetamines, opiates, and phencyclidine (PCP). Testing for MDA and MDEA was added in 2010, also to conform with changes to the HHS regulations.

opioids to the DOT panel: hydrocodone, hydromorphone, oxycodone, and oxymorphone; the commercial names include Vicodin, Percodan, Lortab, Oxycontin, Percocet, Norco, Dilaudid, and Exalgo. These opioids are often included in private sector drug testing programs, and have been associated with widespread addiction and overdose issues, but had not been a mandated part of the DOT tests. The final rule clarifies that DOT does not have authority to add substances such as methadone or synthetic cannabinoids to the drug testing panel, without the scientific and technical expertise of HHS supporting it. HHS is limited currently to testing Schedule I and II drugs under the Controlled Substances Act.

Another change made was to delete MDEA as part of a confirmatory test from the mandatory panel, and inclusion of MDA (methylenedioxyamphetamine) as an initial test. These are psychedelic drugs also known as "ecstasy." There are additional new requirements for drug testing programs, but DOT has eliminated the need for employers and third-party administrators to submit blind specimens, to reduce regulatory costs and burdens. The "shy bladder" process has been modified so that the urine collector will discard any specimen provided during the collection event when the employee does not provide a sufficient specimen by the end of the three hour wait period.

A Medical Review Officer (MRO) must receive and review the drug test results from the employer's testing program, and

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DOT Drug Testing, cont.

also evaluate the medical explanations for certain drug test results, including the use of drugs legally pursuant to a valid prescription. The MRO may need to report medical information concerning a legally prescribed prescription as a result of more synthetic opioids being captured in tests under the new rule, and the interface with the MRO's obligation for reporting "significant safety risks" to the employer, the DOT, a state agency or examiner. To ensure that the employee is not caught by surprise when the MRO must file a report, the new rule will now require the MRO to give the worker up to five business days after the verified negative finding (for a legal prescription) to have the prescribing physician contact the MRO and determine if the medication can be changed to one without the effects that make the worker medically unfit or that does not pose a significant safety risk. Only if that discussion does not alleviate the MRO's concerns would the MRO report any safety issues to the employer or third party.

Currently, the rules only apply to urine tests. At this time, point-of-collection instant tests, hair tests, and oral fluid tests are not allowed under Part 40 for DOT drug testing. Under certain circumstances, blood or body tissue testing can be used, such as post-accident screening by the Federal Railroad Administration or the US Coast Guard. DOT's final rule includes three more "fatal flaws" to the list of reasons when a laboratory would report a "rejected for testing" specimen. It also includes new language emphasizing the existing DOT prohibition on the use of DNA testing on DOT drug-testing specimens, to avoid discrimination against workers whose DNA test revealed a potential medical condition.

The final rule gives the MRO latitude in determining whether a prescription is "legally valid" and there is no maximum duration for the length of time that a prescription can be used by the person to whom it was prescribed. The rule adds that the MRO cannot question the appropriateness of the employee's physician's prescribing practices, nor can the MRO deny a legitimate medical explanation simply because the MRO thinks that the medication should not have been prescribed to the patient.

Significantly, the rule's preamble emphasizes: "Regardless of any state 'medical marijuana' laws, there cannot be a legally valid prescription for marijuana, since it remains a Schedule I substance under the CSA . . . MROs must not treat medical

marijuana authorizations under state law as providing a legitimate medical explanation for a DOT drug test that is positive for marijuana." Not only has the federal government taken an official stance through this DOT rule, current case law supports termination of workers in safety-sensitive positions for positive marijuana tests, even when the employee has a medical recommendation from a physician, holds a valid medical marijuana card, and tests positive but does not appear impaired.

