MSHA 101 for Contractors

Presented To:
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MSHA Task Force

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PRESENTED BY

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MSHA 101 for Contractors

- Key differences between MSHA and OSHA
- Overview of the Mine Act
- Inspections
  - Advanced Notice Prohibitions
- MSHA’s Enforcement Tools
- Accident Investigations
- Special Investigations
- Obtaining a Contractor’s ID
- Training
- Records
- Certifications
- Contractor Checklist
- Whistleblower claims
MSHA vs. OSHA
Agency Comparison

OSHA

- Number of facilities regulated by OSHA: 8 million
- Total number of inspectors: 2,200
- 1 inspector for every 59,000 workers
- Total number of violations in 2012: 78,727
- Average of .01 citations per worksite.

MSHA

- Number of mines regulated by MSHA in 2012: 14,062
- Total number of MSHA inspectors in 2012: 1,095
- 1 inspector for every 13 mines
- Total number of citations issued in 2012: 139,951
- Average of 10 citations per mine.
The OSH Act

• Makes the Secretary of Labor ("Secretary") responsible for issuing standards and regulations to carry out the purposes of the OSH Act in the areas of general industry, construction, agriculture and maritime operations.

• Is not a strict liability statute, and therefore defenses such as employee misconduct or lack of exposure to hazard may be successful.
Key Definitions

• The OSH Act defines “employer” as “a person engaged in a business affecting commerce who has employees,” but does not include the United States or any state or political subdivision of a state.

• “Employees” include supervisors, partners, corporate officers, former employees, applicants for employment and, in some cases, independent contractors, employees of independent contractors, and temporary workers.
Types of OSHA Violations

• *de minimis* notice
• Other than Serious Violation
• Serious Violation
• Repeat Violation
• Willful Violation
When does the OSH Act apply and when does the Mine Act apply?
The Mine Act of 1977 was promulgated in the wake of mining disasters

- Strict Liability Act
- Mandatory Inspection Requirements
- Performance Based Standards
- Mandatory Training
- Rulemaking Power
- Broad Enforcement Authority
• Under the 1977 Mine Act, MSHA had broad authority to, for example:
  – Enter upon the land and structures of a mine operator for the purpose of conducting an inspection or investigation without a warrant
  – Investigate accidents
  – Require access to certain types of documents without warrant or subpoena;
– Issue citations for violations;
– Withdraw miners from all or part of a mine under certain circumstances;
– Issue penalty assessments;
– Issue accident control orders requiring permission for an operator to enter an accident scene and to recover the mine;
– Issue citations for failure to immediately report an accident;
– Seek federal court injunctions for certain actions;
– Pursue civil and/or criminal penalties against agents, officers, directors and operators;
– Cite both the production-operator and an independent contractor for violations caused by an contractor.
Strict liability means liability without regard to FAULT or NEGLIGENCE.
OSHA:
Must obtain a warrant to conduct searches of sites and records.

MSHA:
May conduct warrantless entries/searches of mine sites and records required to be kept under the Mine Act.

OSHA:
Court-ordered injunctive authority to abate imminent danger after a hearing. [§ 13]

MSHA:
Authority to issue withdrawal orders without prior hearing. [§ 103; § 104; § 107]
OSHA:

Does have the right, once on property, to conduct private interviews.

MSHA:

May conduct private interviews.

OSHA:

Valid contest stays abatement until adjudication hearing.

MSHA:

Contest does not generally stay abatement.
The Mine Act Definition of an “OPERATOR”

The Mine Act defines “operator” to mean “any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine.” 30 U.S.C. § 803(d).
• Under the Mine Act, independent contractors working at a mine site may be deemed an “operator.”

• Where an independent contractor is working at a mine site, the mine is deemed the “production-operator.”

