OLD REPUBLIC CONTRACTORS INSURANCE GROUP

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Preparing for Entry-level Driver Training Changes

Federal entry-level driving training requirements will change starting in February of 2020. The state of California is getting ahead of the deadline by announcing changes of its own. Could California's actions serve as a preview of what lies ahead for the rest of the country?

The legislative measure declares that the California Department of Motor Vehicles must adopt the entry-level driver training rules in Parts 380, 383, and 384 of the Federal Motor Carrier Safety Regulations by June 5, 2020.

On that day, California minimum behind-the-wheel training hours to obtain a commercial driver's license (CDL) will take effect. The adoption calls for Class A and Class B CDL applicants having a minimum of 15 hours of behind-the-wheel training, with 10 of the 15 hours taking place on a public road.

A minimum number of behind-the-wheel training hours are included in the *proposed* entry-level driver training regulations by the Federal Motor Carrier Safety Administration (FMCSA), but the final rule did not include this provision. Behind-the-wheel training in FMCSA's final rule includes road instruction but sets no minimum for number of training hours.

Looking to February 7, 2020

Federal requirements for the entry-level driver training rule, which can be found in 49 CFR Part 380, will change on February 7, 2020. The new rule establishes minimum training standards for a driver applying for an initial CDL, upgrading a current CDL, or obtaining a passenger, school bus, or hazardous material endorsement for the first time.

The current rule, which will sunset on February 7, 2020, requires only that drivers receive training on four specific topics before being allowed to operate commercial motor vehicles (CMVs):

1) Driver qualification requirements
2) Hours-of-service
3) Driver wellness
4) Whistleblower protection

Continued ⇨

Preparing for Entry-level Driver Training Changes (Cont.)

Changes to rule

After February 7, 2020, entry-level drivers must successfully complete a prescribed program of theory and behind-the-wheel instruction from a school or other entity listed on FMCSA's Training Provider Registry (TPR).

The categories drivers must be tested on include:

- **Theory instruction** in 30 specific topics under the areas of: Basic Operation; Safe Operating Procedures; Advanced Operating Practices; Vehicle Systems and Reporting Malfunctions; and Non-Driving Activities.
- **Behind-the-wheel instruction** in both range and public road instruction covering about two-dozen topics, including required topics of vehicle control, speed and space management, backing, and parking.

Training related to passenger, school bus, or hazardous materials must come from a provider listed on the TPR to receive an endorsement related to that specific curriculum.

Is Your Independent Contractor Driver Really an Employee?

On October 3, the Supreme Court heard arguments on a case involving whether independent contractors in the transportation industry are really employees and have employee rights, including sidestepping arbitration and instead have their cases heard in court.

Currently, many transportation companies use independent contractors as drivers. These drivers who are engaged in interstate commerce may be required to have any disputes with the company go through arbitration, and not decided by a court. One trucker put this concept to the test when he claimed that he was an employee, and sued the company for failing to pay him for all hours worked. As an employee (and not an independent contractor) he could file his claim in court and not go through arbitration.

The employer, on the other hand, argued that, the driver was an independent contractor, therefore, he could be held to arbitration, and not take his case to court.

The district court agreed with the driver that independent contractors could have cases taken to court, rather than forced to proceed only via arbitration. The case was appealed and the appeals court affirmed the lower court's decision. The basis behind the argument was whether the driver was, indeed, an employee.

Now the Supreme Court has taken up the case, and its outcome could have substantial effect. Depending upon how the high court rules, trucking companies might have a greater challenge labeling drivers as independent contractors. Companies might also be prohibited from requiring independent contractors in the transportation industry to settle issues via arbitration. Those drivers could sue in court, and the cases could even involve class actions. Currently arbitration agreements may (and often do) prohibit class actions.

The transportation industry involves thousands of independent drivers. If these drivers can show that they are employees, the industry could see some sweeping changes, including a driver's ability to sidestep arbitration. In such situations, cases could stretch over time in the courts, placing new demands on transportation companies.

Is Your Independent Contractor Driver Really an Employee?
(Cont.)

Some legal professionals have suggested that at least a couple of the Supreme Court Justices are sympathetic to the driver's argument.

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The case is *New Prime v. Oliveira*; 17-340. A decision is expected by June. We'll keep you posted.