However, some states have held that a positive drug test for marijuana under such circumstances does not constitute misconduct for the purpose of disqualifying the worker from receiving unemployment benefits. Additional recent cases involving refusal to hire applicants who hold medical marijuana cards suggest that some state laws may be more liberally interpreted to provide protections absent actual impairment or assignment of safety-sensitive duties. There appears to be no duty to accommodate medical marijuana use under the federal Americans with Disabilities Act, but interpretation of analogous state laws may vary and this is a quickly evolving area of case law. The final rule is published at: www.transportation.gov/odapc/frpubs.

Questions about compliance can be directly posed to DOT by writing to: ODAPCWebMail@dot.gov. For confidential assistance on DOT issues for commercial drivers or others in safety-sensitive positions, or help revising drug testing programs, contact the Law Office at 301-595-3520 or write to Adele Abrams at safetylawyer@gmail.com.

House Subcommittee Looks at Paid Leave By Gary Visscher, Esq.

The Subcommittee on Health, Education, Labor, and Pensions of the House Education and Workforce Committee held a hearing December 6, 2017 on Workplace Leave Policies. That was a broad topic, but the testimony and Members' questions focused on two issues, workers' interest in greater flexibility in meeting "work-life" needs and schedules, and the increasing number of, and variations in, state and local laws mandating paid leave.

According to testimony at the hearing, 8 states and over 30 localities currently have laws or ordinances which mandate that at least some employers provide paid leave. Most of these laws require that employers provide a certain number of days (usually 5 or 7 per year) of paid sick leave, which an employee may use in case of his or her own sickness, or to care for a sick family member, or for a limited number of other purposes. These laws vary

House Subcommittee, cont.

in terms as to which employers (by number of employees) are covered, what purposes the paid leave may be used for, and whether leave days may be carried over from year to year, etc.

A second set of laws or proposals provide for longer term paid parental leave after the birth or adoption of a child, and generally involve using a public tax system, such as the unemployment compensation system, to establish a fund from which the paid time off is paid. On the other hand, according to testimony at the Subcommittee hearing, 20 states have laws which ban local governments in those states from enacting paid sick leave laws.

In Maryland, paid sick leave will be a major issue before the Maryland legislature when it convenes in January. During the 2017 session, the State House and Senate passed legislation to require that employers of 15 or more provide 5 days of paid leave, restricted to certain uses – primarily sickness of employee or family member, domestic violence, and sexual assault. Governor Hogan vetoed the bill, and proposed an alternative approach which would require employers of 50 or more employees (dropping to 25 by 2020) to provide 5 days of paid leave which could be used by covered employees for any purpose. The state legislature is expected to vote on the respective approaches in the 2018 session.

The number of and variation in state and local paid leave laws has given a push to legislation for a uniform approach and employee benefit at the federal level. The approach that many large employers and associations are supporting is H.R. 4219, the “Workflex in the 21st Century Act.” The bill would amend the Employee Income Security Act (ERISA) to provide for “qualified flexible work arrangement plans” under ERISA. In order to qualify as a “qualified flexible work arrangement plan” the plan would have to meet certain minimum requirements, including providing employees with a minimum number of days of paid leave. The number of days of paid leave depends on the size of the employer and the employee’s years of service; employers of 1000 or more employees would have to provide a minimum of between 16 and 20 days of leave (depending on the employee’s length of service), while employers of 50 or fewer would be required to provide between 12 and 14 days of paid leave. The bill specifies that up to 6 days of the leave could be met by providing paid days for federal or state holidays.

Crystalline Silica: Medical Surveillance and Tuberculosis Testing By Michael Peelish, Esq.

Under the new OSHA standard regulating occupational exposure to respirable crystalline silica (RCS), an employee who is required to wear a respirator for more than thirty (30) days (construction) or an employee who is exposed to RCS above the Permissible Exposure Limit of 50 µg/m³ for more than thirty (30) days in a year (general industry/maritime) is required to receive medical surveillance. The final rule took effect for the construction sector on September 23, 2017, and the rule takes effect for general industry on June 23, 2018.

