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FROM OUR PRESIDENT

Challenging the safety status quo

ACCORDING TO THE BUREAU OF LABOR STATISTICS (BLS), THE CONSTRUCTION INDUSTRY WORKFORCE REPRESENTS FOUR PERCENT OF THE TOTAL U.S. WORKFORCE, but it accounts for 21 percent of workplace fatalities. The "fatal four" – falls, electrocution, struck by an object, and caught-in-between – account for most of these incidents. Similarly, non-fatal injury statistics are also relatively high.

As an employer, you have a responsibility to look after the well-being of all your employees. Individuals could be injured or even die as a result of a construction incident that could happen at any time, especially if your company does not strive to do its best in this area by enacting "world-class safety" practices.

World-class safety starts at the top. When the leadership within a company actively participates in the safety program, is willing to commit resources – both time and money – to safety training, and integrates safety into all aspects of the business, world-class safety is achievable.

A safety culture starts at the top with you. You can't just talk about it, either. For employees to truly take safety seriously, leaders must lead by practicing good safety habits, effectively communicating safety procedures, offering training to all employees, establishing accountability and rewarding success. Sometimes, it requires leaders to challenge the status quo to create a belief that all incidents are preventable, and safety is considered a moral obligation not just for leadership, but for all employees.

Safety leadership is usually reflected in the numbers. When company owners or CEOs are leading the charge to adopt a culture of safety, total recordable incident rates (TRIR) and days away, restricted or transferred (DART) are reduced significantly. ABC's Safety Training Evaluation Process (STEP) offers an excellent opportunity to monitor and improve upon these numbers.

Leaders who insist on observing safety precautions help set a culture of compliance that trickles down throughout an organization. Most importantly, it increases the likelihood that each and every employee returns home safely.

— John Mielke

> *"IT REQUIRES LEADERS TO CHALLENGE THE STATUS QUO TO CREATE A BELIEF THAT ALL INCIDENTS ARE PREVENTABLE, AND SAFETY IS CONSIDERED A MORAL OBLIGATION NOT JUST FOR LEADERSHIP, BUT FOR ALL EMPLOYEES."*

KEEPING YOUR CONSTRUCTION FLEET

WITH A SAFETY-CONSCIOUS APPROACH, YOU AND YOUR EMPLOYEES CAN REDUCE AUTO LIABILITY EXPOSURES AND EXPENSES

By Randy Dombrowski — Safety Services Representative, Sentry Insurance

As you prepare your business for winter's unique hazards, it's a perfect time to reinforce your commitment to safety by reviewing your company safety program. Along with ensuring you still comply with state and federal regulations, this process provides an excellent opportunity to re-engage with your employees on the topic of safety.

Within the construction industry, many employers provide employees with access to company vehicles. While this can improve your company's flexibility and customer access, it's not without risk.

Every employee who gets behind the wheel of one of your company's vehicles can create additional auto liability exposures for you. That's why you'll benefit from creating actionable safety goals for your drivers and documenting the results throughout the year.

Reduce future accidents by looking to the past

No matter your industry, no matter your fleet size, one thing remains the same: reducing accidents should be your drivers' top safety goal. In addition to the seriousness of injuries and the very real potential for loss of life, remember that many accident expenses may not be covered by insurance – which means they'll need to be absorbed by your business.

That's why we encourage you to update your driver safety program with an emphasis on reducing accident frequency. We recognize that 100 percent accident prevention is unrealistic, as your drivers share the road with millions of other drivers and encounter many variables that are

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completely outside their control. That said, it's a worthwhile goal and a strong starting point.

Begin by analyzing accident data from previous years. Use that information to focus your efforts on preventing future occurrences.

- Conduct a thorough year-end accident review. Determine which accidents were preventable, and identify the actions the drivers could have taken. Be critical and honest.
- Use your findings to create a realistic benchmark based on prior performance.
- Note any trends that point to specific accident causes, such as speeding, distracted driving due to cell phone use, or drivers falling asleep behind the wheel. These trends will help you determine the areas to focus on during driver training.
- Have your management team document and communicate your planned safety improvements to all employees, not just drivers. In a company with a true culture of safety, everyone plays a role.

We recommend that all drivers – no matter their experience level – participate in annual classroom driver training.

Define your safety objectives

You set objectives for your employees, defining your expectations and outlining strategies for selling your products and providing service to customers. Take the same approach to safe driving.

At your next employee safety meeting, ask your employees about their driving objectives. Encourage their input and incorporate that input as you establish your company's safe driving objectives.

Begin with general safety guidelines, such as:

- Be aware of your surroundings
- Obey traffic laws
- Treat your vehicle with respect
- Exercise courtesy to pedestrians and other drivers
- Do not use alcohol and drugs
- Allow only authorized passengers in your vehicle
- Wear your seat belt whenever you're behind the wheel
- Lock up the vehicle and trailer at all times
- Avoid using mobile devices while driving

Ask each employee to commit to these objectives. Have them sign a copy of your company policy statement on safe driving and keep the signed copies in their individual personnel files. Additionally, post these objectives in each company vehicle.