• When the independent contractor exercises control or supervises an area of the mine, they may also be considered a “production-operator.”
Ames Construction, Inc., v. FMSHRC, SOL
2012 WL 1292579 (D.C. Cir. 2012)
aff’ing 2011 WL 3794313 (FMSHRC July 25, 2011)

• The Commission held that, under the Mine Act, an independent contractor performing services at a mine is strictly liable for a violation committed by a third party when the violation occurs in connection with an activity for which the independent contractor has supervisory responsibility. D.C. Circuit affirmed, finding that only independent contractors who exercise supervision or control – in other words, also covered by the production-operator portion of § 3(d) – are so liable.

• In other words, you are responsible for any subcontractors or other companies acting under your authority. As a practical matter, make sure that supervisory responsibilities are clearly delineated when working on a mine site.
• Ames citable since it supervised or controlled unloading operations making it a “production-operator” of that part of the mine based on the following factors:
  – Truck driver was escorted to the delivery drop-off location by a crew of 3 Ames employees, as required per an agreement with MSHA;
  – Truck driver was left with an Ames employee and told to “wait right here” while the other two employees went to retrieve a forklift;
  – Truck drivers typically loosed the straps on the truck but “the remainder of the process is left to the contractor who is in charge of the site; and
  – Ames had the authority to stop work that created a danger to employees or property and to ensure unsafe conditions were corrected.
INSPECTIONS

General Rules

- **Always** accompany the inspector
  - Gather information.
  - Take notes.
  - Collect all available evidence regarding violations (e.g., witness names, inspector comments, descriptions, measurements, time, equipment, location).
  - Do not generalize.
  - Record who, what, where, when.
  - Do not add editorialized comments or opinion information in your notes. They may have to be produced in subsequent litigation.
General Rules

– Do not lie or try to deceive the inspector.
– Do not do the inspector’s job for him.
– Arrange abatement and/or protective measures as soon as possible.
– Discuss abatement time extensions if needed.
– If a sampling device is used by the inspector, document everything about the sampling.
– Discuss with the inspector his reasons for issuing a citation or order.
– First, does the standard apply?
Advanced Notice

• What is it?
• Section 103(a) of the Mine Act prohibits “any person” from giving advance notice of inspections.
• The Mine Act allows essential preparation to carry out enforcement activities
• Anything else may be considered “advance notice” by MSHA. See Program Information Bulletin No. P10-15
• Concern for concealment of hazards
• The potential for abuse of authority must be balanced with common sense, safety and the right of miners and mine operators to meaningfully participate in inspections.
Sanctions

• A civil action in federal court to obtain an injunction prohibiting future violations;
• A criminal action in federal court with fines of up to $1,000 or imprisonment or both;
• A civil monetary penalty against the mine operator; and
• Similar sanctions against agents of mine operators who knowingly permit or order the advance notice of inspection activity.
MSHA’s Enforcement Tools

• Section 104(a) citations
• Section 104(d) unwarrantable citations and orders
• Section 104(b) failure to abate orders
• Section 107(a) imminent danger orders
• Section 104 (g) failure to train order
• Section 104(e) pattern of violations
<table>
<thead>
<tr>
<th>Section I - Violation Data</th>
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</thead>
<tbody>
<tr>
<td><strong>1. Date</strong> Mo Da Yr</td>
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<tr>
<td><strong>3. Citation/Order Number</strong></td>
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<th><strong>4. Served To</strong></th>
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<th><strong>5. Operator</strong></th>
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<th><strong>6. Mine</strong></th>
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<th><strong>7. Mine ID</strong></th>
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<th><strong>8. Condition or Practice</strong></th>
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<tr>
<th><strong>8a. Written Notice (103g)</strong></th>
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<tr>
<th><strong>9. Violation</strong></th>
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<table>
<thead>
<tr>
<th><strong>A. Health</strong></th>
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<table>
<thead>
<tr>
<th><strong>B. Section of Act</strong></th>
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<tr>
<th><strong>C. Part/Section of Title 30 CFR</strong></th>
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**See Continuation Form (MSHA Form 7000-3a)**