If the employer is made aware of the results of an employee’s medical surveillance examination, which identifies an Abnormal result on the mandated test for latent tuberculosis (TB), what should the employer do or not do? OSHA states in the Preamble to the Respirable Crystalline Silica Final Rule (RCS), published March 25, 2016: “...there is convincing evidence that inhalation exposure to respirable crystalline silica increases the risk of a variety of adverse health effects, including...infectious tuberculosis.” (81 FR 16381). OSHA further states that “...exposure to respirable crystalline silica in and of itself, without silicosis, increases the risk that latent TB infection can convert to active disease.” (81 FR 16382).

OSHA recognizes that diagnosing latent TB in the silica-exposed population reduces the risk of TB being spread to the population at large. (81 FR 16597). In other words, OSHA concludes it is appropriate to test for latent TB infection in all employees who will be exposed to RCS and are eligible for medical surveillance, for their protection and to prevent transmission of an active, potentially fatal infection to their coworkers.

If an employee is diagnosed with latent TB, the Physician or Licensed Health Care Professional (PLHCP) may refer the employee to the local public health department, where the employee may get recommendations or prescriptions for treatment. If the employer is made aware of an employee’s test results, then the employer should also refer the employee to a specialist for treatment. Removal is not necessary for latent TB infections because employees with latent TB infections are not contagious. However, because employees with latent TB are at greater risk of developing active disease with exposure to RCS,

Medical Surveillance, cont.

informing them that they have a latent infection allows for intervention in the form of treatment to eliminate the infection. (81 FR 16825).

If an employee tests positive for active TB, he or she should be referred to the local public health department as required by state public health law. Those employees will need treatment and, if necessary, be quarantined until they are no longer contagious. This is the appropriate action for employees with active TB to prevent infection of coworkers and others, according to procedures established by state public health laws. (81 FR 16825).

In either of the above situations, do not make precipitous employment decisions without seeking advice from human resources or legal counsel. There may be implications under the Americans with Disabilities Act, the Family and Medical Leave Act, and potentially under the Civil Rights Act, and analogous state laws which may apply to companies, even if their size precludes application of the federal statutes. Our firm provides legal assistance in both occupational safety and health law, and in employment law. Contact our eastern office (301-595-3520) or western office (303-228-2170) for more information.

MSHA Begins Winter Alert Campaign By Joshua Schultz, Esq., MSP

On December 5th, MSHA announced the beginning of the agency's annual Winter Alert campaign. During these campaigns, MSHA inspectors frequently target specific standards which are more likely to lead to hazards during the winter.

MSHA specifically mentioned three best practices at surface mines in the campaign announcement, asking mines to perform the following tasks: check highwalls and benches for stability; examine vehicles for exhaust leaks and consider limiting engine idle time to reduce risk of carbon monoxide asphyxiation; and remove snow and ice on roadways, and apply sand to maintain traction.

MSHA frequently cites 30 C.F.R. § 56.3130 "Wall, bank, and slope stability" and 30 C.F.R. § 56.3200 "Correction of hazardous conditions" when inspectors observe loose material on highwalls. Inspectors will also look at the

base or toe of highwalls for evidence of material which has sloughed off the wall, and often point to cracks in highwall systems as evidence that highwalls are unstable. These cracks are exacerbated by freeze and thaw cycles, thus we strongly recommend preventing access to highwalls which an operation is not actively mining. It is important to note that MSHA requires not just a barrier impeding entry to areas with hazardous conditions, but also a sign warning against entry.

Inspectors may cite 30 C.F.R. § 56.14100 where they find exhaust leaks on vehicles. This is the catch-all standard for defects affecting safety which are not addressed by a specific standard. Note that some administrative law judges have required MSHA to show that a mine had an opportunity to discover and correct hazards cited under this standard, as it has language requiring that defects "shall be corrected in a timely manner." Judges have found that to correct a defect in a timely manner, a mine must have had an opportunity to discover the defect first.

