



A Fast and Furious Safety, Labor and HR Update - Issue 1

Insights

3.26.16

A New Approach to My Posts

Last week I was honored to be named a Top Author in J.D. Supra Readers' Choice Awards. I write a great deal when I should probably be billing, but you guys seem to enjoy my stuff, so thanks! However, I often read an article or have an experience which merits discussion, but I don't have the time to prepare my preferred detailed analysis.

So, this Post is my first effort to alert you to a number of important issues and link you to pertinent articles without as much discussion. Hope you find these observations useful in your business.

Howard

I. A Flurry of D.C. Activity

We've told you that this Administration is not going out quietly. They will work until the midnight hour of their last day in office to change the law by regulation, decision, directive or fiat. On Wednesday, March 23, the US DOL released the long-awaited "**Persuader Rule**." On Thursday, Secretary Perez announced the even longer awaited Silica Rule. On March 22, the NLRB issued its Memorandum on "**Mandatory Submissions to the Division of Advice**," which shows the NLRB's aggressive priorities. We assume that we will soon see the release of OSHA's **Electronic Reporting Rule**.

A. US DOL Persuader Rule

So what you may ask is the "*Persuader Rule*." See our recent Alert for more detail. Many commentators view this rule as an effort to make it more difficult for employers to obtain legal guidance in responding to a union organizing effort. However, assuming that the proposed Rule survives the inevitable legal challenge, management labor law firms will comply with the regulation and still continue to provide needed legal counsel. The current NLRB has reversed 40 years of precedent and in this brave new world, employers need legal guidance on bargaining units, handling routine discipline and discharges during election campaigns, and avoiding promising benefits or wrongly changing existing terms and conditions of work.

ACTION POINT: Recognize the confusing changes in NLRB enforcement and seek advice to avoid pitfalls. An employer cannot respond to a Union Representation Petition in the same fashion as it did

under past Administrations. Trust your attorneys to obey whatever eventually emerges as the Persuader Rule. It's manageable.

B. Silica Rule

DOL Secretary Perez announced OSHA's new Silica Rule on Thursday. This is the second time that Secretary Perez or OSHA Head Dr. Michaels used a widely broadcast NPR show or series to gain maximum coverage, which is a great way to gain the maximum public impact. Dr. Michaels previously used NPR to announce the 2015 Hospital Ergonomics and Workplace Violence Effort.

Dr. Michaels views the Silica Rule as his legacy achievement now that the I2P2 Rule is seemingly DOA. The Agency's proposed rule would set a new permissible exposure limit (PEL) for respirable crystalline silica of 50 micrograms per cubic meter of air calculated as an eight-hour time-weighted average (TWA), down from 100 micrograms for general industry and 250 micrograms for construction and shipyards.

Construction employers will struggle, but we worry that the new Standard will especially harm foundries and primary metals. There are also reputable studies showing that if the current OSHA Standards were effectively enforced, almost all of the employees expected to benefit from the new standard might be equally protected. The AGC of America's Analysis is indicative of industry groups' valid concerns. See also the American Foundry Society page. Silica must be addressed but there are many concerns about OSHA's approach.

ACTION POINT: Carefully review your compliance with the existing OSHA Silica Standard cut-offs and determine where the new much lower PEL's will affect your operations and how to comply.

II. EEOC Issues

I am always shocked when I see a **discrimination case involving a "noose."** There is nothing more inflammatory than using a noose as a joke. A recent 9th Circuit case reminds us that employees remain capable of doing such foolish things. The important point is that some moron did not idly walk in one day and decide to place a noose as a misguided joke. Teasing and banter probably started out innocently and grew into a monster. If teasing and horseplay are allowed to get out of hand, these actions can mutate into bullying or harassment.

ACTION POINT: Train supervisors to recognize and control bad behavior at early stages before it results in harassment or discrimination claims or workplace violence.

Another case shows the importance of your **written job description**. An Oregon ADA-case has been allowed to proceed where a Sales Rep claimed that driving was not an essential function in the job and that if it is essential, providing a driver is a reasonable accommodation.

Action Point: Review those job descriptions and make sure that all essential functions are covered.

III. Wage-Hour

You have no doubt seen the articles about this week's Supreme Court decision allowing statistical analysis to be used in a "donning and duffing" wage-hour class action instead of requiring individualized evidentiary analysis. This decision makes it much easier for plaintiff employees to pursue class actions. Attorneys are still debating the extent to which this is a fact-specific ruling.

ACTION POINT: Maintain accurate timekeeping records to make individual, class and collective actions more difficult to pursue.

IV. Workplace Violence

Employers are wrestling with an expanding list of questions:

- Should I respond to reference checks on former employees with violent histories?
- Are there settings where we should allow employees to bring firearms on site?
- Should we ask employees to tell us when they are involved in domestic abuse situations and/or seek a restraining order?
- What is our "duty" to employees and their coworkers with regard to outside threats?
- How do we handle employees going alone to customer jobsites or homes?
- How can we recognize signs of potential violent behavior?
- What's our duty of accommodation to people with mental or emotional issues who display violent or antisocial behavior?

We are hosting two webinars on **March 29** and **April 14**, where we will discuss these issues with several current and former security or law enforcement advisors. We'll start with the list on March 29 and continue on April 14.

V. Drones

Construction, mining, agriculture, entertainment, utilities and other types of employers are using (or want to use) drones. As many as 2.7 million commercial users are predicted by 2020. Groups such as members of the National Association of Tower Erectors (NATE) are effectively using drones on a wide scale. However, the FAA has not yet provided official guidance for commercial use.

