




OHS Legal & Regulatory Update

Adele L. Abrams, Esq., ASP, CMSP
Law Office of Adele L. Abrams PC
www.safety-law.com

Overview: The Home Stretch

Key Enforcement Initiatives:

- IBI enforcement (former “egregious” policy)
- Placement in SVEP – with impact from NLRB “Joint Employer” definition changes
- Increased use of employer injury/illness data for enforcement –SST program
- More multi-employer citations
- Third-party “walkaround rights”
- Continued emphasis on “gig” workers and misclassification of employees as contractors – DOL & NLRB have final rules reclassifying Independent Contractors
- Heightened whistleblower protection enforcement under Sec 11C and 29 CFR 1904.36
 - New manual with over a dozen new whistleblower policies: https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-03-011.pdf



Agency Collaboration

- 11/21: DOL, NLRB, & EEOC launched joint initiative on retaliation issues when workers exercise their protected labor rights
 - Includes collaboration among agencies to protect workers on issues of unlawful retaliatory conduct, worker outreach, educating public; and engaging with employers, business organizations, labor organizations, and civil rights groups
- 1/2022: DOL & NLRB signed new MOU strengthening the agencies’ partnership and outlining procedures on information-sharing, joint investigations, and enforcement activity, as well as training, education, and community outreach
- 10/23: NLRB & OSHA entered new agreement, enabling the agencies to closely collaborate by more broadly sharing information, conducting cross-training for staff at each agency, partnering on investigative efforts within each agency’s authority, and enforcing anti-retaliation provisions.
 - The agencies also [released a resource](#) on “Building Safe & Healthy Workplaces by Promoting Worker Voice” which provides tools and key references for employers and workers on working collaboratively to create and maintain safe workplaces, including resources on collective bargaining and compliance.



Civil Penalty Increases 2024

- Effective 1/16/24, new penalties took effect
- OSHA’s maximum penalties for serious and other-than-serious violations increased from \$15,625 per violation to \$16,131 per violation
- The maximum OSHA penalty for willful or repeated violations rose from \$156,259 per violation to \$161,323 per violation
- MSHA’s maximum regular assessment is now \$88,354, up from just over \$85,000 in 2023, for both mine operator & contractor violations
 - This is also the maximum for personal supervisor civil penalties under Section 110c of the Mine Act
- The maximum MSHA penalty, reserved for “flagrant violations,” rose to \$323,960 for CY 2024



OSHA E-Recordkeeping

- OSHA reopened e-Recordkeeping rule 3/30/22—*Final rule released July 2023 and took effect 1/1/2024*
 - CY 2023 data must be electronically submitted by 3/2/24 – Logs must also be posted 2/1/24-4/30/24**
- All records are submitted electronically through OSHA's portal (Injury Tracking Application, or "ITA") - <https://www.osha.gov/injuryreporting/ita/>
- Establishments that meet **any** of the following criteria during the previous calendar year do **not** need to electronically submit their information to OSHA:
 - The establishment's peak employment during the previous calendar year was **19 or fewer employees**, regardless of the establishment's industry.
 - The establishment's industry is **listed on Appendix A to Subpart B** of OSHA's recordkeeping regulation, regardless of the number of employees working at the establishment (**Partially Exempt Industries**).
 - The establishment had a peak employment **between 20 and 249 employees** during the previous calendar year AND the establishment's industry is **not on Appendix A to Subpart E** of OSHA's recordkeeping regulation.
- Records are publicly searchable on OSHA website but will redact personal identifiers of workers (company name WILL be identified)
 - Revises NAICS codes that trigger submission of 300A logs by "small" employers (redefined as 20-99 employees at a worksite)
 - Adds new submission requirements for specified employers (using NAICS) with 100+ workers at a worksite—would have to submit 300 and 301 logs PLUS 300A summary
 - ALL employers with 250+ employees at a **WORKSITE** must submit 300A, regardless of NAICS



Site-Specific Targeting & E-Recordkeeping Data

OSHA revised its SST "programmed inspection" program in 2023 – these are typically "wall to wall"