Where MSHA finds snow and ice on roadways, they may cite 30 C.F.R. § 56.9100(b), which requires that "Signs or signals that warn of hazardous conditions shall be placed at appropriate locations at each mine." MSHA may also issue citations where there is snow and ice on walkways or catwalks. There is a specific standard addressing this hazard, 30 C.F.R. § 56.11016, which requires "Regularly used walkways and travelways shall be sanded, salted, or cleared of snow and ice as soon as practicable." Note the language "as soon as practicable," meaning an operation must have time to discover and remedy the hazard. If an inspector finds footprints in the snow on a catwalk and no effort has been made to clean the area, MSHA will likely issue a citation.

Fall 2017 Regulatory Agenda – OSHA and MSHA By Gary Visscher, Esq.

Last week the Trump Administration released the Fall 2017 "Regulatory Plan" and "Unified Agenda of Federal Regulatory and Deregulatory Actions." The "Regulatory Agenda" is issued two times per year, and provides a government-wide list of regulatory actions expected to be taken over the coming year.

The full Regulatory Agenda is no longer printed in the Federal Register, but is posted online (www.reginfo.gov). In most years the Regulatory Agenda is issued with little publicity, but in a departure, the Trump Administration highlighted the release, using it to highlight the deregulatory actions

Regulatory Agenda, cont.

that have been taken since the Administration took over in January. According to the Office of Management and Budget, since January there have been 67 deregulatory actions and 3 new regulatory actions. Of the 67 deregulatory actions, 15 were regulations overturned under the Congressional Review Act (including one OSHA rule).

The Regulatory Agenda and an accompanying report from the Office of Management and Budget emphasize continued compliance with Executive Order 13771, which among other things, requires agencies to identify two rules for removal for each proposed new rule. In addition, OMB states that each agency is expected “to propose a net reduction in total incremental regulatory costs” for 2018.

Consistent with the Administration’s overall approach, the “active action” items for OSHA and MSHA are weighted towards reviewing, updating and revising existing standards, rather than proposing new standards. The Trump Administration’s Regulatory Agenda separately lists “active actions” (those expected to receive action in the next 12 months) from “Long Term Actions.” Several items previously listed on the Regulatory Agenda have been moved to Long Term Actions.

OSHA

OSHA lists 7 items at “final rule” stage: (1) delaying the effective date of the “Improve Tracking of Workplace Injuries and Illness” rule; (2) making technical corrections to 18 current standards; (3) delaying for one year the crane operator qualifications rule; (4) changing OSHA’s procedure for securing medical access orders; (5) amending quantitative fit testing protocol for respirator use; (6) completing action on the standards improvement project (IV); and (7) revisions regarding shipyards and construction to the final rule on beryllium exposure.

OSHA lists four proposed rules: (1) amendments to the “improve tracking of workplace injuries and illness” rule; (2) granting final approval to Puerto Rico’s state plan; and (3) rules clarifying coverage of the construction crane standard.

At the prerule stage, OSHA lists (1) communication tower safety rule; (2) mechanical power presses update; (3) updating the powered industrial trucks standard; (4) updating the lockout/tag-out standard; and (5) revising and reducing the blood lead level for medical removal

under the lead standard.

OSHA lists the following as “long term actions”: (1) injury and illness reporting – musculoskeletal disorders column; (2) infectious disease standard; (3) amendments to the process safety management standard; (4) shipyard fall protection; (5) emergency response and preparedness standard; (6) update to the Hazard Communication Standard; (7) tree care standard; and (8) standard on prevention of workplace violence in health care and social assistance.

MSHA

MSHA lists two items at the “final rule” stage and three items at the “prerule” stage. MSHA projects completion of (1) the workplace exam rule revisions (metal/nonmetal) and (2) the rule on refuge alternatives in underground coal mines. The Workplace Exam rule was issued in January 2017 but was delayed. MSHA has proposed revisions to the rule, which will now take effect in June 2018.