EVALUATE YOUR DRIVERS

Even though you work hard to select and train the right new drivers, you should still regularly evaluate each of your current drivers. When it comes to safety, complacency can be a slippery slope.

Note the following red flags as you review your drivers' files:

- Public complaints
- Excessive maintenance expenses or vehicle abuse
- A history of accidents and violations listed on a current MVR
- Vehicle accidents resulting in an insurance claim

Define what your company considers an acceptable driving record, and just as importantly – the criteria that defines an unacceptable driving record. For example, a standard acceptable driving record over a three-year period could include:

- A maximum of one at-fault accident, or two minor violations
- No major violations

MAJOR VIOLATIONS INCLUDE:

- Evading arrest
- Illegal possession
- Reckless disregard
- Operating without care
- Driving to endanger life
- Operating while intoxicated (OWI)
- Refusing an alcohol test
- Driving while impaired
- Failure to stop for an accident
- Participating in a racing contest
- Speeding 25 mph or more over the limit
- Operating after license has been denied
- Misrepresentation to avoid arrest
- Misrepresentation to obtain driver's license
- Traffic violation resulting in death
- Vehicle use in connection with a felony
- License revocation for any reason
- Operating with a suspended or revoked license

Understand negligent entrustment liability

Negligent entrustment liability allows an injured party to recover damages when they're injured because a person – or business – put a dangerous device, such as a vehicle, in the possession of someone who wasn't equipped to handle it properly or safely.

How does this affect your business? Well, let's say one of your drivers is found to be at fault in an accident that injures another person. To determine negligent entrustment, the injured person must generally prove the following elements:

- The owner of the vehicle entrusted the vehicle to the driver
- The driver was incompetent, reckless or unlicensed
- The owner knew (or should have known) that the driver was incompetent, reckless or unlicensed
- The driver was negligent in his or her operation of the vehicle
- The driver's negligence caused damages

So, what can you do to reduce your company's exposure to negligent entrustment?

- Establish and consistently enforce a formal fleet safety policy. The policy should include provisions that specifically address distracted driving, speeding, drowsy or impaired driving, seat belt usage, and other topics we've outlined in the "Define your safety objectives" section on the previous page.
- Communicate your safety policy to your drivers and provide a way for drivers to officially acknowledge they understand and agree to adhere to the safety policy.
- At least once a year, run motor vehicle record (MVR) checks on all drivers who operate a company-owned or personal vehicle for company business. Review the MVR results in detail and establish a risk-scoring system based on the results.
- Provide regular driver safety training courses, particularly for drivers whose risk scores are out of line with your established parameters.

Rewarding good drivers with simple incentive programs helps encourage safe driving.

Be prepared to reinforce your safety policy frequently, and apply it across your entire fleet to ensure its effectiveness. While there's no way to guarantee that you'll never incur a negligent entrustment accident, establishing and enforcing a solid safety and risk management policy will go a long way toward limiting your liability if one of your drivers is involved in an accident.

If an employee's driving record becomes unacceptable, consider revoking their driving privileges or access to company vehicles. Have the employee sign a statement indicating they understand the reason for this probation, along with the consequences they may face if they violate the conditions of their probation.

Don't focus solely on the negatives, however. We've found that rewarding good drivers with simple incentive programs helps encourage safe driving. For example, try giving special recognition to any driver who remains accident- or violation-free each year.

Enhance your driver orientation and training programs

While driver training is generally a requirement for young drivers and those new to your organization, we recommend that all drivers – no matter their experience level – participate in annual

If an employee's driving record becomes unacceptable, consider revoking their driving privileges or access to company vehicles.

classroom driver training. After all, regulations change and technology is constantly evolving. Plus, there's value in ensuring all drivers throughout your company are on the same page regarding your expectations.

New driver orientation is the first opportunity to communicate your company's expectations, including:

- Company policies and rules
- Driver safety objectives
- Acceptable driving records criteria
- Vehicle maintenance and inspection responsibilities
- Emergency procedures and accident reporting
- Municipal, state and federal regulations
- Vehicle security
- Personal use policies (using personal vehicles for work purposes)

Your general driver training should include sessions dedicated to:

- Operating vehicles of various models and sizes
- Pulling utility trailers or flatbeds with heavy loads
- Securing loads safely
- Driving in changing weather climates
- Recognizing and dealing with vehicle blinds spots
- Identifying alternate routes due to weather, road construction, traffic and other factors

We've worked with businesses throughout the construction industry for decades, and we've seen the positive impact a companywide commitment to safety can make. That commitment begins at the top.

Work with your management team to organize periodic updates, frequent driver meetings, refresher training opportunities, and seasonal training sessions. These action items demonstrate your dedication to your fleet safety policy – and to helping your drivers keep themselves and others safe on the road.

