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Workplace Safety and Health Reporter

Winter 2012

The Occupational Safety and Health Administration (OSHA) is using every tool at its disposal to ensure that employers are in compliance with applicable standards and rules. It is pushing forward with new rules, enforcement initiatives, interpretive letters, and media initiatives at an unprecedented pace. Employers must keep abreast of this activity, increasing their vigilance and addressing safety and health issues relevant to their worksites.

Inside:

OSHA Developments

The New OSHA Top Ten

OSHA has published its annual Top Ten most frequently cited standards for Fiscal Year 2011. OSHA publishes this list to "alert employers about these commonly cited standards so they can take steps to find and fix recognized hazards addressed in these and other standards before OSHA shows up." The list can be a critical tool for employers as it shows hazards frequently encountered in the workplace, as well as those standards that are most frequently targeted by OSHA compliance officers. The Top Ten are:

- Scaffolding (29 C.F.R. 1926.451)
- Fall Protection (29 C.F.R. 1926.501)
- Hazard Communication (29 C.F.R. 1910.1200)
- Respiratory Protection (29 C.F.R. 1910.134)
- Lockout/Tagout (29 C.F.R. 1910.147)
- Electrical, Wiring Methods (29 C.F.R. 1910.305)
- Powered Industrial Trucks (29 C.F.R. 1910.178)
- Ladders (29 C.F.R. 1926.1053)
- Electrical, General Requirements (29 C.F.R. 1910.303)
- Machine Guarding (29 C.F.R. 1910.212)

OSHA Provides Warnings and Work Tips for Anticipated Winter Storm Work Hazards

As the winter storm season approaches, the Occupational Safety and Health Administration has focused on protecting workers from hazards during winter storm response and recovery operations. OSHA's new webpage, entitled "Winter Storms," provides employers with information on preparing for winter storms and identifying and controlling hazards associated with winter storm conditions.

A number of hazards associated with winter storms are addressed:

- being struck by falling objects such as icicles, tree limbs, and utility poles;
- driving accidents due to slippery roadways;
- carbon monoxide poisoning;
- dehydration, hypothermia and frostbite;
- exhaustion from strenuous activity;
- back injuries or heart attack while removing snow;
- slips and falls due to slippery walkways;
- electrocution from downed power lines and downed objects in contact with power lines;
- burns from fires caused by energized line contact or equipment failure;
- falls from snow removal on roofs or while working in aerial lifts or on ladders;
- roof collapse under weight of snow (or melting snow if drains are clogged); and
- lacerations or amputations from unguarded or improperly operated chain saws and power tools, and improperly attempting to clear jams in snow blowers.

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OSHA recommends steps for avoiding or controlling these identified hazards. It also provides links to the Federal Emergency Management Agency, the American Red Cross, the National Weather Service, the National Oceanic and Atmospheric Administration, the Centers for Disease Control and Prevention, and the National Safety Council for additional information.

Employers should review the information provided by OSHA (http://www.osha.gov/dts/weather/winter_storm/index.html) to ensure that they are aware of potential hazards that may affect their employees.

OSHA Continues Issuing "Industry/Hazard Alerts"

Over the last several months, OSHA has continued, and expanded, its practice of publicizing "Industry/Hazard Alerts" on its website. The Alerts are designed to notify employers in certain industries of hazards that are of particular concern to the Agency. OSHA is using this technique in part to ensure industry recognition and knowledge of hazards, which OSHA may attempt to utilize in the context of enforcement proceedings. Employers in the industries targeted should take note of these Alerts and ensure that they are fully compliant with OSHA standards.