At the prerule stage, MSHA lists (1) rule on exposure to diesel exhaust; (2) review of the respirable coal dust exposure standard; and (3) a request for information on alternatives to petitions for modification. MSHA lists two items as long-term actions: (1) respirable crystalline silica exposure; and (2) proximity detection devices for mobile machines in underground mines.

Please let us know if you would like more information on the Regulatory Agenda or on any of the specific items.

OSHA Nominee Advances in Senate

By Adele L. Abrams, Esq., CMSP

On December 13, 2017, Scott Mugno – President Trump’s nominee to head the Occupational Safety & Health Administration – was approved by the Senate Health, Education, Labor & Pensions Committee, which is the final clearance step prior to confirmation by the full Senate. The vote was along straight party lines: all Republicans on the Committee supported him, while the nominee failed to gain support from any minority members.

Mugno has worked most recently as a safety director for Federal Express, and has advocated an approach where safety standards would have “sunset” deadlines, after which they would be rescinded if not reaffirmed. He ran into rough waters during his confirmation hearing on December 6th, due to lack of detail provided on his policies concerning enforcement, support for whistleblower protections, and commitment to supporting OSHA standards that are now in litigation.

OSHA Nominee Advances, cont.

The Senate is not expected to take up a final vote on Mugno's nomination until it reconvenes in 2018 (although it is possible), and Deputy Assistant Secretary Loren Sweatt will continue to head the agency on an acting basis in the interim.

Medical Marijuana in WV, and Coming to a State Near You By Sarah Ghiz Korwan, Esq.

West Virginia is now among more than two dozen states that permit medical cannabis. Earlier this year, the law passed by WV legislature and signed by Governor Jim Justice, permits patients suffering from serious medical conditions to use marijuana for medical use. The conditions included in the legislation are cancer, ALS, HIV/AIDS, multiple sclerosis, Parkinson's disease epilepsy, neuropathies, Huntington's disease, Crohn's disease, post-traumatic stress disorder, intractable seizures, sickle cell anemia, severe chronic or intractable pain, or certain spinal cord damage.

The law limits the form in which medical marijuana may only be dispensed to pill, oil, topical forms, such as gel, creams or ointments, vaporization or nebulization, tincture, liquid or dermal patch. Smoking marijuana is not permitted under this law. Although most provisions of the law took effect immediately upon passage, the regulatory framework is still in development and no identification cards will be issued to patients until July 1, 2019.

For employers, there will be implications and need-to-know information. As an initial matter, there is a broad anti-discrimination policy. Specifically, no employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee's compensation, terms, conditions, location or privileges of employment solely on the basis of such employee's status as an individual who is certified to use medical cannabis. However, employers need not accommodate the use of marijuana at work and employers may discipline employees who are "under the influence" of marijuana at work.

There are specific provisions for employers under MSHA and OSHA mandates and where safety-sensitive jobs are involved. Specifically, an individual may not

operate or be in physical control of the following while under the influence of marijuana with a blood content of more than 3 ng/ml:

- chemicals which require a permit issued by the federal government, state government, federal agency or state agency;
- high-voltage electricity or any other public utility;
- vehicle, aircraft, train, boat or heavy machinery.

In addition, a patient may not perform any work at heights or in confined spaces, including, but not limited to, mining while under the influence of medical cannabis. Finally, a patient may be prohibited by an employer from performing any task which the employer deems life-threatening, to either the employee or any of the employees of the employer, while under the influence of medical cannabis. Further, even if the prohibition results in financial harm for the patient, this prohibition shall not be deemed an adverse employment decision.

These provisions appear to benefit employers who have safety-sensitive workplaces, but they also raise many questions which are not yet answered by the statute or the courts. For example, what is the definition of "under the influence of marijuana"? In addition, although most employers rely on urine testing for drugs, the active ingredient in marijuana still can show on a urine drug test days or even weeks after use depending on a number of factors. Employers with operations in West Virginia, and those states where medical cannabis is permitted, should review their drug and alcohol policies and consult with counsel to determine how they will address these issues.