- The main changes:
 - For high-rate establishments, the SST plan will select individual worksites for inspection using CY 2021 Form 300 A data, rather than CY 2019 data.
 - For upward trending establishments, the SST plan selects individual establishments based on CY 2019-2021 Form 300 A data, rather than CY 2017-2019 information.
 - Low rate establishment lists will be generated using CY 2021 Form 300A data, instead of CY 2019 data.
 - The "non-responders" list will be generated using CY 2021 data, rather than CY 2019.
 - Non-responders are identified by OSHA generating a random sample of establishments that failed to electronically submit data (based on NAICS code).
- If OSHA arrives and finds the establishment is an administrative office and not high hazard, they will stand down.
- If the worksite does not meet the criteria due to being under 20 employees, the inspection will be terminated.
- There may also be a "records only" inspection conducted that includes employee interviews, to verify the employer injury and illness data.
- Any violations in plain view or brought to OSHA's attention during discussion with workers can expand the scope of the inspection.



Non-Responder Enforcement Program

- Program launched by OSHA to provide enforcement guidance regarding potential violations of OSHA's rule requiring electronic submittal of injury and illness records
- OSHA will match open inspections against list of establishments that may have failed to submit their CY 2021/2022 Form 300A data, creating a list of potential non-responders by area office
- The Area Office will review their weekly list to verify the following:
 - The inspection status.* If the inspection is closed, the Area Office will take no further action for that establishment.
 - The establishment meets the ITA reporting requirements.* The Area Office reviewer will check the inspection data to verify that the establishment meets 29 CFR 1904.41's size and industry criteria. If the establishment does not meet these requirements, the Area Office will take no further action for that establishment.
 - The match is valid.* The Area Office Potential Matches Report includes these nine data elements from the two datasets side by side. The Area Offices will review each match to determine if the match is invalid, and if so, the Area Office will take no further action for that establishment.
- For establishments/inspections that ARE valid matches, CSHO informs employer of reporting obligation and follows enforcement procedures in 5/6/21 memorandum [Enforcement Procedures for Failure to Submit Electronic Illness & Injury Records under 29 CFR 1904.41\(a\)\(1\) & \(a\)\(2\)](#).
- The data for calendar year 2021 must have been submitted to OSHA by March 2, 2022.
- <https://www.osha.gov/memos/2022-04-04/ita-non-responder-enforcement-computer-program>



IBI Enforcement Policy

- OSHA expanded its "egregious violation" policy to allow its use in high gravity serious violation cases, and recordkeeping cases, rather than limiting it to willful/repeated citations.
- "Instance-by-instance" (IBI) cases, revisions allow multiple citations/penalties for single violation
- Factors to be considered include:
 - The employer has received a willful, repeat, or failure to abate violation within the past five years where that classification is current
 - The employer has failed to report a fatality, inpatient hospitalization, amputation, or loss of an eye pursuant to the requirements of 29 CFR 1904.39
 - The proposed citations are related to a fatality/catastrophe
 - The proposed recordkeeping citations are related to injury or illness(es) that occurred as a result of a serious hazard.**
 - Instance-by-instance citations may be applied when the text of the relevant standard allows (such as, but not limited to, per machine, location, entry, or employee), and when the instances of violation cannot be abated by a single method of abatement.



Severe Violators Enforcement Program

- OSHA relaunched revised SVEP in 10/22, building on original 2010 program
- OSHA's updated SVEP criteria include the following:
 - Program placement for employers with citations for at least two willful or repeated violations or who receive failure-to-abate notices based on the presence of high-gravity serious violations.
 - Follow-up or referral inspections made one year – but not longer than two years – after the final order
 - Potential removal from the Severe Violator Enforcement Program three years after the date of receiving verification that the employer has abated all program-related hazards.
 - Employers' ability to reduce time spent in the program to two years, if they consent to an enhanced settlement agreement that includes use of a safety and health management system with seven basic elements in OSHA's Recommended Practices for Safety and Health Programs (I2P2).



