

## Four Important OSHA Developments

As we arrive at the mid-point of summer, we thought it would be a good idea to catch up on several important OSHA developments, which are discussed in the following sections.

### New Silica Rule

The new silica rule (the "Rule") will affect thousands of employers and millions of workers as discussed in a [recent article on the Rule](#).

Various industry groups oppose the Rule and it is uncertain whether the Rule will remain intact or whether it will be revised over the course of the next year or two. However, we recommend addressing the Rule now where it applies to your facility/operation. Employers should not wait until June 23, 2017 (if you are in the construction industry) and find that the Rule is in force and your facility/operation is not in compliance with the Rule.

### Temporary Workers

The use of temporary workers has recently seen a marked increase in the American work force. For example, according to the 2015 Staffing Law Conference, approximately 861,000 temporary jobs have been added to the U.S. economy since August 2009. And approximately 10.6 million people work in temporary jobs each year. Generally, temporary workers are employed through a staffing agency and the agency's client is the host employer. Host employers must be aware that temporary workers are entitled to the **same protections** under the Occupational Safety and Health Act of 1970 as all other covered workers. This means a temporary worker shall have the same training on Occupational Safety and Health Administration ("OSHA") regulations as full-time employees. In April 2013, OSHA launched the Temporary Worker Initiative. Under the Temporary Worker Initiative, the host employer has the primary responsibility for identifying hazards and complying with work site specific health and safety requirements. The staffing agency must ensure its workers are equipped with necessary protections and have the appropriate training.

In September 2015, the National Labor Relations Board ("NLRB") ruled that companies that use temporary workers are joint employers and share responsibility with the staffing agency or subcontracting agency for those

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workers. Importantly, the rule no longer requires that companies that only exercise direct control over temporary workers are subject to the rule; instead, merely having authority to control workers qualifies them as joint employers. The NLRB provided a number of recommendations, including: the parent company should verify and validate training that is applicable to the worker and define the training agreement with the staffing agency. For example, the host employer needs to conduct necessary worker training on equipment specific to the job. Training is to be conducted in languages comprehended by the workers (*i.e.*, it is not appropriate to conduct training in Spanish if member(s) of the work force are also Hmong).

To date, OSHA has published three bulletins pertaining to temporary workers:

1. Injury and Illness Recordkeeping Requirements;
2. Personal Protective Equipment; and
3. Whistleblower Protection Rights.

Additional bulletins are planned.

## Trenching and Excavation

Construction season is in full swing in Wisconsin, and a plethora of trenching and excavation work is being conducted on road projects. Unfortunately, one worker is killed approximately every month from a trenching incident. Trenching fatalities and injuries originate from cave-ins, falling loads (*e.g.*, slip of material from a crane), hazardous atmospheres in the trench (*e.g.*, methane) and equipment that falls into a trench. OSHA has two primary sets of regulations that pertain to trenching and excavation: 29 CFR 1926.651 (Specific Excavation Requirements) and 29 CFR 1926.652 (Requirements for Protective Systems).

As a practical matter, the party responsible for the trenching/excavation operation can substantially reduce trenching/excavation injuries and death by:

1. knowing where utility lines are located before starting an activity;
2. keeping heavy equipment and soil stockpiles from edges of the trench;
3. testing for atmospheric conditions if the trench is greater than four feet deep (*e.g.*, methane, lack of oxygen);

4. inspecting trenches at the start of each shift and after a water intrusion event, such as a major rainfall; and
5. not working under suspended or raised loads of materials.

## **Fines and Hazard Communication**

Two recent milestone events may affect your operations. First, as of June 1, 2016, all major components of OSHA's newly revised Hazard Communication Standard ("HCS") are now in effect. These components pertain to hazard classification, labeling, training and safety data sheets ("SDS"). The revised HCS is aligned with the United Nations' Globally Harmonized System for Classification and Labeling ("GHS"), and was promulgated in 2012. The initial compliance deadline was in December 2013 and required employers to conduct the appropriate worker training. The final deadline was June 2016. All facilities, subject to the HCS, should review the compliance status of their programs with the HCS/GHS Standard, including ensuring that chemicals are appropriately labeled and updated SDSs are in the required sixteen section format. If an employer does not receive correct labeling and SDSs from a supplier, the employer should request such information from the supplier and document that the request was made.

Second, employers should be aware that HCS is consistently one of the top three most frequently cited OSHA standard violations. On August 1, 2016, OSHA's civil penalty rate structure increases to reflect the consumer price index dating back several years. Fines for serious and other non-serious violations can rise 80% from the current maximum of \$7,000 to \$12,471. Fines for repeat and willful violations currently capped at \$70,000 will increase to \$124,709. Employers should also be aware that facilities inspected before August 1, 2016, but that receive an OSHA citation after August 1, 2016, will be subject to the new adjusted fine rates. Thus, even if your facility is inspected in July, if the citation is not issued until after August 1, your facility could be subject to the increased fine rate structure.

Thus, in the future, a facility will be subject to more HCS scrutiny and if violations are alleged, the facility may be subject to a substantial increase in fines.

If you have any questions regarding the above OSHA updates, contact Scott Prill.

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