About Sentry

Sentry began in 1904, when members of the Wisconsin Retail Hardware Association formed their own insurance company. Backed by personalized care and Midwest roots, it's now one of the largest and most financially secure mutual insurance companies in the nation. As of May 2018, Sentry earned an A+ (superior) rating from A.M. Best, the industry's leading rating authority, for 27 years in a row.

2018 OSHA CHANGES

By Charles B. Palmer — Partner, Michael Best & Friedrich, LLP

There were some significant changes to the Ocupational Safety and Health Administration (OSHA) regulatory environment in 2018 that will impact how the agency operates during the next few years and how employers will be regulated. Here are a few of the more important changes.

❶ ELECTRONIC REPORTING OF OSHA 300 LOGS IS OUT

On July 30, OSHA issued a notice of proposed rulemaking that would eliminate an Obama-era requirement that employers electronically submit OSHA 300 and 301 injury records to a public recordkeeping site. While the rule change is pending, the reporting obligation is suspended.

Employers with more than 20 employees would still be required to electronically submit OSHA Form 300A, which is the summary of work-related injuries and illnesses. It provides only aggregate injury data, not specifics about each injury. The main purpose of the proposed rule change is to protect sensitive worker information from potential Freedom of Information Act (FOIA) requests.

For example, Form 301 requires employers to collect sensitive information, such as, descriptions of injuries and body parts affected with or without the worker's consent. OSHA determined that the electronic submission of Forms 300 and 301 was an undue burden on employers that did not justify the risk of disclosing sensitive worker information. The comment period ended Sept. 28, and 170 comments were submitted.

❷ SITE-SPECIFIC TARGETING IS BACK IN

On Oct. 17, The U.S. Department of Labor announced OSHA was initiating a Site-Specific Targeting Program. The program will use injury and illness information that employers electronically submitted for 2016. The primary purpose of the program is to target high-injury rate employers for inspection and ensure that employers are submitting their 300A Form. OSHA will target employers that it believes should have provided Form 300A data, but failed to do so, and employers with high incident rates.

The inspections resulting from the program will be comprehensive. This is essentially a reinstatement of a prior OSHA targeting program, with the added inspection risk for employers with more than 20 employees who did not file in 2016, or do not file electronic 300A forms in the future. Employers should review their OSHA incident rates and compare them with their industry's average to determine whether they may be subject to the Site-Specific Program inspections. The OSHA 300A form should be audited before filing to avoid over reporting.

HERE ARE A FEW OF THE MORE IMPORTANT CHANGES.

❶ ELECTRONIC REPORTING OF OSHA 300 LOGS IS OUT

❷ SITE SPECIFIC TARGETING IS BACK IN

❸ OSHA BACKTRACKS ON ANTI-RETALIATION RULES

❹ REPEAT CITATION STANDARD HAS CHANGED

❺ GENERAL INDUSTRY STANDARDS APPLICATION TO CONSTRUCTION MAY BE INVALID

❻ THE STATUTE OF LIMITATIONS MAY BLOCK CITATIONS OF ALLEGED CONTINUING VIOLATIONS

❼ OSHA EXPANSION OF INJURY INSPECTIONS BASED ON AN EMPHASIS PROGRAM OR 300 LOGS MAY BE PROHIBITED

❸ OSHA BACKTRACKS ON ANTI-RETALIATION RULES

Recently, OSHA clarified its position on workplace safety incentive programs and post-incident drug testing under 29 C.F.R. § 1904.35(b)(1)(iv). In 2016, OSHA published a final rule prohibiting employers from retaliating against employees who reported work-related injuries and illnesses. This rule impacted workplace safety incentive programs and post-incident drug testing because it viewed these as potential forms of retaliation, if a reported injury was the only trigger for such a program.

In its clarifying memorandum, OSHA concluded that the 2016 rule does not prohibit incentive programs and post-incident drug testing. Its reasoning was that the incentive programs and post-incident drug testing are implemented to promote workplace safety and health.

❹ REPEAT CITATION STANDARD HAS CHANGED

The Occupational Safety and Health Review Commission (OSHRC) has recently heightened OSHA's burden to prove repeat violations.

OSHA issued a citation to Angelica Textile Services, including four repeat violations. On July 24, OSHRC characterized these violations as "serious" rather than "repeat" violations. In the decision, the commission announced a new standard for repeat violations. Before the Angelica decision, OSHA only had to show substantial similarity in the type of equipment, process, or regulation involved in both citations. Now, a showing of substantial similarity can be rebutted by the company showing "disparate conditions and hazards associated with these violations of the same standard." In addition, a company's abatement efforts may also warrant a reduction in penalty.

For example, Angelica's previous citations were characterized by a complete failure to comply. But after the company's abatement efforts, the alleged "repeat" violations were only characterized by minimal deficiencies. Because of the changes made after the first citation, the OSHRC concluded that the violations were not "repeat" violations.