SVEP Criteria

OSHA designates employers as "severe violators" if they have an inspection meeting one or more of the following criteria:

- Fatality/Catastrophe Criterion: A fatality/catastrophe inspection in which OSHA finds one or more willful or repeated violations or failure-to-abate notices based on a serious violation related to a death of an employee or three or more hospitalizations.
- Non-Fatality/Catastrophe Criterion Related to High-Emphasis Hazards: An inspection in which OSHA finds two or more willful or repeated violations or failure-to-abate notices (or any combination of these violations/notices), based on **high gravity serious violations** related to a **High-Emphasis Hazard** (e.g., fall hazards and those related to NEPs: amputations, combustible dust, crystalline silica, excavation/trenching, lead, and shipbreaking)
- Non-Fatality/Catastrophe Criterion for Hazards Due to the Potential Release of a Highly Hazardous Chemical (Process Safety Management): An inspection in which OSHA finds three or more willful or repeated violations or failure-to-abate notices (or any combination of these violations/notices), based on high gravity serious violations related to hazards defined in the PSM standard.
- Egregious Criterion: All IBI enforcement actions will be considered SVEP cases.



NLRB Independent Contractor Test 2023

NLRB reinstated its *Fedex II* standard, under which it evaluates the common law factors set forth in the Restatement (Second) of Agency:

- The extent of control by the putative employer
- Whether the individual is engaged in a distinct occupation or business
- Whether the work is usually done under the direction of the employer or by a specialist without supervision
- The skill required in the particular occupation
- Whether the employer or individual supplies the instrumentalities, tools, and place of work
- The length of time for which the individual is employed or engaged
- The method of payment (whether the individual is paid by time or by the job)
- Whether the work is part of the regular business of the employer
- Whether the parties believe they are creating an independent contractor relationship, and
- Whether the putative employer is or is not a business.



DOL Independent Contractor Rule

Rule restores the multi-factor "totality of the circumstances" analysis from Obama Admin and eliminate emphasis on "entrepreneurial opportunity" (Trump's rule) – final rule was published 1/10/24 and takes effect in 60 days

- Important b/c OSHA and MSHA adopt DOL definitions and these impact citation policies and defenses – DOL also focused on worker misclassification now!
- DOL revised independent contractor rule applies a six-factor economic reality test that examines the following areas:
 1. the extent to which the performed work is integral to the employer's business;
 2. a worker's level of investment in facilities and equipment;
 3. the nature and degree of control in the working relationship;
 4. a possible contractor's opportunity for profit or loss;
 5. the amount of foresight and initiative judgment the worker needs to be successful; and
 6. how permanent or temporary the work relationship is.
- ✓ NOTE: the DOL independent contractor rule's economic reality test looks at the **totality** of the circumstances surrounding a **particular** worker when determining whether they are really an independent contractor.



Whistleblower Protections

- Sec 11(C) of OSH Act protects workers from retaliation for engaging in protected activity if complaint filed within 30 days with OSHA (federal or state agency)
 - Speaking privately to OSHA
 - Testifying against employer in OSHA case
 - Making internal safety complaints
 - Making formal complaint to OSHA
- Growing OSHA enforcement area
- Interface with e-Recordkeeping rule – SOL extended via citation power (from 30 to 180 days) via 29 CFR 1904.36
- Remedies include: reinstatement, back pay, awarding of retroactive seniority, benefits
- Currently, no private right of action ... but OSHA obtained over \$1 million in recent case for compensatory damages



OSHA Policy on Drug Tests

- Trump OSHA issued “clarifying” policy on 10/11/2018: <https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11>
 - **Biden administration affirmed the 2018 policy in its 2022 whistleblower handbook rev.:**
 - 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 DOT regs for CDL
 - 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, and DOCUMENT!***



OSHA Fall Prevention NEP



- Effective 5/1/23, OSHA launched a fall prevention NEP covering both construction & general industry
 - Program will be reviewed in 6 mo. to determine effectiveness by analyzing both citations and fall hazard data
 - State plans must notify of intent but adoption is not mandatory
- For non-construction, NEP targets the following activities:
 - Roof top mechanical work/maintenance
 - Utility Line Work/maintenance (Electrical & Cable)
 - Arborist/tree trimming
 - Holiday light installation
 - Road sign maintenance/billboards
 - Power washing buildings (not connected with painting)
 - Gutter cleaning
 - Window cleaning
 - Communication Towers
- For other non-construction work, when worker is observed working at height, inspection MAY be initiated upon approval of area office – if inspection not warranted, CSHO will conduct outreach on Fall Protection