Multi-Employer Citation Case Appealed to Fifth Circuit By Gary Visscher, Esq.

A previous newsletter article (June 2017) discussed the recent OSHRC Administrative Law Judge (ALJ) decision in *Hensel Phelps Construction Co.*, which vacated a citation issued to Hensel Phelps as the "controlling employer" under OSHA's Multi-Employer Citation Policy.

The ALJ's stated reason for vacating the citation was that the case arose in the Fifth Circuit (which encompasses Texas, Louisiana, and Mississippi). The ALJ further concluded that controlling precedent by the Fifth Circuit held that

Multi-Employer Citation Case, cont.

OSHA regulations protect only an employer's own employees, and therefore rejected Hensel Phelps' liability based on being the "controlling employer" at a multi-employer worksite.

OSHA appealed the ALJ's decision to the Commission, but the Commission, which had only one member at the time, did not grant review and the ALJ's decision became the final agency order. OSHA had sixty days from the date the order became final to appeal, and did so on November 6, 2017.

The case may allow the Fifth Circuit to clarify its interpretation of the Occupational Safety and Health Act. The case cited by the ALJ as controlling precedent in the Fifth Circuit, *Melerine v. Avondale Shipyards*, 659 F.2d 706 (5th Cir. 1981), involved liability in a private tort case, rather than an OSHA citation, though it cited a 1975 Fifth Circuit decision which involved an OSHA citation. Other courts of appeals, including the Courts of Appeals for the D.C., Second, Sixth, Seventh, Eighth, and Tenth circuits, have upheld OSHA's authority to cite an employer whose own employees were not exposed to the violative condition. Should the Fifth Circuit rule to the contrary, the issue may find its way to the Supreme Court.

NLRB's Joint Employer Reversal – What is Old is New Again By Diana R. Schroeder, Esq.

On December 14, 2017, in a 3-2 decision, the NLRB overturned its controversial 2015 *Browning-Ferris Industries* decision which significantly expanded the standard for determining when two separate entities could be considered a "joint employer" in a labor relations context. The *Browning-Ferris* decision held that joint employer status existed if the entities "share or co-determine those matters governing the essential terms and conditions of employment" given their right of control, and irregardless of the entity's actual control.

Browning-Ferris had a grave impact on contractors and on the franchise business model. Last week's *Hy-Brand Industrial Contractors* decision represents a return to the 30-year old precedent that was kicked out by the 2015 Obama-era *Browning-Ferris* decision. *Hy-Brand* contracted the standard back to pre-*Browning-Ferris*, and holds that "two or more entities will be deemed joint employers under the National Labor Relations Act (NLRA) if there is proof that one entity has exercised control over essential employment terms of

another entity's employees (rather than merely having reserved the right to exercise control) and has done so *directly and immediately* (rather than indirectly) in a manner that is not limited and routine." A finding of joint employer status would translate to joint liability regarding labor-relations matters.

Although this decision does not directly impact employers outside the labor relations context, the Department of Labor may soon follow suit and retool its policies for finding joint employer or multi-employer status under the Fair Labor Standards Act and under Occupational Safety and Health Act. In addition, federal legislation is now pending which would serve to provide much-needed predictability for employers.

Please contact the Firm for a copy of the decision or for more information.

Second Circuit Issues Decision on OSHA/MSHA Jurisdiction By Gary Visscher, Esq.

Another twist in the always confusing jurisdictional "line" between MSHA and OSHA was delivered in a decision issued on December 18, 2017 by the Court of Appeals for the Second Circuit. The case is *Sec'y of Labor v. Cranesville Aggregate Companies, Inc.*, dba Scotia Bag Plant.

Cranesville operates a sand and gravel pit, as well as several processing plants on property adjacent to the pit. At issue in this case was a "Bag Plant" at which sand was dried and put in bags, either singly or in combination with concrete or other materials. The Bag Plant was about 600 feet from the pit, and separated by railroad tracks that run across the property but connected by a private roadway.

