OSHA has announced its Top Ten Frequently Cited Standards for fiscal year 2010. They reflect the most commonly found hazards at employers’ facilities. According to the Agency, it “publishes this list to alert employers about these commonly cited standards so they can take steps to find and fix recognized hazards addressed in these and other standards before OSHA shows up.” The Top Ten are:

- Scaffolds (29 C.F.R. 1926.451)
- Fall Protection (29 C.F.R. 1926.501)
- Hazard Communication (29 C.F.R. 1910.1200)
- Respiratory Protection (29 C.F.R. 1910.134)
- Ladders (29 C.F.R. 1926.1053)
- Lockout/Tagout (29 C.F.R. 1910.147)
- Electrical, Wiring Methods (29 C.F.R. 1910.305)
- Powered Industrial Trucks (29 C.F.R. 1910.178)
- Electrical, General Requirements (29 C.F.R. 1910.303)

OSHA compliance officers will focus on these hazards during regular inspections.

OSHA Penalties Increased by Administrator

OSHA’s head, Dr. David Michaels, significantly revised the Agency’s penalty structure, effective October 1, 2010, increasing penalties on employers. Among other things, the Assistant Secretary directed that OSHA:

- Expand the look-back period for considering whether a current violator should be considered a “repeat” violator (accompanied by greater proposed penalties) from three years to five; and
- Increase penalties by 10 percent for employers that have been cited for any high gravity serious, willful, repeat, or failure-to-abate violations within the previous five years, and eliminate “discounts” for an absence of past violations, unless OSHA actually conducted an inspection without issuing citations.

Brad Hammock, a former OSHA Counsel for Safety Standards and Jackson Lewis’ Workplace Safety Compliance practice area leader, said, “We are seeing OSHA issue citations with significantly higher penalties than in recent years. And OSHA is more reluctant than in the past to reduce those penalties during settlement negotiations.”

Retooled Recordkeeping National Emphasis Program

OSHA has retooled its Recordkeeping National Emphasis Program (NEP) to better target employers who, in the Agency’s view, may be underreporting workplace injuries and illnesses. Recordkeeping NEP inspections involve a detailed review of employers’ recordkeeping logs, workers’ compensation data, other injury and illness information, and in-depth interviews with employees, supervisors, and medical personnel. The NEP was initiated originally in September 2009 to investigate whether, and to what extent, injuries and illnesses are being under-reported by employers.

Continued on next page
Final Rule on Cranes and Derricks in Construction
By many measures, the most significant safety standard issued by OSHA in the last two decades is the new rule on Cranes and Derricks in Construction. It contains more than 40 sections of detailed requirements in such areas as crane assembly, crane operation, inspections, and operator training and certification. The final rule generally became effective on November 8, 2010, and OSHA will soon start enforcing the rule vigorously. Employers should look for a compliance directive on the cranes and derricks in construction rule this fall. OSHA has already issued a small entity compliance guide (available on OSHA’s webpage) on the new rule.

Proposal to Restore MSD Column on “300 Log”
OSHA requires employers to maintain an injury and illness report log, called the “300 Log,” in their workplaces. The Agency has proposed adding a separate column on the 300 Log for employers to record work-related musculoskeletal disorders (MSDs). Under the proposed rule, employers would be required to “check the box” in a separate column on the OSHA 300 Log – an “MSD” column – for injuries and illnesses that fit within the Agency’s definition of MSD. OSHA also has proposed removing existing language from its recordkeeping compliance directive that “minor musculoskeletal discomfort” is not recordable as a restricted work case “if a health care professional determines that the employee is fully able to perform all of his or her routine job functions, and the employer assigns a work restriction for the purpose of preventing a more serious injury.”

Whether this proposed rule will become effective in 2011 is uncertain. It is still undergoing Executive Branch clearance and OSHA held teleconferences with small businesses in April to discuss the effect the rule would have on these employers. We will keep you apprised of OSHA’s progress on our OSHA Law Blog, www.oshalawblog.com.

OSHA Review Commission on Recordkeeping Inaccuracies
In a much anticipated decision, the Occupational Safety and Health Review Commission (“Commission”) has ruled that OSHA can enforce its requirement that employers record work-related injuries and illnesses on the OSHA 300 Log even when the employer’s duty to record occurred more than six months before the issuance of a citation. Secretary of Labor v. AKM LLC d/b/a Volks Constructors. The Commission rejected the employer’s argument that the six-month statute of limitations in the Occupational Safety and Health Act for OSHA to enforce violations of the Act prohibited the Agency from enforcing recordkeeping violations that occurred beyond that six-month period. The Commission determined that employers had a duty to “maintain” or review continually their recordkeeping logs to ensure the entries are accurate.