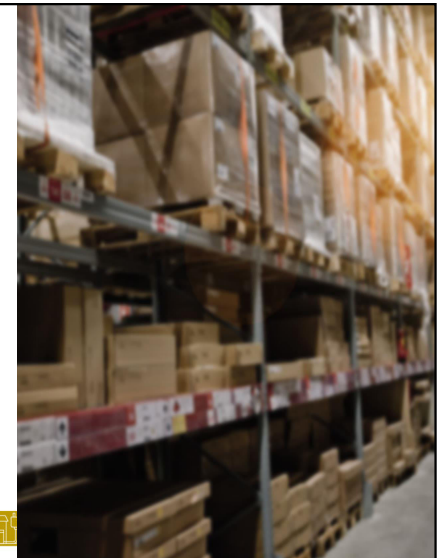


OSHA Warehouse Safety NEP

CPL 03-00-026 - [National Emphasis Program on Warehousing and Distribution Center Operations](#) - launched 07/13/2023 and is OSHA-wide (state plan notice of intent and adoption is required)

- Covers inspections at warehousing and distribution center operations, mail/postal processing and distribution centers, parcel delivery/courier services, and certain high injury rate retail establishments
- NEP will focus on workplace hazards common to those industries, including:
 - powered industrial vehicle operations,
 - material handling/storage,
 - walking-working surfaces,
 - means of egress, and
 - fire protection.

➤ ***Heat and ergonomic hazards must be considered during all inspections covered by this NEP and a health inspection shall be conducted if OSHA learns that heat and/or ergonomic hazards are present.***



OSHA Heat Illness Prevention NEP

OSHA NEP looks for employers to incorporate the following into a prevention program, and can enforce via GDC, recordkeeping/reporting, training rules:

- A training program informing employees about the effects of heat stress, and how to recognize heat-related illness symptoms and prevent heat-induced illnesses;
- A screening program to identify health conditions aggravated by elevated environmental temperatures;
- An acclimation program for new employees or employees returning to work from absences of three or more days;
- Specific procedures to be followed for heat-related emergency situations; and
- Provisions that first aid be administered immediately to employees displaying symptoms of heat-related illness.



Other OSHA National Emphasis Programs

- Combustible dust – CPL 03-00-008
- Hazardous machinery (LOTO & Amputations) – CPL 03-00-022
- Hexavalent Chromium - CPL 02-02-076
- Lead – CPL 03-00-009
- Primary Metals - CPL 03-00-018
- Process Safety Management – CPL 03-00-021
- Shipbreaking – CPL 03-00-020
- Crystalline Silica – CPL 03-00-023
- Trenching & Excavation – CPL 02-00-161



Fall 2023 Reg Agenda

Pre-rule stage – Key Items:

- Mechanical Power Presses. OSHA is analyzing comments from a Request for Information in 2021.
- Workplace Violence in Healthcare and Social Services. Watch for *potential* that the scope of this rule could be expanded, in light of the many mass shootings at retail, service, education and other workplaces -- some unions have called for expansion of state OSHA workplace violence rules. Agency now analyzing comments on SBREFA report.
- Blood Lead Level for Medical Removal. OSHA is reviewing comments from 2022 ANPRM – comments under review. This impacts those doing welding work, as well as those engaged in demolition and waste removal activities, and shooting ranges.
- Heat Illness. SBREFA process concluded and response to draft report is public and under analysis by OSHA. Federal rule will impact workplaces in terms of regulating exposure to both indoor and outdoor heat sources. – OSHA being urged to complete rule before Summer 2024
 - There are already mandated heat exposure reduction standards in a number of states that run their own OSHA programs (e.g., California, Washington, Oregon, Minnesota) and Maryland is developing a rule (early stages)



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Proposed rule stage – Key items:

