OLD REPUBLIC CONTRACTORS INSURANCE GROUP

REGREVIEW SM

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OSHA Implements New Weighting System for Inspections

OSHA announced that it has recently implemented the OSHA Weighting System (OWS) for fiscal year (FY) 2020. The Agency says OWS will encourage the appropriate allocation of resources to support its balanced approach of promoting safe and healthy workplaces, and continue to develop and support a management system that focuses enforcement activities on critical and strategic areas where the Agency's efforts can have the most impact.

Under the current enforcement weighting system, OSHA weights certain inspections based on the time taken to complete the inspection or, in some cases, the impact of the inspection on workplace safety and health. OSHA says OWS recognizes that time is not the only factor to assess when considering the potential impact of an inspection. Other factors — such as types of hazards inspected and abated, and effective targeting — also influence the impact on workplace safety and health. The new system adds enforcement initiatives such as the Site-Specific Targeting to the weighting system.

The OWS replaces the current enforcement weighting system initiated in FY 2015. The new system is based on an evaluation of the existing criteria and a working group's recommendations regarding improvements to the existing weighting system. OSHA says it has been running the new weighting system currently to confirm data integrity.

The system will continue to weight inspections, but will do so based on other factors, including Agency priorities and the impact of inspections, rather than simply on a time-weighted basis. OSHA says the new OWS approach will incorporate the three major work elements performed by the field: enforcement activity, essential enforcement support functions (e.g., severe injury reporting and complaint resolution), and compliance assistance efforts.

OWS takes effect October 1, 2019.

OSHA Issues Beryllium Final Rule for Construction, Shipyards

OSHA has issued a final rule on occupational exposure to beryllium and beryllium compounds in construction and shipyards by delaying the compliance deadlines for nearly all provisions of the standards to September 30, 2020.

The one exception to the September 30, 2020, compliance deadline is for the permissible exposure limit (PEL) and the short-term exposure limit (STEL), which OSHA has been enforcing since May 11, 2018. OSHA says this final rule confirms that the exposure limits remain in effect.

The Agency is not adopting the portion of the proposed rule that would have revised its existing beryllium standards for construction and shipyards to revoke the ancillary provisions.

OSHA says it will publish a new proposal for the construction and shipyard beryllium standards to seek comment on different changes it is considering. The final rule takes effect September 30, 2019.

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OSHA Approves New Respirator Fit Testing Protocols

OSHA has issued a final rule that provides employers with two new fit testing protocols for ensuring that employees' respirators fit properly.

The new protocols are the modified ambient aerosol condensation nuclei counter (CNC) quantitative fit testing protocol for full-face piece and half-mask elastomeric respirators, and the modified ambient aerosol CNC quantitative fit testing protocol for filtering face piece respirators. Both protocols are variations of the original OSHA-approved ambient aerosol CNC protocol, but have fewer test exercises, shorter exercise duration, and a more streamlined sampling sequence.

These two quantitative methods add to the four existing in Appendix A of OSHA's Respiratory Protection Standard at 1910.134, which contains mandatory respirator fit-testing protocols that employers must choose from to protect employees from hazardous airborne contaminants.

OSHA says the rule does not require employers in general industries, shipyard employment, and construction to update or replace their current fit testing methods, and does not impose additional costs. The rule took effect September 26, 2019.

New OSHA Alert Offers Solutions For Working Safely Near Overhead Power Lines

Working with or near power lines can expose workers to electrical hazards, but these dangers can be avoided through safe work practices. A new OSHA Alert outlines steps employers and workers can take to help prevent injuries from contact with power lines:

- Conduct a hazard assessment to identify and address potential safety hazards before work begins.
- Ask the electric company to de-energize and ground overhead power lines.
- Educate workers on safety procedures and requirements.
- Know the safe working distance for workers and equipment.
- Use non-conductive wood or fiberglass ladders.

Wear personal protective equipment, such as rubber insulating gloves and insulating sleeves, and industrial protective helmets.

General Duty Clause (The OSH Act 5.(a)(1))

The General Duty Clause, found in the Occupational Safety and Health Act of 1970, has become increasingly important to employers in the last few years as OSHA has begun to utilize the clause in more and more of its penalty and enforcement actions. The discussion below describes the General Duty Clause and how it is being used by OSHA to ensure a safe work environment.