Employers should document comprehensive abatement efforts when they are cited for OSHA violations to ensure they are not later struck with enhanced, repeat violation penalties. Serious citations carry a penalty of up to $12,934 while a repeat penalty can be as much as $129,336.

❺ GENERAL INDUSTRY STANDARDS APPLICATION TO CONSTRUCTION MAY BE INVALID

The OSHRC recently held that OSHA's construction eyewash standard was invalid. Generally, all OSHA standards must go through notice and comment rulemaking before they can be enforced. However, in the 1970s, Congress authorized OSHA to adopt certain startup standards without going through this process because it wanted OSHA to get a running start on enforcing the standards.

When the startup standards were first adopted, the construction standards only applied to the construction industry, the maritime standards only applied to maritime work, and the manufacturing standards only applied to manufacturing. However, several months after the initial startup standards

were approved, OSHA decided that the startup standards could apply to all industries.

The OSHRC concluded that this was improper because the eyewash standard did not go through proper Notice and Comment Rulemaking to validly be applied to the construction industry. This decision is based partly on fairness. Employers in the construction industry never had the opportunity to comment on a proposed rule in the manufacturing industry because they would not expect it applied to them.

There are other standards that did not go through the appropriate notice and comment rulemaking procedures, so speak to your legal counsel before accepting a citation until OSHA resolves this issue.

❻ THE STATUTE OF LIMITATIONS MAY BLOCK CITATIONS OF ALLEGED CONTINUING VIOLATIONS

In Delek Refining v. OSHRC, the Fifth Circuit Court of Appeals recently held that the company's failure to take certain actions in 2005 was barred by the statute of limitations. 29 U.S.C. § 658(c) states, "no citation may be issued under this section after the expiration of six months following the occurrence of any violation."

The company's argument was based on AKM LLC v. Sec'y of Labor (Volks). Volks addressed the question whether injury recordkeeping violations that involved OSHA 300 log entries more than six (6) months prior to the issuance of a citation were barred by 29 U.S.C. § 658(c).

In Delek, a refinery was cited for certain Process Hazard Analysis deficiencies, which were documented years earlier. The Fifth Circuit found Volks persuasive, stating "just as a single violation occurred in Volks when the company failed to create the records within the prescribed time-period, so too (did the violations in this place) 'occur' within the meaning of Section 658(c) when an employer does not 'promptly' or 'timely' do as (the regulation) directs." Although the court concluded that the violations were time barred in this case, the court agreed with the statement in Volks that some safety violations could extend the statute of limitations when they involve continuing, unlawful risks to employee health and safety.

The result in Delek suggests that OSHA cannot merely rely on past documentation to issue a citation. OSHA must show a current violation and hazard to employees from that violation within the last six months. This may be relevant in the case of OSHA citations to any standard where there is a documentation, training, evaluation, or certification requirement in which OSHA alleges a continuing violation for omissions, or mistakes that occurred more than six months earlier.

❼ OSHA EXPANSION OF INJURY INSPECTIONS BASED ON AN EMPHASIS PROGRAM OR 300 LOGS MAY BE PROHIBITED

On Oct. 9, the Eleventh Circuit Court of Appeals in Georgia affirmed a lower court's decision to vacate a judicially issued inspection warrant. The issue arose after an employer reported an electrical accident to OSHA, and OSHA attempted to conduct a comprehensive inspection of the entire facility based on the company's recordkeeping forms. In the initial inspection, OSHA found a number of hazards that the "Poultry Regional Emphasis Program" identified as concerns. However, the company denied OSHA's request to conduct a comprehensive inspection.

The denial required OSHA to obtain an inspection warrant. The Eleventh Circuit found that OSHA failed to demonstrate probable cause for its expanded inspection warrant. The company's recordkeeping forms did not amount to reasonable suspicion that violations existed. Simply reporting an injury on an OSHA 300 form does not lead to the conclusion that the employer is in violation of an OSHA standard, and it does not require a full scale investigation. In addition, the court recognized that "the existence of a hazard does not necessarily establish the existence of a violation, and it is a violation which must be established by reasonable suspicion in the application" for a warrant.

AN IN-DEPTH LOOK AT OSHA'S ATTEMPTS AT ELECTRONIC RECORDKEEPING AND MORE

By Eric Hobbs — Attorney, Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

As 2018 moves along, so do things at the Department of Labor – but still pretty slowly. The president's nominated-but-still-unconfirmed candidates to lead the department's agencies continue to languish in the Senate, and the "acting" heads are reticent to take any significant steps toward change. Here is the latest as of the end of October.

Electronic Recordkeeping Rule

Probably the biggest news of the summer and early fall was the Occupational Safety and Health Administration's (OSHA) July publication of an anti-climactic Notice of Proposed Rulemaking (NPRM) to amend its electronic recordkeeping (really electronic injury data reporting) rule and its October publication of a memorandum reversing its position on post-incident drug testing and safety incentive programs as retaliatory under the rule.