- PPE in Construction. NPRM was published in June 2023 (could spill over to Gen Industry). Women workers and some small statured male workers often are not provided with appropriately fitting Personal Protective Equipment (PPE).
 - Powered Industrial Truck Design. The NPRM was published in February 2022, and would update the currently adopted ANSI standard from 1969 and replace it by incorporating more current (2019/2020/2021) ANSI standards for forklifts and other powered industrial trucks. Agency analyzing comments (no due date)
 - Respirable crystalline silica: NPRM due in January 2024 to address medical removal.
 - Walking Working Surfaces amendments. The NPRM for the general industry fall protection rule plans to re-open the rulemaking record May 2023, but this is largely a technical correction.
 - LOTO: Changes to allow more computerized/electronic LOTO – NPRM due 8/24
 - Welding in Confined Spaces (construction: NPRM due 2/24
 - Others include: Infectious Disease, amendment to crane standard, communication tower, emergency responder proposal (OUT FOR COMMENT NOW), tree trimming rule
- **Worker Walkaround Representative Designation. Released April 1, 2024**



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Final Rule Stage:

- Hazard Communication update, (overdue from 11/23). While primarily impacting chemical manufacturers, it will also have an impact on importers and distributors and will likely require retraining of **all** workers to understand the changes in labeling and chemical classification. (cleared by OMB – release due any day!)
- Tracking of Workplace Injuries and Illnesses (to require electronic submission of OSHA 300A forms by certain employers of 20 to 99 workers, and expanded submissions by employers of 100 or more to include the OSHA Accident Forms 300 and 301). Final rule released now and took effect 1/1/24

Meanwhile at MSHA ...

- **MSHA Powered Haulage final rule was released 12/2023 – will apply to contractors and delivery drivers at mine sites (program, maintenance & inspection requirements - \$324K max penalty)**
- **MSHA final crystalline silica rule was issued and takes effect in 12 months (coal) and 24 months (MNM) – VERY different from OSHA rule!**



OSHA New “Walkaround Rights” Rule

- Occupational Safety & Health Act of 1970 gives employers and employees the right to authorize a representative to accompany OSHA officials during a workplace inspection
- Final rule published in April 1, 2024, Fed. Reg. <https://www.govinfo.gov/content/pkg/FR-2024-04-01/pdf/2024-06572.pdf>
- Final Rule grants “walkaround rights” during OSHA inspections to non-employees, such as a third-party or a union representative, when those individuals are “reasonably necessary” to “aid in OSHA inspections as the employees’ representative – **takes effect May 31, 2024!**”
 - Rule clarifies the relevant knowledge, skills and experience with hazards in the workplace, or language skills, for those authorized by employees to assist with the inspection as their representative – special knowledge can include IH experience, **language** or **communication** skills
- Final rule clarifies that – consistent with the law – workers may authorize another employee to serve as their representative OR select a NON-EMPLOYEE
- OSHA has published “FAQs” at <https://www.osha.gov/worker-walkaround/final-rule/faq>



Emergency Responder Proposal

- OSHA's NPRM related to the Fire Brigades standard, 29 C.F.R. 1910.156, and related standards, was proposed on 2/5/24
- Proposed rule updates the 40 yr old Fire Brigades standard, transforming it into an Emergency Response standard focused on firefighting, emergency medical services, tactical rescue, and the equivalent services offered in workplaces by employer-provided services
- 250-page proposal modifies 1910.156, IBR 22 NFPA standards, most of which are focused on firefighting training, personal protective equipment, health and safety requirements, and apparatus
- It makes important changes to:
 - 29 C.F.R. § 1910.6 Incorporation by reference
 - 29 C.F.R. § 1910.120 Hazardous waste operations and emergency response and Appendix B
 - 29 C.F.R. § 1910.134 Respiratory protection
 - 29 C.F.R. § 1910.155 Scope, application and definitions applicable to this subpart
 - 29 C.F.R. § 1910.157 Portable fire extinguishers
 - 29 C.F.R. § 1910.158 Standpipe and hose systems
 - 29 C.F.R. § 1910.159 Automatic sprinkler systems
- Comments closed May 6, 2024.