Section 5(a)(1) of the Occupational Safety and Health Act of 1970 requires that all workers must be provided with a safe and healthful workplace. The section, more commonly known as the General Duty Clause, specifically states:

"Each employer shall furnish to each of his employees employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

California Amends Definition of "Serious Injury or Illness" For Reporting Purposes

A bill approved by California's governor on August 30 amends the definition of "serious injury or illness" for reporting purposes. Cal/OSHA says the bill brings the language in line with federal OSHA standards and creates uniformity in the state's Labor Code.

Specifically, the amendment:

- Revises the definition of a "serious injury or illness" occurring in the workplace or in connection with employment to remove the 24-hour minimum time requirement for inpatient hospitalization, for other than medical observation or diagnostic testing, and to include an employee suffering "an amputation," or "the loss of an eye," among other things, but does not include any injury, illness or death caused by an accident on a public street or highway, "unless the accident occurred in a construction zone."
- Deletes the exclusion of serious injury, illness or death caused by violations of the Penal Code in the workplace.
- Redefines serious exposure to include exposure of an employee to a hazardous substance in a degree or amount sufficient to create a "realistic possibility," instead of substantial probability, that a death or serious physical harm could result from the "actual hazard created by the" exposure.
- Establishes that a serious violation exists when Cal/OSHA determines that there is a "realistic possibility," instead of substantial probability, that death or serious harm could result from the "actual hazard created by" a condition alleged in a complaint.

The bill does not list an effective date, but state laws generally take effect on January 1 of the following year, unless a later date is specified in the statute.

OSHA Updates Field Operations Manual Used by Inspectors

OSHA recently issued a revised Field Operations Manual (FOM), which provides current information and guidance to the OSHA national, regional, and area offices concerning the Agency's policy and procedures for implementing inspections, issuing citations, and proposing penalties. OSHA says significant changes for the 2019 update include:

- Updated Enforcement Follow-Up and Monitoring Inspection in Chapter 2, Section VI.G.2.b.
- Updated Inspection Preparation and Planning in Chapter 3, Section II.A.
- Updated Inspection Scope in Chapter 3, Section III.B.
- Updated Refusal to Permit Inspection and Interference in Chapter 3, Section IV.C.1.
- Updated Walk-around Representatives in Chapter 3, Section VII.A.2.
- Updated General Penalty Policy in Chapter 6, Section I.
- Updated Civil Penalties to include the "Inflation Adjustment Act" in Chapter 6, Section II.A.
- Updated Chapter 6 to replace specific inflation-adjusted penalty amounts with references to the Annual Adjustments to OSHA Civil Penalties memorandum.
- Updated Procedures for an Inspection in Chapter 9, Section I.H.5.
- Updated Fatality and Catastrophe Investigations in Chapter 11 Section II.C.2.
- Updated Federal Agency Appeals Procedures in Chapter 13, Section VIII.G.2.f and VIII.G.3.
- Updated Citable Program Elements in Chapter 13, Table 13-1.
- Updated Obtaining Warrants in Chapter 15, Section III.

DOT Drug and Alcohol Clearinghouse Registration Begins

The CDL Drug and Alcohol Clearinghouse portal is now accepting stakeholder registrations in advance of the website's launch on January 6, 2020.

Motor carriers, medical review officers, substance abuse professionals, and consortium/third-party administrators must create an account to submit information to the portal. Motor carriers will need an account to perform the required investigations of drivers via the clearinghouse, and drivers may need an account depending on the type of query.

Submitting of data

Once implemented, employers and their service agents must populate the clearinghouse with:

- Their employees' DOT drug and alcohol violations under Part 382, and
- Verification of a CDL driver's completed steps in the DOT return-to-duty process.

A clearinghouse account is necessary to provide these data elements.

Employer Queries of the System

Effective January 6, 2020, motor carriers must request clearinghouse queries on applicants and existing CDL drivers. This task also requires the motor carrier have an active portal account. A driver may need an account.

The clearinghouse has driver privacy built into its rulemaking. A motor carrier must have permission to request a driver's DOT drug and alcohol history. The medium for consent differs based on the report type being provided.

A limited query is performed annually on existing drivers. The limited query simply alerts a motor carrier whether the driver has information in the database. Drivers sign a general consent of the motor carrier's making that is outside of the clearinghouse. Motor carriers may ask drivers to sign a consent that will work for more than one year, provided the release has an end date.