OSHA Reverses Policy on Drug Testing, Incentive Programs

OSHA has changed course in its view of employers' post-incident drug testing programs and injury rate-based incentive programs. In a Memorandum to Regional Administrators and State Designees published October 11, the Agency now says most of these types of programs do not run afoul of the anti-retaliation provisions of the injury and illness recordkeeping regulation at §1904.35(b)(1)(iv).

This is a huge shift in policy guidance from that published when the Agency issued the final rule in May 2016 requiring employers to electronically submit injury and illness records. As part of that rulemaking, OSHA added a provision that employers not have any barriers for employees to report injuries or illnesses. The rule also said that employers could not discriminate or punish employees for being injured.

While the rule itself didn't address drug testing or incentive programs, policy guidance published along with it indicated that most post-incident drug testing programs would be in violation. The same thing was said about incentive programs that were tied to injury rates.

But now, OSHA says that many employers who implement safety incentive programs and/or conduct post-incident drug testing do so to promote workplace safety and health. In addition, the Agency says evidence that the employer consistently enforces legitimate work rules (whether or not an injury or illness is reported) would demonstrate that the employer is serious about creating a culture of safety, not just the appearance of reducing rates. Thus, action taken under a safety incentive program or post-incident drug testing policy would only violate §1904.35(b)(1)(iv) if the employer took the action to penalize an employee for reporting a work-related injury or illness rather than for the legitimate purpose of promoting workplace safety and health.

OSHA Reverses Policy on Drug Testing, Incentive Programs (Cont.)

In the new policy, OSHA says that incentive programs can be an important tool to promote workplace safety and health. 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," the Agency says, "is always permissible under §1904.35(b)(1)(iv)."

OSHA describes another type of incentive program that is rate-based and focuses on reducing the number of reported injuries and illnesses. These programs typically reward employees with a prize or bonus at the end of an injury-free month or evaluate managers based on their work unit's lack of injuries. The Agency says these rate-based incentive programs are also permissible under §1904.35(b)(1)(iv) "as long as they are not implemented in a manner that discourages reporting."

So, 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 §1904.35(b)(1)(iv) as long as the employer has implemented adequate precautions to ensure that employees feel free to report an injury or illness.

What would be an "adequate precaution"?

OSHA says that a statement that employees are encouraged to report and will not face retaliation for reporting may not, by itself, be adequate to ensure that employees actually feel free to report, particularly when the consequence for reporting will be a lost opportunity to receive a substantial reward. However, 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, the Agency says that any inadvertent deterrent effect of a rate-based incentive program on employee reporting would likely be counterbalanced if the employer also implements

- 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 emphasizes the employer's non-retaliation policy;
- A mechanism for accurately evaluating employees' willingness to report injuries and illnesses.

In addition, OSHA says that most instances of workplace drug testing are permissible under §1904.35(b)(1)(iv). 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.

NIOSH Announces New Online Resources for Lockout/Tagout in Manufacturing

The National Institute for Occupational Safety and Health (NIOSH) announced new online resources from the National Occupational Research Agenda (NORA) Manufacturing Sector Council, which are designed to help businesses safeguard employees from the release of hazardous energy during service and maintenance activities. NORA is a partnership program developed by NIOSH that identifies workplace safety and health issues that require more attention and research.

Members of the NORA Manufacturing Sector Council reviewed, adapted, and compiled resources to create the website as a guide to help businesses start or improve and maintain their existing hazardous energy control (lockout/tagout) program. The failure to develop and use hazardous energy control procedures is one of OSHA's annual top 10 most frequently cited workplace safety violations.

Link: https://www.cdc.gov/niosh/docs/wp-solutions/2011-156/pdfs/2011-156.pdf

Sexual Harassment Claims with EEOC Skyrocket

The U.S. Equal Employment Opportunity Commission (EEOC), which enforces the employment anti-discrimination laws, announced preliminary FY 2018 sexual harassment data.