All the agency proposed in the NPRM was to eliminate the obligation of employers with larger establishments to report electronically their 300 Log and Form 301 data, in addition to their Form 300A (Annual Summary) data. In sum:

What would change?

- Employers with 250 or more employees in a single establishment no longer would need to e-file their 300 Logs or Forms 301, but still would have to e-file their 300A summaries annually. The reason offered by OSHA is that collection of the 300 and 301 logs "adds uncertain enforcement benefits, while significantly increasing the risk to worker privacy."
- Employers would have to submit their employer identification numbers (EIN) when e-filing their Forms 300A to "reduce or eliminate duplicative reporting." OSHA points out that BLS data collection surveys already require this information, suggesting that the additional requirement is no big deal.

What would not change?

- Employers with 20-249 employees in designated industries still would e-file their Forms 300A annually.
- In the NPRM, OSHA makes no comment on its interpretation that the rule allows the agency to issue citations for employee whistleblower discrimination or retaliation, without an employee who has complained and without regard for OSH Act Section 11(c)'s requirement that whistleblower complaints be filed by a complainant within 30 days of an adverse action.

Comments on the NPRM were due to OSHA on or before Sept 25.

While the regulated employer community thought OSHA had missed its opportunity in the NPRM to walk back or at least to modify the agency's positions on post-incident drug testing and

> THE PURPOSE OF THIS MEMORANDUM IS TO CLARIFY THE DEPARTMENT'S POSITION THAT **(THE RETALIATION PROVISION OF THE RULE)** DOES NOT PROHIBIT WORKPLACE SAFETY INCENTIVE PROGRAMS OR POST– INCIDENT DRUG TESTING."
>
> **OSHA**

safety incentive programs as retaliatory, all were surprised on Oct. 11 when OSHA issued a memorandum to its field personnel essentially doing a 180 on both positions.

"The purpose of this memorandum," OSHA said, "is to clarify the Department's position that (the retaliation provision of the rule) does not prohibit workplace safety incentive programs or post- incident drug testing."

In the preamble to its final rule, OSHA had taken the position that post-accident testing policies/testing might violate 29 C.F.R. § 1904.35(b)(1)(i) ("You must establish a reasonable procedure for employees to report work-related injuries and illnesses promptly and accurately. A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness."); or 29 C.F.R. §1904.36 ("In addition to [29 C.F.R.] §1904.35, section 11(c) of the OSH Act also prohibits you from discriminating against an employee for reporting a work-related fatality, injury, or illness…"). In the Oct. 11 memorandum, OSHA reversed itself and said, among other things:

With respect to safety incentive programs (emphasis added):

- "One type of incentive program rewards workers for reporting near-misses or hazards, and encourages involvement in a safety and health management system. Positive action taken under this type of program is ***always permissible*** under [the Rule]."
- "Another type of incentive program is rate-based and focuses on reducing the number of reported injuries and illnesses. This type of program typically rewards employees with a prize or bonus at the end of an injury-free month or evaluates managers based on their work unit's lack of injuries. ***Rate-based incentive programs are also permissible*** … as long as they are not implemented in a manner that discourages reporting. Thus, if an employer takes a negative action against an employee under a rate-based incentive program, such as withholding a prize or bonus because of a reported injury, OSHA would not cite the employer under [the rule] as long as the employer has implemented adequate precautions to ensure that employees feel free to report an injury or illness."
- "An employer could avoid any inadvertent deterrent effects of a rate-based incentive program by taking positive steps to create a workplace culture that emphasizes safety, not just rates. For example, any inadvertent deterrent effect of a rate-based incentive program on employee reporting would likely be counterbalanced if the employer also implements elements such as:
  - An incentive program that rewards employees for identifying unsafe conditions in the workplace;
  - A training program for all employees to reinforce reporting rights and responsibilities and emphasize the employer's non-retaliation policy; or
  - A mechanism for accurately evaluating employees' willingness to report injuries and illnesses.

With respect to post-incident drug testing:

- "… (M)ost instances of workplace drug testing are permissible under (the rule)."
- Examples of permissible drug testing include:
  - Random drug testing.
  - Drug testing unrelated to the reporting of a work-related injury or illness.
  - Drug testing under a state workers' compensation law.
  - Drug testing under other federal law, such as a U.S. Department of Transportation rule.
  - Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees.

If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries.

Notably, the two federal court challenges to the rule, which have been effectively stayed since President Donald Trump took office, are still pending. It remains to be seen if either of them will be re-enlivened and if the judges assigned to them will rule on the plaintiffs' challenges to many of the electronic recordkeeping rule's unchanged provisions and OSHA's interpretations. Indeed, it is conceivable that one or more of the plaintiffs may withdraw their complaints and seek dismissal. But, if not, there still is a chance the rule will be found unlawful, in whole or in part.