If a current driver has data in the clearinghouse, the employer must request a full query, which includes detailed information on the violation and any completed steps in the return-to-duty process. Motor carriers must also perform a full query as a part of the pre-employment process on new hires.

Due to the sensitive nature of the full query, the driver must have a portal account to electronically provide authorization. As a result, all applicants need a portal account, while existing drivers would only need one if a full query is necessary.

If a driver refuses to give permission to access his or her clearinghouse record (limited or full query), he or she cannot perform a safety-sensitive function.

Study: Truck Drivers Rank Among Most Sleep-Deprived Americans

A study from Ball State University indicates that truck drivers as a group are getting inadequate sleep.

The report analyzed more than 150,000 working adults from 2010 to 2018 and found that Americans getting seven hours or less of sleep increased from 30.9 percent in 2010 to 35.6 percent in 2018.

The transport and material moving industry ranked third among the professions with the highest levels of poor sleep, at 41 percent. Police and military ranked first at 50 percent and healthcare support occupations was second at 45 percent.

Inadequate sleep can lead to physical and mental health issues, injury, loss of productivity and premature death, according to the study's lead author.

The *Journal of Community Health* published the study on Monday, September 24.

Nearly 1,500 CMV Drivers Cited for Speeding During Operation Safe Driver Week

Speeding was the focus of this year's Operation Safe Driver Week. So appropriately, the most citations and warnings given to commercial motor vehicle (CMV) drivers during the event were speed-related.

Violations of the basic speed law and driving too fast for conditions ranked No. 1 on the list of citations given to CMV drivers during the Commercial Vehicle Safety Alliance's Operation Safe Driver Week, July 14-20, throughout North America.

Law enforcement officers issued 1,454 citations and 2,126 warnings to CMV drivers for speed-related violations.

In addition to focusing on driver behavior, CMV drivers received 6,170 state/local driver citations and 27,163 warnings for state/local violations such as vehicle-related equipment violations and expired license plate tags.

The top 10 list is as follows:

	Description	Citations	Warnings
1	Speeding/driving too fast for conditions	1,454	2,126
2	Failure to wear a seatbelt	954	586
3	Failure to obey a traffic control device	426	871
4	Using a handheld phone/texting	249	170
5	Improper lane change	92	194
6	Following to closely	57	143
7	Possession/use/under the influence of alcohol and/or drugs	55	18
8	Improper Passing	41	30
9	Inattentive, careless, and/or reckless driving	32	55
10	Operating while ill or fatigued	25	45

Study Indicates Widespread Drug Abuse in Trucking Industry

A study looking at drug abuse in the trucking industry resulted a hair test failure rate of 14.2 times greater than urine test rates, leading to the conclusion that drug abuse among drivers is a significant issue.

The University of Central Arkansas study paired the results from a survey of 151,662 truck drivers' paired urine and hair drug screenings. Based on the results of the study, it was determined that 310,250 truck drivers would fail a hair test for illicit drugs and opioids use.

Test results showed a significant discrepancy between drivers failing a urinalysis (949, or 0.6 percent) and those prospective drivers who either failed or refused to submit a hair test (12,824, or 8.5 percent).

The study stemmed from a Trucking Alliance survey of 15 trucking companies that utilize a pre-employment hair test when hiring commercial truck drivers, along with the federally required urine test.

The most widely detected drugs were (in order) cocaine, opioids (including heroin), and marijuana. Positive tests for all these drugs automatically disqualify drivers with commercial driver's licenses from operating a commercial truck.

Among the conclusions from the study:

1. The sample size was large enough to draw inferences to the national driver population, with a 99 percent confidence level and a margin of error of less than 1 percent;
2. The sample is representative of the national truck driver population; and
3. The urine vs. hair tests can be generalized across the national driver population.

Masonry Contractor Cited for Exposing Employees to Fall, Scaffolding Hazards

OSHA has cited an Illinois company for exposing employees to fall and scaffolding hazards while working on a commercial building project in Chicago. The company faces penalties of $252,136 and has been placed in the Severe Violator Enforcement Program.

OSHA inspectors cited the company for repeat and other-than-serious safety violations, including failing to provide fall protection, install guardrail systems on platforms, provide safe access to scaffold work platforms, use rebar caps to protect employees from impalement hazards, document fall protection training, and submit injury and illness logs.