Based on the preliminary data, in FY 2018, which ended September 30:

- The EEOC filed 66 harassment lawsuits, including 41 that included allegations of sexual harassment. That reflects more than a 50 percent increase in suits challenging sexual harassment over fiscal year 2017.
- Charges filed with the EEOC alleging sexual harassment increased by more than 12 percent from fiscal year 2017 to more than 7,500; the first increase in at least eight years.
- For charges alleging harassment, reasonable cause findings increased to nearly 1,200 in FY 2018 compared to 970 in FY 2017. Successful conciliations reached nearly 500 up from 348 in FY 2017.
- Overall, the EEOC recovered nearly $70 million for the victims of sexual harassment through litigation and administrative enforcement in FY 2018, up from $47.5 million in FY 2017.
- Hits on the sexual harassment page of the EEOC's website more than doubled this past year, as many individuals and employers sought information to deal with workplace harassment.

The increase is logically due to the #MeToo movement, which has empowered more willingness to report such issues. Employers remain on the forefront of sexual harassment situations, and need to address the issues, particularly giving the EEOC’s enforcement focus on them. Some steps include reviewing (and possibly updating) any related policies, communicating any changes, training managers and supervisors, investigating all claims, and enforcing the policies. Having multiple reporting resources can help improve the protections of any victims.

Sexual Harassment Claims with EEOC Skyrocket (Cont.)

The numbers are preliminary, and not yet validated by the Office of Enterprise Data and Analytics. The agency has worked this past fiscal year to address the pervasive problem of workplace harassment.

A number of states are also enacting laws governing workplace sexual harassment.

OSHA Issues Updated Compliance Directive on Trenching and Excavation

Due to a resurgent number of trenching/excavation fatalities and serious injuries, OSHA has issued an updated compliance directive (CPL) on trenching and excavation. The CPL describes policies and procedures for continued implementation of an OSHA National Emphasis Program (NEP) to identify and to reduce hazards which are causing or are likely to cause serious injuries and fatalities during trenching and excavation operations.

In 1985, OSHA implemented CPL 02-00-069 - Special Emphasis: Trenching and Excavation, in response to the continuing incidence of trench/excavation collapses and accompanying loss of life. The newly issued CPL supersedes that document.

While the updated CPL continues support for compliance assistance and inspection programs related to the implementation of a NEP for trenching and excavation operations, it also:

- Provides a national reporting system for all OSHA trenching and excavation inspections by updating guidance for recording trenching and excavation inspections in OSHA's online information system; and
- While the updated CPL continues support for compliance assistance and inspection programs related to the implementation of a NEP for trenching and excavation operations, it also:
- Provides a national reporting system for all OSHA trenching and excavation inspections by updating guidance for recording trenching and excavation inspections in OSHA's online information system; and
- Establishes the requirement for each area office/region to develop and implement outreach programs in support of this emphasis program. The programs should include providing compliance assistance material to excavation employers, permitting and other municipal organizations, industry associations, equipment rental organizations, water works supply companies, and major/local plumbing companies.

Commission: Eyewash Standard Invalidly Applied to Construction Employer

The Occupational Safety and Health Review Commission (OSHRC) ruled that the Secretary of Labor did not have the authority under section 6(a) of the OSH Act to adopt a "quick-drenching" standard to construction employers without notice-and-comment rulemaking.

At issue was whether the Secretary had the authority under section 6(a) to adopt a "quick-drenching" standard that was originally promulgated under the Walsh-Healey Act and applied only to non-construction employers contracting with the federal government, as an OSHA standard generally applicable to all employers, including those in the construction industry. OSHRC concluded that section 6(a) did not authorize the Secretary to apply the quick-drenching standard to construction employers without notice-and-comment rulemaking.

The case centered around a construction company whose worksite was inspected by OSHA, and was issued a citation alleging a violation of §1926.50(g)-the construction "quick-drenching" provision that requires immediate on-site access to eye/body wash facilities for employees who may be exposed to "injurious corrosive materials."

Proposed revisions to forklift regulation expected soon

As part of its process to develop a proposed rule updating its standard for powered industrial trucks (PITs), OSHA sent its pre-rule to the Office of Management and Budget (OMB). The current regulation at 1910.178 relies on ANSI standards from 1969, and the Industrial Truck Association has encouraged OSHA to update and expand the regulation to account for substantial revisions to ANSI standards on PITs over the last 45 years.

The current regulation covers 11 types of trucks, but there are now 19 types found in industry. OSHA's upcoming proposed rule would seek to update the consensus standard referenced from the 1969 version of the ANSI B56.1 to the 2016 version. As soon as OMB approves the pre-rule, it will appear in the Federal Register.