The following Industry/Hazard Alerts are listed:

- Incorrectly Refurbished Circuit Breakers
- Student Worker Killed While Filming Football Practice from a Scissor Lift
- Dangers of Engulfment and Suffocation in Grain Bins
- Grain Storage Bins
- Clearing Piping Systems with Natural Gas
- Hair Smoothing Products that Could Release Formaldehyde
- Work Precautions for Handling Hazardous Drugs

OSHRC Establishes Test for Applying Attorney-Client Privilege to Third-Party Reports

The Occupational Safety and Health Review Commission has established a three-part test to determine whether third-party safety and health audits performed for employers or their counsel are protected from disclosure by the attorney-client privilege. Applying underlying legal principles of privilege to the technical area of safety and health assessments, the Commission in a case of first impression has identified steps all employers need to consider taking before conducting any safety and health audits of their operations. The case, *Secretary of Labor v. Delek Refining, Ltd.*, OSHRC No. 09-0844, was decided on July 11, 2011.

In *Delek*, the company contracted with a third party, the Process Safety and Reliability Group, Inc. (PSRG), to conduct an audit of its process safety management (PSM) program and, in the company's view, to assist its counsel in assessing technical issues associated with compliance with the PSM standard. After an investigation into an explosion and fire at a Delek facility, OSHA issued citations against the company and litigation ensued. During discovery, the Secretary of Labor subpoenaed a copy of the audit report. Delek moved to quash the subpoena, claiming that the report was protected by the attorney-client privilege. The Administrative Law Judge denied Delek's motion to quash, and the company sought review of the denial with the Commission.

The Commission articulated three prerequisites that must be met for the privilege to attach to third-party reports:

- The company must have provided information to the third party, rather than the third party having obtained its own information. "Thus, the privilege will not apply where the attorney consults the third party to obtain information the client did not have . . . or employs the third party to gather data through studies and observations of the physical conditions at a client's site, rather than through client confidences."
- The company must have sought legal advice as opposed to some other kind of advice.
- In order to provide legal advice, the attorneys needed the services of the third party to translate technical or complex information.

The Commission did not rule on whether the report at issue in *Delek* met this test. Instead, it remanded that question to the ALJ "to review the report *in camera* and reconsider, in accordance with the principles discussed …, the extent to which the attorney-client privilege may be applicable."

The Commission's test leaves many open questions for employers, particularly what constitutes "legal advice" in the course of a safety and health audit. In addition, the Commission did not address whether any other privileges could have applied to the report, such as the work product doctrine that protects from disclosure documents that "are prepared in anticipation of litigation or for trial." (An earlier decision by a federal appeals court said that the work product doctrine could apply to OSHA and Commission proceedings.) Nevertheless, *Delek* provides a framework for employers to consider when deciding whether, and how, to perform safety and health audits of their facilities.

Exercise Regime Constitutes Medical Treatment for OSHA Recordability

Following its recent interpretation that "therapeutic exercise" constitutes medical treatment for OSHA recordkeeping purposes, OSHA has stated that an exercise regime recommended by a Certified Athletic Trainer for an employee who exhibits any signs or symptoms of a work-related injury involves medical treatment and is a recordable case. OSHA made this interpretation in a letter recently posted on its website, available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=27698.

In the same letter, OSHA also provided guidance on whether specific types of exercise constitute medical treatment. OSHA states that if a Certified Athletic Trainer "utilizes stretching" to relieve symptoms of a work-related injury or illness, the "stretching" constitutes medical treatment. It also states that a written home exercise program provided by a Certified Athletic Trainer for signs or symptoms of a work-related injury or illness constitutes medical treatment for recordkeeping purposes.

OSHA's interpretation is particularly important for musculoskeletal disorders (MSDs). MSDs are often managed, in part, through exercise regimes. OSHA notes that exercise given as a purely precautionary measure (i.e., before the onset of signs or symptoms) would not qualify for recordability. However, if an employee experiences any signs or symptoms of a work-related injury or illness — even very early signs or symptoms — exercise given to manage those signs or symptoms would constitute medical treatment for recordkeeping purposes.

Employers should take note of this new interpretation and adjust their recordkeeping practices accordingly.