OSHA has cited the company for fall protection violations 13 times since 2010. The company has 15 business days from receipt of the citations and penalties to comply, request an informal conference with OSHA’s area director, or content the findings before the independent Occupational Safety and Health Review Commission (OSHRC).

CBAs May Not Allow for the Delay of FMLA Leave

Millions of employees work under a collective bargaining agreement (CBA). Such agreements can provide for any number of benefits, but what they may not do, according to a 9/10/19 U.S. Department of Labor (DOL) opinion letter, is agree to or allow the delay of FMLA leave when the leave would otherwise qualify for FMLA protections.

On March 24, 2019, the DOL issued an opinion letter that had a ripple effect through the FMLA administration community. It generally indicated that when leave qualifies for FMLA protections, neither the employer nor the employee may delay it while the employee is using other accrued paid time off. If the leave qualifies, then the paid time off would run concurrently with the otherwise unpaid FMLA leave.

In light of this, some employers changed their policies to stop allowing the delay of FMLA leave. But what if, wondered at least some of these employers, a CBA provides for paid leave and employees would prefer to start the delay of FMLA leave? This can be particularly true if taking FMLA leave before taking accrued paid leave might negatively impact an employee's seniority status under the applicable CBA and state civil service rules, as determined by a state's civil service commission.

Tough noogies, says the DOL. Once an employee puts you on notice of the need for leave, the FMLA clock starts ticking, and you need to provide an eligibility/rights and responsibilities notice. The employer is also responsible in all circumstances for designating leave as FMLA-qualifying and giving notice of the designation. Failure to follow the FMLA's notice requirements may constitute interference with, restraint on, or denial of the exercise of an employee's FMLA rights.

"Once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave."

This is true even if the employer is obligated to provide job protections and other benefits equal to or greater than those required by the FMLA pursuant to a CBA or state civil service rules.

The DOL didn't stop there. It indicated that, if pursuant to a CBA and other policies, an employer provides for the accrual of seniority when employees are utilizing accrued paid leave, it must permit employees to accrue seniority when they are substituting FMLA leave for paid leave.

The March opinion letter resulted in confusion for many employers, and this latest entry will likely give rise to more questions. With this second letter, it should be clear that, if the leave would otherwise qualify for FMLA protections, employers are to provide those protections and not delay them during accrued paid leave.

Does Hazcom Apply to Office Environments?

Office settings

Office workers who encounter hazardous chemicals only in isolated instances are not covered by 29 CFR 1910.1200, the Hazard Communication Standard. OSHA considers most office products such as pens, pencils, adhesive tape, and correction fluid to be exempt under the provisions of the rule, either as articles or as consumer products.

For instance, OSHA has previously stated that intermittent or occasional use of a copying machine does not result in coverage under the rule. However, if an employee is responsible for replacing the toner in all the copiers in the building, or whose only job is to operate and service the copier for eight hours a day, then the Hazard Communication Standard would apply.

Final Research Agenda for Hearing Loss Prevention Issued

The National Institute for Occupational Safety and Health (NIOSH) says the final National Occupational Research Agenda (NORA) for Hearing Loss Prevention is now available. The Agenda is intended to identify the knowledge and actions most urgently needed to prevent hearing loss in the workplace, and to provide a vehicle for stakeholders to describe the most relevant issues, research gaps, and needs for workers across various industries.

The following objectives were agreed upon for the hearing loss prevention Agenda, which was finalized after a public comment period:

1. Provide scientific basis for policies and guidelines that will inform best practices for hearing loss prevention efforts.
2. Develop effective, evidence-based education designed to improve hearing conservation program outcomes for exposed workers and management.
3. Develop, commercialize, and widely implement noise control solutions on jobsites in key industries.
4. Develop audiological tests for hearing loss prevention.
5. Improve occupational hearing loss surveillance.

Yes, the FMCSA Can Launch a Surprise Audit

The Federal Motor Carrier Safety Administration (FMCSA) is not required to provide advanced notice when contacting motor carriers about an audit to check on compliance regulations. But before you start walking on eggshells about an unexpected audit, some advice.

Not Normal

A surprise audit is not the norm with the FMCSA. While within the rules, the agency more often than not gives carriers notice that an action will take place. Be aware that surprise audits are more likely when time is an important factor, such as after a serious crash or fear that evidence may be destroyed if advanced notice is given.

