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REGREVIEW SM

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Are Large Product Heating, Aging Furnaces Confined Spaces? OSHA Says Yes

In a recent Letter of Interpretation (LOI), OSHA addresses whether the definition of confined space applies to large product heating and aging furnaces. Such furnaces are used to heat product parts using natural gas to temperatures ranging from 700°F to 2200°F to facilitate material processing.

One of the requirements in the definition of confined space is that it must have a limited or restricted means of entry or exit. The LOI addresses questions on whether this applies to the furnaces.

OSHA says yes, based on the following:

- Stepping into furnaces that are 22 to 29 inches above the building floor, which would require more than one step (9.5 inches) to climb up, may be considered restricted.
- The furnaces' doors are actuated remotely, so an employee within this space cannot walk out of the space without restriction.
- If some special means of access such as ladders, and temporary, movable, spiral, or articulated stairs are needed to enter the space, they may be considered a limited or restricted means of egress making the space confined under the standard.

General industry employers should follow the regulations at 1910.146 to determine their obligations regarding confined space work.

EPA Adds Aerosol Cans to Universal Waste Regulations

EPA has added hazardous waste aerosol cans to the list of materials that can be managed under the Resource Conservation and Recovery Act's (RCRA) universal waste management system. The Agency says the final rule promotes the collection and recycling of these cans and encourages the development of municipal and commercial collection programs to reduce the quantity of aerosol cans going to municipal solid waste landfills or combustors.

The final rule affects those who generate, transport, treat, recycle, or dispose of hazardous waste aerosol cans, unless they are households or very small quantity generators (VSQGs). Entities potentially affected by this action include over 25,000 industrial facilities in 20 different industries, including the retail, construction, and manufacturing sectors.

Five states - California, Colorado, New Mexico, Ohio, and Utah already have universal waste aerosol can programs in place and have set standards for puncturing and draining aerosol cans by universal waste handlers.

The final rule greatly benefits retailers by simplifying handling requirements for hazardous waste aerosol cans. The rule takes effect 60 days after publication in the *Federal Register*.

Fall 2019 Regulatory/Deregulatory Agenda Released

On November 20, the White House Office of Management and Budget (OMB) released the Fall 2019 Unified Agenda of Regulatory and Deregulatory Actions. The Agenda provides a sneak peek into the federal government's plans to create, revise, or withdraw regulations in the next year.

Some of OSHA's listings for upcoming rulemakings include:

Rule	Timetable
Powered Industrial Trucks Design, Standard Update	Proposed rule, Jan. 2020
Update to theHazard, Communication Standard	Proposed rule, Jan. 2020
Welding in Construction Confined Spaces	Proposed rule, Feb. 2020
Walking Working Surfaces	Proposed rule, April 2020
Amendments to the Cranes and Derricks in Construction Standard	Proposed rule, May 2020
Communication Tower Safety	Proposed rule, September 2020
Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records	Final rule, December 2019
Technical Corrections to 27 OSHA Standards and Regulations	Final rule, December 2019
Exposure to Beryllium to Review General Industry Provisions	Final rule, December 2019

Other upcoming rules are still in the early stages of development; in many cases, OSHA is still gathering background information. These future revisions would affect the following areas:

- Emergency Response
- Mechanical Power Presses Update
- Powered Industrial Trucks
- Lockout/Tagout Update
- Tree Care Standard
- Prevention of Workplace Violence in Health Care and Social Assistance
- Blood Lead Level for Medical Removal
- Occupational Exposure to Crystalline Silica; Revisions to Table 1 in the Standard for Construction

How Can You Determine if a Musculoskeletal Disorder (MSD) is Work-Related?

Work-relatedness

Not all musculoskeletal disorders (MSDs) are work-related. MSDs can and do develop outside the workplace. The determination of whether any particular MSD is work-related may require the use of different approaches tailored to specific workplace conditions and exposures. Broadly speaking, establishing the work-relatedness of a specific case may include:

- Taking a careful history of the patient and the illness;
- Conducting a thorough medical examination; and
- Characterizing factors on and off the job that may have caused or contributed to the MSD.

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A Peek at What's on Deck for Regulatory Changes

It's that time of year again. The time when everyone can let out a collective sigh of relief and excitement as the U.S. Government regulatory bodies have published their fall unified agenda. Yes, it is a time of wonder. If you wonder what the government has planned regarding employment laws, read on.

Joint employment: The Equal Employment Opportunity Commission (EEOC), National Labor Relations Board (NLRB), and the Department of Labor (DOL) all plan to issue regulations governing joint employment. The changes to the Fair Labor Standards Act are designed to provide clarity and thereby enhance compliance, including adopting a four-part balancing test to determine if two or more companies are joint employers. The DOL believes the proposed changes will help to promote greater uniformity among court decisions nationwide. A final rule is scheduled for December.