Much of industry is awaiting FAA guidance. Currently one needs, among other things, an exemption to Section 333 of the FAA's Modernization Reform Act of 2012. It is expected that the FAA will not require a full pilot's license but employers and lawyers will still wrestle over the definitions of adequate training and procedures.

Chris Gibson of Sentera recently spoke at the Carolinas AGC HR and Safety Conference about how they train their professional operators or customer-employer operators. Sentera also works with Boeing on assembling and modifying drones for commercial use and is an impressive organization. Drones are surprisingly simple to operate, but once the FAA issues guidance, employers will be expected to determine and follow industry standards, and companies like Sentera, provide examples of the training and procedures that they deem necessary. If you use drones, make sure that you can show that you are following industry best practices.

This week's Construction Today includes a detailed article by Georgia Tech Professor Dr. Javier Irizarry, P.E., CGP, Professor of Building Construction and Director, CONNECTech Lab. *Things to Consider B4 UFLY a Drone on a Jobsite.*

VI. Examples of Superior Safety and Building Ideas

The winners of the AGC-Willis Safety Awards were announced at the AGC National Convention this month. We have linked to the Lists of the Winner's Best Practices from 2014 and 2015. Can't wait to see the 2016 List of Best Practices. I know the Judges of the exhausting process used to determine the winners. If a contractor wins 1st, 2nd or 3rd in a category, they did far more than draft nice policies and achieve a low recordable rate. This year, **Sundt Construction, Inc. was** the Grand Award Winner. Try to imagine what it takes for a company this large to so excel in its safety efforts. I've served on the AGC National Safety Committee with Sundt Safety Professionals and they deserve the award. Got other clients and friends on the list, such as Faith Technology, and we're proud of them.

Follow this link to the AGC Alliant Building Awards, which were also released at the AGC National Convention. Must give a shout out to Gilbane. See also:

<http://www.businesswire.com/news/home/20160322005228/en/Alliant-Announces-Winners-2016-Build-America-Awards> .**Send us information about other safety and HR Awards.**

Follow this link to Construction and Engineering giant AECOM's recent release of its thoughtful **2015 AECOM Safety Report: Getting to the Heart of Safety.** I'm sure that AECOM would wisely state that they are a work in progress, but what does it say about a company that they go to such effort for an annual US and International Safety Report? AECOM includes sterling safety professionals from URS, Hunt, Tishman and other entities and seems to be drawing ideas from an All Star Team. Send me your ideas and we'll tout them.

Finally, 11,000 employee **Children's Healthcare of Atlanta**, deservedly recently won its 10th consecutive placement on the elite "Fortune magazine 100 Best Companies to Work For." Their win (again!) was not an accident. CHOA is wildly creative in how they recognize employee achievements and they celebrate and support employees who are pregnant, seek to improve their health, or serve in the US armed forces. Recently, CHOA formed teams of runners to push runner wheelchairs of disabled kids in the Atlanta Half marathon. **Try to top that!** Seriously, send examples to me.

We'll talk in future posts about other Construction and General Industry employers and their journeys in improving their safety, quality, and creating a workplace where employees want to work. We can learn from each other's' successes AND stumbles. There are only two stages in business ... improving or declining. There is no such thing, at least in my experience, in staying the same. **What do you think?**

VII. Self Help, Management and HR Guidance

I try on **Twitter** ([@howardmavity](#)) to review and repost Articles which are unique and practical but it's a near-overwhelming task. Please send us articles and posts that you find useful to your work. My buddy Travis Vance does the same ([TVanceLawyer](#)).

SITUATIONAL AWARENESS.

We're often oblivious to our surroundings and that's a problem for quality and especially for avoiding hazards. I fought full-contact mixed martial arts until I was 50 and had to undergo surgery to repair my optic orbit. Yes, I know that sounds weird, but the comradery was great and no one wanted to hurt one another. As I got older, I was fighting men one half my age. As I aged, I had to be supernaturally alert just to survive. There is something to that old saw about guile overwhelming youth, but only so far. A useful side effect of my middle aged efforts to survive is that I automatically and continuously survey EVERY setting, and even my jock 21 year old son is amazed at my reflexes when I am in LA traffic.

My point is that we MUST train workers to be situationally aware. They must never become nonchalant. Employees must constantly evaluate their workplace for hazards. This attitude is also vital if one has the misfortune to be in an active shooter scenario. Most employees would freeze and/or fall to the ground. That would not be my response. Admittedly years of boxing, judo and karate means that I'd refuse to be a victim. I'd be a hunter. But you don't have to have 20+ years of fighting experience to be situationally aware. A situationally aware person would somehow find a way to run, and that's the right decision in most cases.

We can't encourage our workers to get the snot beat out of them for years in martial arts, but we can train employees to constantly survey their environment and to react.

With that rather self-serving introduction, please review The Art of manliness' article: [10 Tests, Exercises, and Games to Heighten Your Senses and Situational Awareness](#)

Common Sense Guidance for Self-Management.

There are so many worthy articles on this topic, but I really liked [11 Skills that are Hard to Learn but Will Pay Off Forever](#). These suggestions are so damned practical.

Many of us are addicted to social media, so read this article: <http://www.entrepreneur.com/article/273031>

There is so much more that I could share. Let me know what subjects most interest you. I am scarily efficient at reviewing electronic media and I'll happily post what interests you.

Thanks again for reading my posts. The literally tens of thousands of hits I have received has been such an honor. **Let me know WHAT YOU WANT TO SEE.**

Related People



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