OSHA conducted an inspection of the Bag Plant in May 2009 because it received an employee complaint, and after conducting separate safety and health inspections, issued a number of citations, and proposed penalties of nearly \$500,000. Cranesville contested OSHA's jurisdiction, arguing that the Bag Plant along with the remainder of Cranesville's operation was under the jurisdiction of MSHA.

Most of the time when jurisdiction is an issue, the Secretary argues that if any of the activities listed as "milling" in the Interagency Agreement take place, jurisdiction belongs to MSHA. "Drying" is one of the activities listed under "milling" in the Interagency Agreement. This time, however, the Secretary argued that the fact that "drying" of sand was done at the Bag

Second Circuit Issues Decision, cont.

Plant did not mean that it was under MSHA jurisdiction. Instead the Secretary argued that it depends on what the purpose of drying the sand was. The Secretary argued at Cranesville, the purpose of the drying operation was to make “the end-product easier to handle and prevent hydration of cement (with which the sand was mixed) and not to upgrade the product to increase its value.”

The Administrative Law Judge sided with Cranesville, and vacated the OSHA citations on the grounds that MSHA, not OSHA, had jurisdiction. The Secretary appealed the ALJ decision, and the case sat unresolved before the Commission for several years. Finally, in April 2016 the Commission issued a decision in which the then-two members of the Commission disagreed on the merits and vacated the direction for review, leaving the ALJ decision to stand as the final order of the Commission. The Secretary then appealed to the Second Circuit.

The Second Circuit viewed the case primarily in terms of giving deference to the Secretary: “Because the Commission did not afford proper deference to the Secretary’s reasonable determination, the Commission’s decision was not in accordance with the law.” Unfortunately, the case may provide little guidance to employers with similar operations seeking to determine which agency has jurisdiction and which set of standards and rules apply.

The Secretary argued before the Commission that the fact that MSHA had not previously included the Bag Plant in its inspections of Cranesville’s pit and processing plants supported its position in the litigation that the Bag Plant was under OSHA rather than MSHA jurisdiction. In other cases, of course, the Secretary has argued that past inspection practices have no bearing on whether MSHA has jurisdiction.

However, the case does stand for the proposition that jurisdiction should be based on the overall “function” of the facility in question, rather than simply looking at whether any one of the listed activities in the Interagency Agreement may take place at the facility. Even though the Bag Plant was drying sand, “[a]t the Bag Plant, Cranesville was essentially operating in its capacity as a manufacturer and not as a mine operator.”

Worker Safety Issues in the Cannabis Industry

By Adele L. Abrams, Esq., CMSP

The end of 2017 marked a beginning of sorts: the first legal medical marijuana dispensaries opened in Maryland. Debates continue over the general safety issues concerning the effects of cannabis on workers (and drivers), and how and when to legally drug test workers in states where marijuana is legal recreationally (currently eight states and Washington, DC) or medically (29 states plus DC).

More than half the U.S. population now resides in states where cannabis can be legally used, at least at the state level. Now, as growing facilities for cannabis are opening with increased frequency as well as the storefront operations where it can be sold, both workers and employers engaged in cannabis enterprise need to be aware of what safety and health hazards may be present on-the-job.

At a recent conference, researchers from Colorado State University and the Mountain & Plains ERC (a NIOSH educational research center on occupational health and safety) explored the issues of worker well-being in Colorado’s cannabis industry, which can yield valuable information because that state (with nearly 3,000 dispensaries) has valuable experience to share with states that are new to the industry. By contrast, Maryland currently has licensed under 100 such facilities to open through 2018.

The cannabis industry demographics (at least in Colorado) tend toward Caucasian college-age hourly workers, who provide services as “budtenders” (retail sales persons), trimmers and growers. Among the issues identified by the researcher and others who have studied safety and health hazards in the cannabis industry are:

- lack of safety training (for more than half of the workers in the Colorado study),
- pesticide exposure,
- powdery mildew that can adhere to the raw weed, a fungal disease that can cause health issues for trimmers and growers when they breath it or have dermal contact,
- mold that grows on the walls of the grow houses, and also causes allergic reactions,
- lack of hazard concerns or situational awareness, and
- cannabis use by the workers on the job.