Typical Timeline

An investigator will typically give you at least one week's notice — and often more — before visiting for an audit. The advanced notice should give you time to gather all your required records in advance, and make the experience go smoother for all parties.

Providing Records

If an audit begins and your compliance records are stored onsite, you must present them upon request. Otherwise, §390.29(b) gives you up to 48 hours excluding weekends and holidays to get any requested records to the audit location.

Preparation Tips

While an audit — or even just the threat of one — can be a nerve-wracking experience, here are some basic steps to make sure you'll pass the test.

- **Don't panic:** Review your letter to know what agency is coming to visit, and look for any specific instructions and any listing of records the investigator will be examining.
- **Stay up to date:** Make sure you are up to date with paperwork filing, and review the regulations and your compliance program so you are prepared to respond to questions.
- **Self-audit:** Conduct them either internally or through a third-party safety and compliance provider that cover areas subject to review by the DOT. It's a sound business practice and can help you get a better understanding of what investigators are looking for.

Using a Master Key for Lockout/Tagout

The lockout/tagout standard generally relies on each authorized employee applying a personal lock and retaining the key for it. According to 1910.147(e)(3), the authorized employee who applied a lock or tag should be the one who removes it. However, that paragraph contains an exception:

When the authorized employee who applied the lockout or tagout device is not available to remove it, that device may be removed under the direction of the employer, provided that specific procedures and training for such removal have been developed, documented and incorporated into the employer's energy control program.

Since a tagout device must be non-reusable, destruction of the device would be required to remove it. Many employers apply a similar standard to locks, using bolt cutters or other destructive methods if a lock needs to be removed by someone other than the authorized employee who applied it.

Procedures and Training

Using a master key to remove a lock could be acceptable — after putting some procedures in place and providing training. The exception says the employer must provide equivalent safety to having the authorized employee remove his lock. These procedures must include:

- Verification that the authorized employee who applied the device is not at the facility;
- Making all reasonable efforts to contact that authorized employee to inform him/her that the device has been removed; and
- Ensuring that the authorized employee knows the lock was removed before he resumes work at that facility.

In a letter of interpretation from February 28, 2000, OSHA clarified that bolt cutters or other destructive methods are not the only options for someone other than the authorized employee to remove a lock. That letter stated, “Safety is ensured not through the use of a specific removal device, be it a master key or bolt-cutter; rather, it lies in effective procedures, careful training, and procedures designed to ensure accountability.”

OSHA clarified that using a master key would be deemed equivalent only if lock removal was performed under the employer’s direction and in accordance with 1910.147(e)(3), as summarized above. Specific procedures and training must be developed and included in the energy control program, with procedures to ensure that only persons authorized and trained to use the master key can gain access to it.

That letter concluded by noting, “The success of any employer’s energy control program, including lockout or tagout device removal actions, depends upon ensuring that its employees follow established, effective procedures, thereby respecting the sanctity of another employee’s lockout or tagout device.”

Safely Using Scissor Lifts

Working at heights is always dangerous, and becomes even more dangerous when employees are elevated in equipment that can move. For employees using scissor lifts, most operating rules start with “do not” (actually, a lot of OSHA rules start with “do not”). Safety, however, depends not only on avoiding unsafe actions, but on following safe practices. Employees may need a list of “always do” items along with the prohibited “never do” items.

Always inspect before use

Workers must be trained to use scissor lifts, and must demonstrate that they can use the equipment properly. This includes properly maintaining the equipment and following the manufacturer's instructions.

A scissor lift is not a powered industrial truck according to OSHA, but a pre-use inspection (similar to pre-shift forklift inspections) should be conducted. Remember that OSHA even requires employees to inspect stepladders before the first use on each shift, so requiring your employees inspect scissor lifts makes sense.

They'll need training on how to do that, and what to look for. The manufacturer may recommend things like testing controls, ensuring that guardrail systems are functioning, and verifying that brakes are operating properly before each use. Employees should always report any defects or maintenance needs.

Always use equipment safely

Workers should understand all rules for safe operation, but as noted, these rules might be better presented as a "to do" list rather than a "never do" list. For example, rather than telling workers to never move the lift while in an elevated position, offer a list of operating rules like, "Always lower the lift before moving to a new work area."