Reestablishment of the 'Site-Specific Targeting' Program.

In a related move, and to the surprise of just about everyone, OSHA announced Oct. 16 that it will conduct comprehensive inspections of employers' *non-construction* worksites having 20 or more employees, based on the employers' electronically-submitted injury/illness data e-filed in 2017. The establishment lists (primary, secondary and tertiary, as in the case of the former SST program) will be divided into "high-rate establishments" and "low-rate establishments." High-rate establishments will be those with "elevated" (above average) days away, restricted or transferred (DART) rates. The low-rate establishments will be included solely to verify the reliability of the information they submitted to OSHA in their Forms 300A. In addition, OSHA will be targeting for inspection employers it believes should have electronically submitted 2016 data in 2017, but did not. Any employer selected for inspection should be certain, before allowing the inspection, to require the compliance officer to establish to the employer's satisfaction that it really is on the SST list and in which category.

(Non-)Confirmation of Scott Mugno as OSHA Chief

It is nearly certain that one of the reasons the electronic recordkeeping rule NPRM proposes to change as little as it does is that OSHA still is without a confirmed head. Scott Mugno remains the nominee, and the Senate remains focused on the confirmations first of judicial appointments. There has been a lot of talk over the

KEY RETIREMENTS AT OSHA AND SOL

Another development on the enforcement front is the retirement of OSHA's chief of enforcement, Tom Galassi. Galassi, who retired in July, has been a stabilizing force during this period of uncertainty and, for a while, appeared to be the leading candidate for the position of career deputy assistant secretary. He served in the temporary position of deputy for a time early on in the Trump Administration, and many in business were surprised to see him replaced. It wasn't until this summer that he announced his plan to retire. Who will replace him also is yet to be seen.

It is conceivable, however, that no successor will be named until a new assistant secretary for OSHA is confirmed. In the meantime, Galassi's second-in-command, Patrick Kapust, will serve as acting director. Needless to say, for those on the compliance side of OSHA, the choice of his predecessor will be very important. The director of the construction enforcement has not changed. Dean McKenzie remains in that position.

At about the same time Galassi retired, so did OSHA Associate Solicitor of Labor Ann Rosenthal. For the past several years, Rosenthal has been responsible for leading OSHA's litigation charge nationally, working with the solicitor of labor (the Department of Labor's top lawyer) to set litigation policy in OSHA cases. Who will replace Rosenthal also is up in the air. The predecessor can make a significant difference to how OSHA approaches litigation nationally, what cases it chooses to press, what remedies it seeks, etc. So, we watch carefully.

last few months about Senate Republicans and Democrats agreeing on a "package" of nominees – a compromise – that both would agree to confirm by consent. It is conceivable that, by the time of publication, Mugno will have been confirmed. If that is the case, it is also nearly certain that the next year will see considerably more change at OSHA than we have seen since President Trump took office. If Mugno has not been confirmed, however, he likely will need to be renominated for the third time, we hope, by the next Congress … which will be after the mid-term elections.

Until then, dramatic policy change is unlikely. And that means the regional and area OSHA offices likely will maintain the status quo in enforcement, unless otherwise directed by things like the Oct. 11 memorandum on post-incident drug testing, safety incentive programs and the new SST program.

Suit against OSHA to Produce Data Collected under the Electronic Recordkeeping Rule

In January, the public advocacy group Public Citizen sued OSHA in federal court in Washington over the agency's refusal to produce, under the Freedom of Information Act, employer data that has been submitted under the electronic recordkeeping rule. Public Citizen has asked the court to order OSHA to produce all data submitted under the rule from Aug. 1 to Dec. 31. Such disclosure and misuse by third parties – competitors, unions, plaintiffs' lawyers, etc. – of the data is one of the major reasons businesses objected to OSHA's collection of injury and illness data in the first place. If the court rules in favor of Public Citizen, the push for an even more significant amendment of the rule is sure to grow.

The Relationship of More Funding with Posting Fatalities On-Line

On a bit of a related note, the Senate Appropriations Committee in June approved a bill that would increase OSHA's funding by about 1 percent. In the bill, the committee also instructs OSHA to resume "timely" posting of work-related fatalities on its website, something the Trump Administration had stopped doing in mid-2017. It will interesting to see what kind of a reception that bill gets from the Senate as a whole.

LEGAL PRIMER

CONDUCTING & MANAGING THE RESULTS OF SAFETY AUDITS

By Attorney Troy D. Thompson — Axley Brynelson, LLP

The Duty To Audit

Under the Occupational Safety and Health Act ("OSH Act") and its substantive regulations, employers in the construction industry are subject to a comprehensive safety and health audit requirement. Covered employers must institute a safety and health program that provides for "frequent and regular" inspections of job sites by "competent persons" to assure compliance with OSHA's construction standards. Some contractors remain unaware of this requirement until after it is too late and a preventable injury has occurred and/or OSHA has issued a citation and penalty.