Heat Stress Prevention ANPRM

- OSHA issued ANPRM on 10/27/21 for a new rule on “Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings” - proposal reopened for additional comment on SBREFA response to draft rule – comments closed 12/23/2023 (Docket No. OSHA-2021-0009).
 - Proposal covers both outdoor and indoor work settings, and background information can be found on OSHA's Heat Injury and Illness SBREFA website at <https://lnkd.in/gmi2qBvU>.
- OSHA lost key heat stress case where OSHRC held it could not use the National Weather Services’ “Heat Index” for enforcement - *Secretary of Labor v. A.H. Sturgill Roofing, Inc.* This necessitated a rulemaking in order for OSHA to be able to regulate this hazard at the federal level.
- “Excessive heat” as including outdoor or indoor exposure to heat at levels that exceed the capacities of the body to maintain normal body functions and may cause heat-related injury, illness, or fatality.
- OSHA seeks public comment on the nature and extent of hazardous heat in the workplace and interventions and controls to prevent heat-related injury and illness, including measuring heat exposures, strategies to reduce it, personal protective equipment and other controls, and worker training and engagement
- ANPRM Federal Register notice is: https://www.govinfo.gov/content/pkg/FR-2021-10-27/pdf/2021-23250.pdf?utm_source=federalregister.gov&utm_medium=email&utm_campaign=subscription+mailing+list



MSHA Surface Haulage Rule

Applies to all operations and contractors at mines, regardless of how many miners are employed (proposed rule applied to sites with 5+ miners)

Conveyors are not included (same as proposed rule)

Operators must create written program addressing mobile equipment safety including:

- Identifying and analyzing mobile equipment hazards; take actions to reduce site-specific risks
- Maintenance procedures and schedules for mobile equipment
- Identifying currently available and newly emerging feasible technologies (does not require adoption)
- Training miners and other persons at the mine necessary to perform work

Program evaluation by responsible person at least annually, or as mining conditions/work practices change that may affect health and safety

During program development and updates, operators must consult with miners & their representatives

Program may be hard copy or electronic & available on request of miner or inspector

Part 45 independent contractors will create and implement their own programs; operators can integrate contractor programs into their own if they wish

- **Published in 12/20/23 Fed Reg – effective 1/19/24, but compliance due 7/17/24**



MSHA Silica Rulemaking

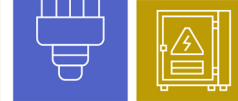
MSHA's final rule for Respirable Crystalline Silica: "**Lowering Miners' Exposure to Respirable Crystalline Silica and Improving Respiratory Protection**": <https://www.govinfo.gov/content/pkg/FR-2024-04-18/pdf/2024-06920.pdf>

- Final rule published in 4/18/24 *Fed. Reg.*
- Rule takes effect 6/17/24, except for some sections with extended implementation dates –
- 4/14/25 for coal (931 mines, 55K miners)
- 4/8/26 for metal/nonmetal (MNM) (11,231 mines, 199K miners)
- There are about 75,000 **contract miners** affected across all sectors
- Unitary rule in 30 CFR Part 60 for both coal and MNM – but there are distinct provisions and effective dates
- **NO TABLE ONE** – Credit not given for respirators and must attain PEL through engineering and work practice controls (and worker rotation is NOT allowed)
- Sampling every three months if above 25 ug/m3 Action Level and operators must immediately notify MSHA if they have any overexposures
- Miner training on silica hazards via Part 46/48 and HazCom training (must cover in all types of training – new miner, annual refresher, task and site specific hazard)
- Medical surveillance requirements – reported to NIOSH



Federal Cannabis Update

- Federal cannabis decriminalization likely – Biden has called for declassification as CDS & pardoned federal prisoners convicted of cannabis possession
- Federal legalization will **negate** current ADA case law that does not protect medical users because it is "illegal" under federal law
- Veterans Equal Access Act, or [H.R. 2431](#) was reintroduced in 4/23 and has 21 BIPARTISAN co-sponsors!
- FDA/NIDA 250-page report: "Marijuana is neither as risky nor as prone to abuse as other tightly controlled substances and has potential medical benefits"
 - The review also said there is some "scientific support" for therapeutic uses of marijuana, including treatment of anorexia, pain, and nausea and vomiting related to chemotherapy.
- FDA/NIDA recommended that the Drug Enforcement Administration make marijuana a Schedule III drug, alongside drugs such as ketamine and testosterone, which are available by prescription.



Questions???

Adele L. Abrams, Esq., ASP, CMSP
Law Office of Adele L. Abrams PC
301-613-7498
safetylawyer@gmail.com



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