Other "to do" operating rules might include:

- Always evaluate the work area for possible hazards.
- Verify that the work surface is stable and free from objects that could affect stability.
- Check the wind speed to ensure that it is not excessive.
- Use any required personal protective equipment.

Most injuries and fatalities involving scissor lifts were the result of employers not addressing matters like fall protection, stabilization, or positioning (such as working near power lines). By providing employees a list of things to always check before starting work, they'll have positive steps to follow. This may better encourage them to follow safe work practices, rather than expecting them to go through a negative checklist of things to avoid.

Bloodborne Pathogen Coverage and Vaccinations

The bloodborne pathogens standard is not meant solely for employees in health care, although many provisions seem particular to that industry, such as handling used needles and contaminated laundry. Still, any employee who has occupational exposure to blood or other potentially infectious materials (OPIM) falls under the standard.

In layman's terms, occupational exposure means reasonably anticipated contact with blood or OPIM as a result of job duties. For example, employees who are designated to provide first aid or medical assistance as part of their job duties would be covered by the bloodborne standard. According to OSHA, it is reasonable to anticipate that such employees will have occupational exposure to blood or OPIM, so they must be trained as required in the standard.

Some exceptions

Some employees may have training in first aid, but not be covered by the standard. For example, a company might host a CPR class at no cost to employees as a benefit. Not all employees who take the course will be designated as first responders, and the employer won't expect them to assist injured coworkers. Therefore, they do not have occupational exposure and are not covered by the standard.

Good Samaritan acts are not considered occupational exposures unless the employee is a member of a first aid team or is otherwise expected to provide medical assistance. Some employees may choose to help injured coworkers, but OSHA recognizes that employers cannot reasonably anticipate which individuals (not designated as responders) would choose to help.

Vaccination provisions

Employees with occupational exposure must be offered the hepatitis B vaccine and vaccination series. Some employees may decline, and in fact OSHA estimated that only about half of employees offered the vaccine would accept it. An employee who declines must sign a hepatitis B vaccine declination, which can be found in Appendix A to 1910.1030.

In some cases, a covered employee may decline because he or she already received the vaccination. If so, medical documentation of the vaccination should be included in the employee's medical file if at all possible. If such documentation cannot be obtained, the employee must sign the declination form.

Note an employee could initially decline the vaccination, but later change his or her mind and request it. If the employee's duties still involve occupational exposure, the employer must make the vaccination available.

Finally, if an employee has an exposure incident while acting as a Good Samaritan, the employer is not required to provide the vaccination series, nor offer the post-exposure evaluation other follow-up. However, OSHA encourages employers to do so.

Does Your Attendance Policy Violate the FMLA?

Jeremy was one of the many employees that needed unforeseeable intermittent leave, for him because of migraines. The company had a no-fault attendance policy that assessed points for certain absences. If an employee accumulated 11 or more points, he or she was terminated. Some reasons for absences, including FMLA leave, were excluded from the point system. Therefore, Jeremy did not have points assessed for his FMLA leave.

The attendance policy also allowed employees to reduce the number of points by one for every 30 days of perfect attendance. The policy considered time off for vacations, bereavement, jury duty, holidays, and other absences as hours worked, so taking such time off did not stop or reset the 30-day clock. The policy did not, however, include FMLA leave in the point reduction benefit.

Jeremy accumulated 12 points under the policy and was terminated. In response, he sued arguing that the company interfered with his FMLA rights because each time he used intermittent FMLA leave, the 30-day perfect attendance clock was impermissibly interrupted and reset, interfering with his ability to reduce accumulated points under the attendance policy. If the company treated his FMLA leave the same as the other excluded types of absences, he would have fewer points on his attendance record and he would not have been terminated.

The employer argued that the policy did not interfere with FMLA rights, it treated FMLA leave the same as equivalent non-FMLA leave for purposes of its attendance point reduction schedule. Until an employee reached the 30-day mark, he has accrued no benefit — benefit being the actual reduction of an absence point — so there can be no benefit to be restored upon returning.

The court indicated that attaching negative consequences to the exercise of protected rights surely tends to chill an employee's willingness to exercise FMLA rights; Jeremy's ability to remain employed hinged on his not taking FMLA leave. The court also opined that the point reduction could be viewed as an employment benefit, the accrual of which, like the accrual of other benefits or seniority, must be available to an employee upon return from leave.