Among other things, OSHA's construction standard states:

> THE POINT IS THAT SAFETY COMPLIANCE CAN ONLY BE OBTAINED WITH A REQUISITE LEVEL OF UNDERSTANDING OF THE APPLICABLE REGULATIONS.

> Contractor requirements. Accident prevention responsibilities. (1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part. (2) Such programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers. 29 C.F.R. § 1926(b)(2).

The regulations explain that a "competent person" is one who is specifically designated by the employer and capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them. 29 C.F.R. § 1926.32(f).

Suffice it to say, compliance with this standard requires the employer and competent person to have a technical understanding of applicable OSHA standards. It also requires an ongoing and significant commitment to developing and effectively implementing an overall employee safety and health program and promptly abating violative conditions when they arise.

In addition to OSHA's requirement of frequent and regular inspections of job sites, OSHA imposes numerous other audit requirements on covered employers. Those requirements appear throughout the regulations in various individual standards.

For example, the regulations include audit requirements relating to confined spaces, lockout/tagout, and personal protective equipment, among others:

> The employer shall evaluate the workplace to determine if any spaces are permit-required confined spaces. 29 C.F.R. § 1910.146.

> The employer shall establish a program consisting of energy control procedures, employee training and periodic inspections

to ensure that before any employee performs any servicing or maintenance on a machine or equipment where the unexpected energizing, startup or release of stored energy could occur and cause injury, the machine or equipment shall be isolated from the energy source and rendered inoperative. 29 C.F.R. § 1910.147(c)(1).

The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer shall: (s)elect, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment; (c)ommunicate selection decisions to each affected employee; and, (s)elect PPE that properly fits each affected employee. 29 C.F.R. § 1910.132(d)(1).

It is not possible to list all of the audit or other requirements here. The point is that safety compliance can only be obtained with a requisite level of understanding of the applicable regulations. In other words, it is not sufficient for a contractor to merely apply a common sense approach to employee safety and health. Instead, compliance requires that each contractor engage qualified experts, internally or externally, who are familiar with the OSHA standards and prescriptive requirements.

For employers who do not have the resources to employ a full-time safety director, there are reasonable outside options available to assist them to get into compliance, such as contracting for safety and health consultation services through ABC of Wisconsin. ABC makes available to its members, for a reasonable fee, experienced consultants who can assist in the development of safety and health programs, job site inspections, and audit requirements, among other services.

Some insurance agencies and insurers may also provide safety and health consultation services as an added value to their clients. The State of Wisconsin Laboratory of Hygiene may be yet another option through its "WisCon" program which offers free consulting services to small employers, subject to some conditions.

This author recently had a very favorable experience with ABC of Wisconsin's safety consulting services. The author represented a general contractor in an OSHA fatality inspection following the tragic death of a subcontractor's employee on a multi-employer job site. OSHA cited the subcontractor and separately evaluated

whether the general contractor was in compliance with applicable regulations under the auspices of OSHA's multi-employer job site policy. The general contractor had a strong commitment to safety and had engaged ABC of Wisconsin to assist it in staying in compliance at the job site during the course of the project.

During the OSHA inspection, the OSHA compliance officer said he was impressed with the general contractor's safety compliance efforts as supported by ABC. That has left a strong, favorable impression of ABC's safety consulting services with this author.

Ultimately, compliance is a choice and an employer who fails to conduct or manage the results of required audits is exposed to potential liability associated with non-compliance. OSHA's current penalty structure starts at $12,934 per violation for serious or other-than-serious violations and $129,336 per violation for willful or repeated violations. In some cases, OSHA has applied an "egregious penalty" policy to penalize an employer on a per-instance or per-employee basis, which consists of OSHA stacking or multiplying penalties based on the length of a violation and/or the number of employees exposed. There are limits on OSHA's ability to apply its egregious penalty policy, but contractors should be aware of it.

The Duty To Abate Violative Conditions Revealed In Audit Findings

Significantly, it is not sufficient for an employer to merely go through the motions of conducting required audits. Rather, an employer must promptly abate or correct violative conditions identified in an audit. An employer who conducts the required audits but fails to properly manage the results can be exposed to significant liability including, for example, citations for willful violations of the OSH Act.

Although OSHA's focus is generally on the current inspection matter, during the course of an inspection, OSHA will periodically request that an employer produce information concerning prior audits, irrespective whether performed in-house or by an outside consultant, the findings, and the employer's actions taken to address the audit findings. In some cases, OSHA will request this information from the employer and separately from the outside expert, insurance agency, insurance company, etc. There are some defenses to an overly broad request, but OSHA has been successful in its efforts to obtain some of this information.

> THE BOTTOM LINE IS THAT EMPLOYERS HAVE A DUTY TO COMPLY WITH THEIR AUDIT OBLIGATIONS UNDER THE LAW AND TO PROPERLY MANAGE THE RESULTS.