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<tr>
<th><strong>Section II - Inspector's Evaluation</strong></th>
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<tr>
<th><strong>10. Gravity:</strong></th>
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<thead>
<tr>
<th><strong>A. Injury or Illness (has) (is):</strong></th>
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<tr>
<th><strong>Unlikely</strong></th>
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<th><strong>Reasonably Likely</strong></th>
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<th><strong>Highly Likely</strong></th>
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<th><strong>Occurred</strong></th>
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<th><strong>B. Injury or Illness could reasonably be expected to be:</strong></th>
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<tr>
<th><strong>No Lost Workdays</strong></th>
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<th><strong>Lost Workdays Or Restricted Duty</strong></th>
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<tr>
<th><strong>Permanently Disabled</strong></th>
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<tr>
<th><strong>Fatal</strong></th>
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<th><strong>C. Significant and Substantial:</strong></th>
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<th><strong>Yes</strong></th>
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<tr>
<th><strong>No</strong></th>
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<th><strong>D. Number of Persons Affected:</strong></th>
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<tr>
<th><strong>11. Negligence (check one):</strong></th>
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<table>
<thead>
<tr>
<th><strong>A. None</strong></th>
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<tr>
<th><strong>B. Low</strong></th>
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<th><strong>C. Moderate</strong></th>
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<th><strong>D. High</strong></th>
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<th><strong>E. Reckless Disregard</strong></th>
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<th><strong>12. Type of Action</strong></th>
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<tr>
<th><strong>13. Type of Issuance (check one):</strong></th>
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<table>
<thead>
<tr>
<th><strong>Citation</strong></th>
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<th><strong>Order</strong></th>
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<th><strong>Safeguard</strong></th>
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<th><strong>14. Initial Action</strong></th>
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<th><strong>A. Citation</strong></th>
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<th><strong>B. Order</strong></th>
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<tr>
<th><strong>C. Safeguard</strong></th>
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<tr>
<th><strong>D. Written Notice</strong></th>
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<th><strong>E. Citation/Order Number</strong></th>
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<th><strong>F. Dated Mo Da Yr</strong></th>
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<th><strong>15. Area or Equipment</strong></th>
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<tr>
<th><strong>16. Termination Due</strong></th>
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<th><strong>A. Date</strong> Mo Da Yr</th>
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<th><strong>B. Time (24 Hr. Clock)</strong></th>
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**Section III - Termination Action**

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<tr>
<th><strong>17. Action to Terminate</strong></th>
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<th><strong>18. Terminated</strong></th>
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<th><strong>A. Date</strong> Mo Da Yr</th>
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<th><strong>B. Time (24 Hr. Clock)</strong></th>
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**Section IV - Automated System Data**

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<thead>
<tr>
<th><strong>19. Type of Inspection (activity code)</strong></th>
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<tr>
<th><strong>20. Event Number</strong></th>
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<tr>
<th><strong>21. Primary or Mill</strong></th>
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<tr>
<th><strong>22. Signature</strong></th>
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<th><strong>23. AR Number</strong></th>
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*MSHA Form 7000-3, Mar 85 (Revised)*
• You need to understand what the citation/order form check boxes mean, because they relate to penalty amounts and other potential enforcement.
Increasing penalty points from, for example, 120 to 135, increases the penalty assessment from $13,609 to $44,645.

-The difference between a "moderate" negligence and "high" negligence determination is 15 points.
Gravity

Significant & Substantial

• Basic elements of S&S
  – An underlying violation of a mandatory health or safety standard;
  – A reasonable likelihood that the violation will result in an illness or injury; and
  – A reasonable likelihood that the illness or injury in question will be of a reasonably serious nature.
Negligence

Unwarrantable Failure

• Unwarrantable failure findings are only supportable by evidence of aggravated conduct constituting more than ordinary negligence on the part of the operator.