In two separate opinion letters, the most recent of which was issued in August 2018, the Department of Labor (DOL) applied the FMLA regulations to no-fault attendance and point-reduction policies and stated that accrual toward point reduction must, at the very least, be frozen during FMLA leave. In its 1999 opinion letter, the DOL indicated that an employer's FMLA obligation to restore an employee to the same or equivalent position includes the obligation to restore the number of days accrued toward absentee point reduction.

If your company has an attendance point policy, ensure that it does not assess points for FMLA leave, and if it also includes an attendance point reduction provision, make sure it includes FMLA leave as hours worked, and does not stop the reduction clock.

Dyer v. Ventra Sandusky, LLC , Sixth Circuit Court of Appeals, No. 18-3802, August 8, 2019

Brake Inspector Requirements §396.25

Motor carriers operating commercial motor vehicles must make sure that each of their brake inspectors is qualified. A "brake inspector" is defined as a person who:

- Is an employee of the motor carrier; and
- Is responsible for making sure that all brake inspections, maintenance, repairs, or service are done in compliance with the applicable safety standards.

While the regulations do not apply to those who are not employed by the motor carrier, they place responsibility on the motor carrier to assign only qualified employees for assuring that any repair, adjustments, inspections, or service meet the safety standards.

The brake inspector qualification requirements can be met in such ways as completing an officially approved apprenticeship or training program or through relevant training and/or experience totaling at least 1 year.

Passing the air-brake tests required for a commercial driver's license (CDL) does **not** automatically qualify a driver as a brake inspector. Such a driver may examine a vehicle's air brakes — such as during a routine vehicle inspection — but may **not** perform brake adjustments or other brake–related tasks without having the training or experience required by §396.25.

If permitted by their employers, drivers can be authorized to perform brake adjustments at a roadside inspection if those adjustments are done under the supervision of a qualified brake inspector. Such supervision may be by telephone.

Documentation of Inspector's Qualifications

The carrier must maintain evidence of the inspector's qualifications at its principal place of business or where the inspector is employed. The documentation must be retained for as long as the inspector is employed in that capacity and for 1 year after that. (396.25(e))

The above brake-inspector regulations came into effect on January 1, 1991, and had to be implemented by January 1, 1992.

Can a Company Issue a Back Support to an Associate Without a Prescription from a Physician?

Back belt

You may issue PPE without a doctor's prescription. However, OSHA would prefer that employers attempt to reduce ergonomic hazards by addressing engineering, work practice, and administrative controls, and that PPE be used only as a last resort. In a letter of interpretation 0920/1993 – Personal protective equipment, general requirements and employer responsibility, OSHA states:

"If a hazard cannot be removed by engineering, or administratively controlled in the workplace then personal protective equipment would be required."

Engineering controls – physical changes to the job to control or reduce the hazards

Work practice controls – changes in the way employees perform the work (such as lifting technique, two-person lift teams, using micro-breaks, etc.)

Administrative controls – policies that are designed to reduce the magnitude, duration, and/or frequency of exposure (reducing shift length, rotating workers, scheduling more breaks, adjusting the work pace, etc.)

After all of these approaches have been tried, then employers may use PPE to supplement these other controls. PPE does not eliminate ergonomic hazards and it cannot be relied on as a permanent solution to MSDS hazards unless other feasible controls are unavailable.

NIOSH has also concluded that the results of studies analyzing the effectiveness of back belts in injury reduction show insufficient evidence that back belts actually do reduce injury. In fact, NIOSH says there is some research showing that workers believe they can lift more when wearing a back belt, and may subject themselves to even greater risk by lifting more weight than they would have without a belt.

Where Can I Find the OSHA Regulations on Safe Lifting?

Lifting

There is no OSHA regulation that specifically addresses safe lifting procedures. If, during an OSHA inspector's review of an employer's records or as the result of an employee complaint, a great number of lifting injuries are uncovered which the employer has not taken steps to resolve, the employer may be cited under Section 5(a)(1) of the OSH Act, commonly referred to as the General Duty Clause. This section of the Act requires employers to provide a safe and healthful workplace for their employees.

Use the NIOSH revised lifting equation to evaluate manual lifting tasks and ensure that your workers are lifting safely.