An employer who conducts required audits and properly manages the results can achieve significant benefits including enhanced employee safety and health, reduced work injuries, lower worker's compensation premiums, and favorable treatment from OSHA on both citation and penalty matters. According to OSHA, in the event an employer permanently remedies a condition identified in a self-audit before an OSHA inspection takes place (and before the occurrence of an accident or other event triggering an inspection), OSHA's practice is to not issue a citation. If, on the other hand, an employer has identified a violative condition, and the OSHA inspection finds the violation before it is abated, a citation may be issued. An employer's good faith efforts to address an audit, albeit insufficiently, will generally benefit the employer. Conversely, if the employer has ignored the audit, OSHA may cite the employer for a willful violation.

The bottom line is that employers have a duty to comply with their audit obligations under the law and to properly manage the results. Courts have stressed that the OSH Act does not impose absolute liability on employers for non-compliance, but the act requires diligent efforts to comply. An employer who demonstrates good-faith efforts to comply is in a much better defensible position than an employer who operates without regard to the substantive requirements of the regulations.

The author, Troy D. Thompson, is a labor and employment attorney with Axley Brynelson, LLP in Madison, Wisconsin. He regularly represents employers in employee safety and health matters throughout the state of Wisconsin including OSHA and MSHA matters. He can be reached at (608) 283-6746 or tthompson@axley.com.

EVENT REMINDERS

ABC Associated Builders and Contractors, Inc.
Wisconsin Chapter

WWW.ABCWI.ORG

First Aid/CPR / Dec. 4 – West Bend area

Farmstead Wiring / Dec. 4 – Madison

First Aid/CPR / Dec. 5 – Stevens Point area

Construction U, Construction Leadership / Dec. 6 – Madison

First Aid/CPR / Dec. 6 – Eau Claire area

10-Hour OSHA / Dec. 6/Dec. 13 – Stevens Point

10-Hour OSHA / Dec. 7/Dec. 14 – Madison

Networking Social / Dec. 9 – Madison

First Aid/CPR / Dec. 20 – Madison

Apprentice Skill Competition / Jan. 25 – West Bend

SuperCon / Feb. 13-14 – Wisconsin Dells

Projects of Distinction Banquet / Feb. 14 – Wisconsin Dells

NEW MEMBERS

*For membership information contact **Bill Stranberg**, Membership Director*
Associated Builders & Contractors of WI – 608-244-5883

SEPTEMBER 2018

• Antigo Refrigeration & Heating Ltd. (Schulz Heating & Cooling Ltd.)
Jessica Fink
2238 Neva Road
Antigo, WI 54409
Phone: (715) 627-2665
Description: Mechanical Contractor
Sponsor: Steve Klessig, Keller, Inc.
Beam Club Members-to-date: 52

• Grade A Construction, Inc.
Jim Yaresh
157 Enterprise Road
Delafield, WI 53018
Phone: (262) 646-7590
Description: Drywall, Insulation, Painting & Staining Contractor
Sponsor: David Buslee, Clarity Management
Beam Club Members-to-date: 1

• Horizon Electric Company
Debra Gonyo
PO Box 270025
Milwaukee, WI 53227
Phone: (414) 604-9200
Description: Electrical Contractor
Sponsor: Jay Zahn, R&R Insurance Services, Inc.
Beam Club Members-to-date: 38

• Lange Plumbing, Inc.
Corey Champlin
N5769 State Road 58
New Lisbon, WI 53950
Phone: (608) 847-5599
Description: Plumbing Contractor
Sponsor: Scott Truehl, Friede & Associates, LLC
Beam Club Members-to-date: 9

OCTOBER 2018

• BayBrookes Heating & Cooling, LLC
Rhonda Herschelb
727 Industry Road, Suite A
Sauk City, WI 53583
Phone: (608) 644-1719
Description: Mechanical/HVAC Contractor
Sponsor: Joe Daniels, Joe Daniels Construction Co.
Beam Club Members-to-date: 17

• Innovation Electrical Service
Dave Faretta
W380 N8291 Mill St.
Oconomowoc, WI 53066
Phone: (262) 443-7595
Description: Electrical Contractor
Sponsor: Jay Zahn, R&R Insurance Services, Inc.
Beam Club Members-to-date: 39

• LaForce, Inc.
Ron Blank
2602 Agriculture Drive
Madison, WI 53718
Phone: (800) 236-8858
Description: Door Frames, Security Integration & Building Specialties Supplier
Sponsor: Dan Bertler, Supreme Structures Inc.
Beam Club Members-to-date: 28

• Your Service Company, Ltd.
Julian Coleman
1660 S. Church St.
Watertown, WI 53094
Phone: (414) 562-6446
Description: Mechanical Contractor
Sponsor: Val Anderson, A & A Plumbing of Milwaukee
Beam Club Members-to-date: 1

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