• “Reckless disregard,” “intentional misconduct,” “indifference,” or “serious lack of reasonable care.”
• **Section 104(d) citations and orders**
  
  – Section 104(d)(1) citation
    
    • Must be a violation of a mandatory health or safety standard.
    
    • Must be “S&S.”
    
    • Must be unwarrantable failure to comply with the standard.
• **Section 104(d)(1) orders**
  – If during the same inspection a violation resulting from an unwarrantable failure to comply is observed, a § 104(d)(1) order will be issued.

• **Section 104(d)(2) orders**
  – Any unwarrantable failure violations observed on subsequent inspections will be § 104(d)(2) orders.
  – Section 104(d)(2) orders will be issued until a complete inspection is made of the entire operation and no unwarrantable failure violations are observed.
• Maximum civil penalty is $70,000 for each violation. Penalty assessment criteria are set forth at 30 C.F.R. § 100 and include:
  – The appropriateness of the penalty to the size of the business.
  – The operator’s history of prior violations.
  – The operator’s negligence.
  – The seriousness or gravity of the violation.
  – The operator’s good faith in correcting the violation.
  – The effect of the penalty on the operator’s ability to stay in business.
The MINER Act

• Flagrant – what is it?
  – The MINER Act defines “flagrant” as “a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.”
  – Maximum penalty of $242,000
Section 110(e) makes it a misdemeanor upon conviction when “any person gives advance notice of any inspection to be conducted under this Act” unless the Act provides for such authorization.
Accident Investigations

The Main Elements

• When and how will the Accident be Reported?
  – 15 Minutes to Report
• What will the 103(k) Order Encompass?
• The Inspection/Investigation Team
• Scene Examination
• Equipment Evaluation
• Document Production/Requests
• Interviews/Statements
• Other Investigation Issues/Wrap Up
Special Investigations

• **Target of special investigations**
  – officers, directors, and agents of the company, who may include foremen, safety directors, and others involved in day-to-day supervision of all or part of mining operations.

• **Actions reviewed for possible special investigations include:**
  – all § 104(d) unwarrantable failure, S&S citations and orders;
  – all fatal and serious injury accidents; and
  – all § 107(a) imminent danger orders that involve a violation of a mandatory standard.
Civil and Criminal Penalties

• The Mine Act gives MSHA authority, in certain circumstances, to impose civil penalties and criminal fines against individual managers and corporate operators.

• Civil penalties may be assessed against an agent of a corporate operator if he knowingly authorized, ordered, or carried out the violation.
Section 110(c)

Provides for the imposition of criminal fines up to $250,000 and prison sentences up to one year (first offense), as well as civil penalties up to $70,000 against an individual (director, officer or agent of a corporation) who “knowingly authorized, ordered or carried out” any violation of any health or safety standard or any order issued under the Act.
Special Investigations

• Things you should know:
  – Investigators may contact employees directly, including management employees, without notifying mine management.
  – You may be contacted away from work.
  – The investigator is entitled to review documents that are required to be maintained by the Mine Act without a warrant or subpoena.
  – Other types of documents may be provided voluntarily. When in doubt, consult with counsel.
  – Individuals are not required to talk to the investigator. The decision to talk should be an uncoerced, voluntary decision to do so, or not.
  – Individuals have the right to speak with the investigator alone.
– Individuals have a right to counsel or other representative prior to and during an interview with an investigator.
– Individuals may refuse to answer certain questions, discontinue an interview at any time, refuse to have an interview tape recorded, and refuse to sign a statement taken by the investigator.
– Don’t falsify records, reports, or certifications required to be made under the Mine Act; this is a felony offense.
– When individuals speak to the investigator, any statement made can be used against management officials and/or the company.
– Always be truthful.
MINE ACT LIABILITY

Statutory Provisions

Section 110(f)

Provides for fines up to $250,000 and prison sentences up to five years against any person who “knowingly makes any false statement, representation or certification in any application, record, report, plan or other document filed or required to be maintained pursuant to the Act.”
Obtaining a Contractor ID

• ANY contractor may obtain a permanent ID number from MSHA.