Regular rate: A revision to the Fair Labor Standards Act seeks to provide additional guidance on whether more modern forms of compensation and benefits need to be included in the regular rate and overtime calculations. This would allow employers more flexibility regarding, for example, employee discounts, wellness benefits, and tuition reimbursements. A final rule is scheduled for December.

FMLA: The Department of Labor's Wage and Hour Division (WHD) plans to publish a Request for Information (RFI) on the FMLA yet this month. This RFI, is looking for comments on ways to improve the FMLA to help both employees and employers. The WHD has also investigated revising the FMLA forms. Although this RFI could lead to proposed revisions to the FMLA regulations sometime next year, a final rule could depend upon the Presidential election.

Tip credit: The DOL wants to align its regulations with the recent statutory changes. The agency is also proposing to revise the existing "dual jobs" regulation to provide greater clarity regarding an employer's ability to take a tip credit to satisfy minimum wage obligations for time spent by a tipped employee performing duties that are related to the employee's tipped occupation. Don't get too excited about this one, the next step is that the comment period will end December 9. This does mean, however, that you still have time to voice your input on this.

Fluctuating workweek: Currently, the use of the fluctuating workweek method is not available to employers who compensate their employees with bonuses or other incentive-based pay. The DOL proposes to revise these regulations to grant employers greater flexibility to provide additional forms of compensation to employees whose hours vary from week to week. The comment period for this is ending on December 5.

Wellness programs: The EEOC plans to revise the regulations to implement the equal employment provisions of the Americans with Disabilities Act (ADA) to address the interaction between title I of the ADA and wellness programs. This issue has been in the hopper for some years, and maybe this time a final rule is in the future. Don't hold your breath too long, however, as a proposed rule is scheduled for January.

There you have it. Time to deck the halls with vast pages from the unified agenda to the merriment of all. No better way to bring that warm, welcoming feeling to you and yours.

Entry-Level Driver Training Delay Looming

The Federal Motor Carrier Safety Administration (FMCSA) is expected to announce a delay of the entry-level driver training (ELDT) rule in the days or weeks to come.

In July, FMCSA issued a proposal that would delay two provisions of the rule for two years. The agency proposed delaying:

- The compliance date for electronic transmission of information by training providers to the FMCSA, and
- The compliance date for electronic transmission of information from the FMCSA to state driver licensing agencies.

The agency accepted comments through mid-August. While it remains likely that FMCSA will delay these two aspects of the rule, **a full delay of the rule now appears imminent**.

What does this mean?

If FMCSA goes forward with a full delay, the current process to obtain a commercial driver's license (CDL) will remain in place. This means that an individual with a commercial learner's permit (CLP) is not subject to a specific course of knowledge and skills training, provided by an FMCSA approved entity prior to taking the CDL skills test.

For training entities, this means not having to meet all of the curriculum, facility, and trainer requirements that would have been mandated by the rule. While some training entities may delay putting these provisions in place, others will continue to implement the requirements as a best practice measure in anticipation of the rule going into effect at a later date.

Senate Bill Would Promote Women in Trucking Industry

Two U.S. Senators introduced a bipartisan bill supporting the involvement of more women in the trucking industry. The *"Promoting Women in Trucking Workforce Act"* was introduced by Senators Tammy Baldwin of Wisconsin and Jerry Moran of Kansas.

The bill would instruct the Federal Motor Carrier Safety Administration (FMCSA) to establish a Women of Trucking Advisory Board and identify the barriers women face when trying to enter the trucking industry. The act would include working with organizations and companies to coordinate formal education and training programs while helping to identify and establish training and mentorship opportunities.

Statistics show that the trucking industry lags behind the U.S. labor force for hiring women. Women make up 47 percent of the general workforce, but only 24 percent are employed in the trucking industry, and only 7 percent are drivers.

The proposed legislation would also require FMCSA to submit a report to Congress on the board's findings and recommendations. The Women in Trucking Association and the American Trucking Association both support the bill.

Critical Violations Sideline 13.5% of CMVs During Brake Safety Week

Brake-related violations sent 13.5 percent of inspected commercial motor vehicles (CMVs) out-of-service during the Commercial Vehicle Safety Alliance (CVSA) Brake Safety Week in September.

Inspectors conducted 34,320 inspections of CMVs the week of September 15 to 21, 2019, placing 4,626 vehicles out-of-service after critical brake-related conditions were identified during roadside inspections.

When a vehicle is placed out-of-service due to a critical violation, motor carriers must correct the violation before the vehicle can proceed.