Individuals working in the cannabis trade enjoy their work, and their work product, according to the study:

Cannabis, cont.

78 percent of workers used cannabis at least daily, with nearly 30 percent using it 4 or more times per day. Use during or prior to work appears to be condoned, as 49 percent reported using it before work, and 29 percent using the drug while at work, at least weekly. Finally, workers reported that 43 percent used cannabis while driving on personal time, although it was not clear whether they reported actually driving and using concurrently, or just use within hours of driving.

While cannabis business employers in Maryland and elsewhere may be happy to find that they will have a generally satisfied, happy workforce, there are underlying health and safety concerns that warrant more research as the industry expands in more than half of the states. More robust safety and health programs, and worker training, are needed. In 2017, the Colorado Department of Health and Environment released a “Guide to Worker Safety and Health in the Marijuana Industry” that outlined compliance obligations, and identified nearly two dozen chemical, biological, and physical hazards that can affect cannabis industry workers. While federal OSHA governs Colorado and has no intention of promulgating cannabis-industry-specific standards any time soon, this issue can also be addressed by state governments that run their own

OSHA programs, in cannabis friendly states such as Maryland, California, Oregon, and Washington. Workers in all states who have safety or health concerns can still trigger an inspection at cannabis facilities in all states, and this is a protected activity under Section 11(c) of the Occupational Safety & Health Act of 1970.

Employers must be aware of when personal protective equipment, such as respiratory masks or gloves to limit dermal contact, may be needed. Growing facilities should try to control humidity to the extent feasible, to limit mold creation, and actively try to prevent its proliferation. Employers need to do a hazard assessment, comply with all applicable OSHA rules such as safety for walking and working surfaces, and also should consider ergonomic factors in growing facilities, trim rooms, and retail shops.

Companies should develop formal policies on cannabis use during work or when driving on company business (such as for delivery services that are common in California for medical users). It may also be useful to identify which positions will be considered “safety-sensitive” for purposes of on-the-job use restrictions. For assistance in developing workplace safety and health programs, or employment policies, contact the Law Office at 301-595-3520 (eastern) or 303-228-2170 (western).

2018 SPEAKING SCHEDULE**ADELE ABRAMS**

- 1/04/18: Business 21, webinar on OSHA Recordkeeping Requirements
- 1/10/18: National Safety Council, webinar on OSHA's Crystalline Silica Standard
- 1/12/18: Environmental Information Association, Workshop on Crystalline Silica, Baltimore, MD
- 1/17/18: Penn State Mine Safety Supervisor's Conference, presentation Legal Liability for EHS Professionals, Allentown, PA.
- 1/23/18: BLR Webinar on OSHA Enforcement & Initiatives 2018
- 1/25/18: Mechanical Contractors Association of America, presentation on Legally Effective Document Management, San Diego, CA
- 1/30/18: North American Meat Institute Safety Conference, presentation on E-Recordkeeping Requirements, Atlanta, GA
- 2/1/18: Progressive Business Conferences, webinar on OSHA Temporary Worker Safety
- 2/13/18: Northwest Safety Conference, OSHA documentation presentation, and ADA, OSHA and Medical Marijuana presentation, Minneapolis, MN
- 2/27/18: Society of Mining Engineers, presentation on OSHA's Crystalline Silica Rule & Impact on Mining, Minneapolis, MN

MICHAEL PEELISH

- 1/10/18: Chesapeake Regional Safety Council Competent Person Silica Training, Baltimore, MD
- 1/17/18: 22nd Annual Professional Development Mine Safety Seminar for Supervisors, Penn State
- 1/30/18: Chesapeake Regional Safety Council Competent Person Silica Training, Richmond, VA