• Form and instructions available at MSHA.gov
Training

• The required training will vary depending upon:
  – The type of mine:
    • Underground or surface
    • Coal or Metal/Nonmetal
  – The experience of the miner.
  – The particular hazards at the mine and the tasks involved.
  – The nature of the work (e.g. construction, maintenance, etc.) and the level of exposure to mine hazards.
Responsibility for Independent Contractor Training
30 C.F.R. § 46.12

• Production-operator has primary responsibility for ensuring site-specific hazard awareness training is given to contractor employees.

• Each independent contractor has primary responsibility for complying with other required training under Parts 46 and 48.
Is your training adequate?
Secretary of Labor, MSHA, v. Eastern Associated Coal Corp.  
27 FMSHRC 238 (Rev. Comm. 2005)

- Eastern operates an underground coal mine. Eastern decided to have polyurethane grout injected into the roof of an entry for additional support.
- The roof grouting provisions in Eastern’s roof control plan addressed various topics related to this task, including training, PPE, roof control, fire protection, and spills associated with grout work.
- Eastern does not do any grout work, so it hired ESS/Micon (“Micon”), a specialist with 18 years’ experience doing such work, to perform the grout work.
- Eastern provided hazard training to two Micon employees before they performed the grouting task. Eastern did not train the Micon employees on its roof control plan.
• While the Micon employees were grouting the roof, two pieces of the roof fell and struck one of the Micon employees.

• Following an investigation, MSHA issued five citations to Eastern. At issue before the Review Commission was a citation for violation of 30 C.F.R. § 48.11(a)(3), failure to perform hazard training.

• It was undisputed that Micon’s employees fell under the definition of miners in § 48.2(a)(2) (short-term maintenance or service worker contracted by the operator) and that Eastern was required to provide hazard training to them.

• In dispute was whether that hazard training should have included Eastern’s roof control plan’s grout provisions.
• The Commission found the language of the standard was ambiguous. Because of that ambiguity, the Commission had to determine whether the Secretary’s interpretation was reasonable.
• The Commission concluded that “an operator is required to tailor its hazard training of contract employees according to their work and conditions under which they perform.”
• Because Micon’s employees were performing a task for which Eastern’s roof control plan contained certain mine-specific requirements, “Eastern was required to insure that Micon employees received adequate hazard training on the safety procedures contained in its roof control plan that pertained to the task that they were to perform.” The Commission further noted that Micon’s task-training could not be expected to include mine-specific hazards and conditions.
RECORDS/DOCUMENTS

• Completed, up-to-date training records.
• Work area exam records.
• Equipment pre-shift exam records.
• Safety meeting minutes.
Certifications

• Verify whether certifications for foremen, supervisors, etc. are required.
• Individual state requirements
• May depend on the scope of work
CONTRACTOR DUE DILIGENCE CHECKLIST

• The scope of work and any necessary safeguards have been defined.
• Specific training requirements have been identified and compliance has been documented.
• Have a management system in place to respond promptly to and notify operator of complaints, hazards and follow-up action and can address imminent danger situations immediately.
• Have copies of all applicable state and federal safety and health regulations and standards, and company rules and programs.

• Implement necessary programs in place for MSHA requirements (i.e., respiratory protection, workplace exams, etc.)

• Have copies of all licenses, required work permits, insurance and bonds.

• Record keeping
  – Training
  – Daily inspections
  – Equipment examinations
• Have written safety and health programs.
• Ensure that equipment has current mandatory inspection certificates where necessary.
• Verify that any needed employee certifications are current (e.g., cranes, forklifts, etc.)
For more information on these and other occupational safety and health topics, please visit:

http://safety-health.jacksonkelly.com/

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