Under OSHA’s recordkeeping rule, employers are required to enter a recordable injury on the OSHA 300 Log within seven days of the occurrence of the injury. Employers also must retain their logs for five years. Under OSHA’s rule, employers must go back and update entries should the circumstances surrounding them change. In an earlier decision, Johnson Controls, Inc., the Review Commission had ruled that OSHA could cite employers for inaccurate entries until the entries were corrected or until the end of the five-year retention period, whichever is longer.

The employer in AKM LLC argued that Johnson Controls should be overturned for several reasons, including the Supreme Court’s decision in Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618 (2007). Ledbetter held that an employee’s pay discrimination claim under Title VII of the Civil Rights Act of 1964 was time-barred because it was not brought until more than 10 years after the practice that resulted in the disparity originated. The Commission rejected the employer’s arguments, holding that under OSHA’s recordkeeping rule, an inaccurate entry on the OSHA 300 Log constitutes a continuing violation of the rule throughout the entire five-year retention period. (Congress later passed legislation to overturn the Ledbetter decision.)

According to Joe Dreesen, a member of Jackson Lewis’ Workplace Safety Compliance practice group, “The decision reiterates the need for employers to integrate into their recordkeeping procedures a mechanism to ensure they go back and continually evaluate the accuracy of entries — during the entire retention period.”

PPE Compliance Directive

The directive provides useful information to employers to help them understand how OSHA’s employer payment for PPE final rule should be implemented. That rule requires employers to pay for most PPE, but carves out certain exceptions where employer payment is not required. Since the rule came into effect, many employers have struggled to understand exactly how these exceptions can be applied to their worksites.

The directive gives examples of PPE that employers must provide to their employees, provides examples of exempted PPE, and lists frequently asked questions (FAQs) to assist employers with compliance. It also provides scenarios “of potential workplace conditions that would lead to a citation.”
Key information from the directive includes:

• Body protection (e.g., laboratory coats, coveralls, vests, and jackets) is required for employees who face potential bodily injury in the workplace of “any kind” that cannot be eliminated through other control measures. Metatarsal guards are required when there is a potential for injury to the metatarsal portion of the foot from impact or compression hazards. Employees who work in actual or potentially explosive and hazardous locations “must wear” conductive shoes to reduce the risk of static electricity buildup on the body. However, employees exposed to electrical hazards must never wear conductive shoes.

• For employers who have instituted a reimbursement policy for PPE (i.e., an employee initially purchases the PPE and is reimbursed by the employer), the employer should reimburse the employee within one billing cycle or one pay period.

• With the publication of this enforcement guidance, employers should expect Compliance Safety and Health Officers to increase their focus on PPE during inspections. Employers should review their PPE policies, hazard assessments, training, and payment practices to ensure they are fully compliant.

State Initiatives

California “Serious” Violations Law

A new state law makes it easier for the California Division of Occupational Safety and Health (Cal/OSHA) to classify workplace safety violations as “serious” for purposes of issuing citations and proposed penalties to employers. Assembly Bill 2774 broadens the definition of “serious violation” and establishes specific procedures for Cal/OSHA to create a rebuttable presumption that a “serious violation” exists at a worksite. Under the new law, Cal/OSHA can create a rebuttable presumption that a “serious violation” exists if it demonstrates that “there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.” This “realistic possibility” standard is looser than the California Labor Code’s previous requirement of a “substantial probability” of death or serious physical harm.

Before issuing a citation alleging that a particular violation is serious, Cal/OSHA inspectors are directed to consider the following information:

• The training employees and supervisors have had related to preventing employee exposure to the hazard or similar hazards;
• Employer procedures for uncovering and controlling the hazard or similar hazards;
• Supervision of exposed or potentially exposed employees;
• Employer procedures for communicating with employees regarding its health and safety rules; and
• Any information the employer provides regarding the circumstances surrounding the alleged violative conditions, why the employer believes a serious violation does not exist, and why the employer’s actions were reasonable.

Cal/OSHA may obtain this information by presenting a form to the employer (at least 15 days before issuing a serious violation citation) describing the alleged violation and requesting a response from the employer.

If Cal/OSHA establishes a presumably serious violation, the employer may rebut the presumption by presenting evidence that it “did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation.” This can be met by proving (1) the employer took all steps a reasonable employer would take under the same circumstances, and (2) the employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as it was discovered.

California employers should become familiar with the information and evidence needed to rebut the presumption of a serious violation. Employers may limit risks by providing strong training programs for employees and supervisors, implementing systems to “find and fix” hazards, and understanding industry best practices for addressing hazards.
About the Workplace Safety Compliance Practice Area

Jackson Lewis’ Workplace Safety Compliance practice, led by former Department of Labor OSHA attorney, Brad Hammock, provides comprehensive legal services to employers seeking to comply with federal and state OSHA rules, defend against OSHA enforcement actions, and participate in OSHA rulemaking proceedings. With experienced OSHA attorneys located strategically throughout the nation, Jackson Lewis is uniquely positioned to serve all of an employer’s workplace safety needs:

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