State Update

Nevada OSHA Beefs Up Enforcement Efforts

Stung by federal and media charges of ineffectiveness and an overall failure to protect workers, Nevada OSHA has overhauled its investigative practices in ways that could spell trouble for unwary and unprepared employers.

Nevada OSHA reportedly has instructed its team of more than 40 investigators to find serious, willful, or repeat violations in at least half of their safety inspections. *See New OSHA Rule Ruffles Feathers*, Las Vegas Review Journal, July 2, 2011. Until now, the average rate for such citations ran about 22 percent. This means investigators will be on the lookout for as many serious, repeat, and willful violations as they can find, even if the same violation might have drawn a lesser classification in the past.

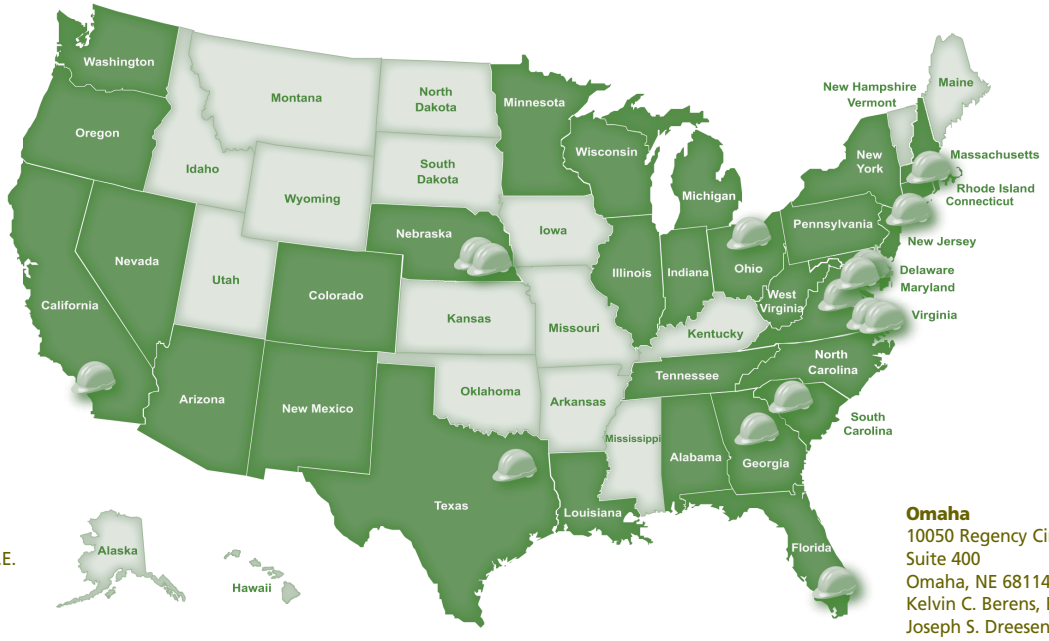
New rules also allow Nevada OSHA to look back five years (as opposed to the two years under the previous rules) to determine if a violation is a "repeat" infraction of one for which the employer was cited before. This follows a similar change in federal OSHA enforcement policy.

Employers should review their safety policies and procedures and to make sure that all required safety devices, personal protective equipment, other measures, and records are in place. Of key importance: review citations received within the past five years and conduct a safety assessment of the cited items to help identify and eliminate possible repeat violations. Make your workplace safety-compliant before OSHA arrives.

For more information about the Nevada OSHA enforcement, please contact Jeffrey D. Winchester, Jeffrey.Winchester@jacksonlewis.com.

About the Workplace Safety Compliance Practice Area

Jackson Lewis' Workplace Safety Compliance practice, led by former Department of Labor OSHA attorney, Brad Hammock, provides comprehensive legal services to employers seeking to comply with federal and state OSHA rules, defend against OSHA enforcement actions, and participate in OSHA rulemaking proceedings. With experienced OSHA attorneys located strategically throughout the nation, Jackson Lewis is uniquely positioned to serve all of an employer's workplace safety needs:



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