Other data collected during Brake Safety Week included:

- 2,567 vehicles had chafed rubber hose violations;
- 1,347 vehicles had chafed thermoplastic hose violations;
- 2,704 violations of §393.45 of the Federal Motor Carrier Safety Regulations (FMCSRs) and Canadian equivalent included chafed rubber hoses; and
- 1,683 violations of §393.45 of the FMCSRs and Canadian equivalent violations included kinked thermoplastic hoses.

BLS: Employer-Reported Injury, Illness Rate Unchanged in 2018

The Bureau of Labor Statistics (BLS) recently released its Employer-Reported Workplace Injuries and Illnesses report, which show there were 2.8 million nonfatal workplace injuries and illnesses reported by private industry employers in 2018, unchanged from 2017. The numbers translate to a rate of 2.8 cases per 100 full-time equivalent (FTE) workers.

The data are estimates from the 2018 Survey of Occupational Injuries and Illnesses (SOII), which covers counts and incidence rates of employer-reported nonfatal workplace injuries and illnesses by industry and type of case, along with more detailed estimates of case circumstances and worker characteristics for cases that resulted in days away from work.

Highlights from the report include:

- The incidence rate for total recordable cases (TRC) in private industry remained unchanged from 2017, as did the incidence rates for days away from work (DAFW) cases and for days of job transfer and restriction only (DJTR).
- Retail trade was the only private industry sector where the TRC rate increased in 2018, from 3.3 cases to 3.5 cases per 100 FTE workers.
- Within private industry, there were 900,380 injuries or illnesses that caused employees to miss at least one day of work in 2018.
- Results from the SOII contain the first national estimates for emergency room (ER) and hospital visits for nonfatal occupational injuries and illnesses requiring DAFW. These estimates include case and demographic data such as industry, event, and occupation.
- A total of nearly 334,000 DAFW cases resulted in a visit to the ER or in-patient hospital.

Power Buttons not Energy Isolating Devices

The lockout/tagout requirements generally apply if an employee needs to remove or bypass a guard, or place any part of his body into a machine's point of operation (there is a minor servicing exception in 1910.147(a)(2)(ii), but that's another article).

The term "lockout" involves, according to OSHA, the "placement of a lockout device on an energy isolating device" under an established procedure. Further, an "energy isolating device" means something that "physically prevents the transmission or release of energy." Significantly, 1910.147 clarifies that "Push buttons, selector switches and other control circuit type devices are not energy isolating devices."

This means that simply turning off a machine using a power switch, or activating an emergency stop button, will not normally suffice for lockout. These switches typically interrupt a control circuit, which does not meet OSHA's definition for an energy isolating device. Of course, an electrician might be able to assist in either installing an appropriate disconnect switch or determine whether the current switch meets the OSHA definition.

Trying to simplify lockout procedures, some employers have applied creative thinking regarding power switches, but responses from OSHA have usually rejected these efforts.

Locking power switches

One employer asked about installing a bracket to a power switch, allowing it to be locked while in the "off" position. Responding to this idea in a letter of interpretation from 2003, OSHA said this "may be acceptable" but only if the switch is an energy isolating device that physically prevents the transmission of electrical energy. As noted, that's usually not the case.

In addition, OSHA mentioned that installing a locking bracket would be a modification to the electrical box, likely resulting in a violation of Subpart S, Design Safety Standards for Electrical Systems, unless the change was "approved" (as defined in 1910.399) through independent third-party testing.

Exclusive control?
Another employer noted that lockout requirements don't apply if equipment is controlled by unplugging it, and the plug is under the exclusive control of the employee doing the service. So, the employer asked whether the "exclusive control" exception could apply when a power switch was under the control of the employee doing the maintenance.

Responding to whether flipping a power switch would be similar to "unplugging" equipment, OSHA issued a letter from 2000, stating that the cord and plug exception does not apply to on/off switches, and that expanding that "exclusive control" provision to those switches would require a new rulemaking.

Injured Employees, Light Duty, and Working from Home

If an employee gets injured and is unable to perform the usual job duties, you likely offer light duty. Providing light duty not only turns "days away" into "restricted work" on your 300 Log, but keeps the employee active in the workplace. This can help speed the employee's recovery, maintain a routine of coming to work, and allow you to track how the employee is doing.

In some cases, an injured employee might be limited in the number of hours he can work each day. For example, perhaps the employee can work only four hours rather than the usual eight hours. This is still considered a restricted work case, not a lost time case.

It may also happen that an employee is physically able to perform some work, but is unable to report for to the workplace. For example, a knee injury may prevent the employee from driving, but he might still be able to perform some tasks from home (even if only light duty). Unfortunately, OSHA has said that if an employee works from home, the days will likely need to be recorded as lost time — even if the employee performs all routine job functions.

OSHA interpretation
Normally, if an employee performs all routine job functions, the injury is not a restricted work case. However, a letter of interpretation from August 26, 2008, addressed this question: If a clerical employee injures her knee and cannot report to work, but performs all usual job duties from home, is this considered lost time if she doesn't ordinarily work at home?

OSHA noted that since working from home is not part of her normal schedule, the case would have to be recorded as days away, even though she's performing all regular duties. However, OSHA did note that the answer would differ if she normally worked from home. For example, if she ordinarily worked from home two days per week, the employer could count two days of restriction and three days of lost time for each week of recovery.

Workers' compensation
As that scenario shows, there may be cases where offering light duty or allowing an employee to work from home won't change how the case is recorded on the 300 Log. However, assigning work (even light duty) may still be worthwhile for workers' compensation purposes.

Generally, an employee who is unable to work will be eligible for wage replacement benefits through workers' compensation. However, most states will deny (or reduce) those benefits if the employee refuses a light duty offer. Workers' compensation is a type of insurance, and it won't pay an employee who could be earning wages but simply refuses to accept the work.

Does Hazcom Apply to Office Environments?

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.

File MCS-150, and Don't Risk USDOT Number Deactivation

In the past, the purpose of the MCS-150 form was for interstate motor carriers to register with the Federal Motor Carrier Safety Administration (FMCSA), let them know details about your operation, and obtain a USDOT number.

That changed a few years ago. Now, all existing carriers use the MCS-150 only to update their information. New carriers use an online-only MCSA-1 form to obtain their USDOT number, but then switch to the MCS-150 after that to make updates. Even after that change, the MCS-150 remains an important form for you to understand.

Filing requirements

FMCSA requires that you file your MCS-150 every two years according to Section 390.19T, but that is merely the minimum.

The update is required biennially even if your company information has not changed. It is also required if your company has ceased interstate operations since the last required update or if you are no longer in business and you did not notify FMCSA.

You may update your MCS-150 information as often as necessary to keep your information current. However, you must at minimum update according to the schedule. You are also encouraged to file your form online for a faster processing experience.

The mandatory biennial update filing schedule is determined by your specific USDOT number:

USDOT Number ending in:	Must file by last day of:
1	January
2	February
3	March
4	April
5	May
6	June
7	July
8	August
9	September
0	October

If the next-to-last digit of your USDOT number is odd, you must file an update in every odd-numbered calendar year. If the next-to-last digit of your USDOT number is even, you file the update in every even-numbered calendar year.

Consequences for not filing

Real consequences exist for the failure to file your biennial update. You run the risk of deactivation of your USDOT number and face civil penalties of up to $1,270 per day, to a maximum of $12,695.

FMCSA Drug & Alcohol Clearinghouse Query Plans Now Available for Purchase

Query plans are now available to purchase for employers of drivers requiring a commercial driver's license. The announcement comes two months before launch of the Federal Motor Carrier Safety Administration (FMCSA) Drug & Alcohol Clearinghouse on January 6, 2020.

Purchasing a query plan enables motor carriers and their designated consortia or third-party administrators to conduct queries for all current and potential new employees as required by §382.701.

Queries are electronic checks in the Clearinghouse used by carriers to learn if current or potentially future employees are prohibited from driving a commercial motor vehicle or performing other safety-sensitive functions due to an unresolved violation under Part 382.

The plans can only be purchased on the FMCSA Clearinghouse website by registered employers.

FMCSA will charge a flat fee of $1.25 for every limited or full query and offer bundles depending on need, though the bundles do not offer a discount per query. Discounts per query are available if carriers purchase an unlimited bundle plan for $24,500.

IRS Increases Retirement Plan Limits for 2020

Every year, the IRS looks at the cost-of-living and makes changes to the contribution limit for employees who participate in 401(k), 403(b), and most 457 plans. The IRS announced that the contribution limit for tax year 2020 increases from $19,000 to $19,500. Other limits are also increasing:

- The catch-up contribution limit for employees aged 50 and over who participate in these plans is increased from $6,000 to $6,500.
- The limitation regarding SIMPLE retirement accounts for 2020 is increased to $13,500, up from $13,000 for 2019.
- The income ranges for determining eligibility to make deductible contributions to traditional Individual Retirement Arrangements (IRAs), to contribute to Roth IRAs and to claim the Saver's Credit all increased for 2020.

The limit on annual contributions to an IRA remains unchanged at $6,000. The additional catch-up contribution limit for individuals aged 50 and over is not subject to an annual cost-of-living adjustment and remains $1,000.

Employers who offer such retirement plans will need to be aware of these changes to inform employees. This will involved reviewing and updating qualified plans, related summary plan descriptions, and other relevant employee communications, to help ensure that their employees have the information they need to make financial decisions. Open enrollment is also occurring for many employers, and these new changes will add to employee benefit managers' busy schedule.

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

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.