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Baby Blue dwarf rabbitbrush attracts pollinators in late summer

Cover photo courtesy Winger Landscape Photography, L.L.C.



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Murphy promoted at Honnen

Honnen Equipment Co., Commerce City, recently appointed **Matt Murphy** as senior sales manager. In this role, he will be responsible for overseeing all John Deere Construction & Forestry sales operations for Colorado and southern Utah. Murphy, previously sales manager with Honnen for over six years, brings 18 years of experience in heavy equipment sales and sales management experience to his new role.



Matt Murphy

Photo courtesy Honnen Equipment Co.



Ralston retires after 24 years of service

Donna Ralston retired as executive director, **Colorado Arborists and Lawn Care Professionals (CALCP)**, in October. During her 24-plus years of service in the industry, she was executive director for several associations. Ralston received Rocky Mountain Regional Turfgrass Association's Distinguished Service Award last year and this year was honored with the CALCP Golden Gun Award for outstanding service.



Donna Ralston

Photo courtesy Donna Ralston



Swingle sponsors Denver Zoo's Pollinator Pathway

Swingle Lawn, Tree & Landscape Care celebrated the June opening of a newly installed pollinator garden at Denver Zoo with a ribbon cutting ceremony. This **Pollinator Pathway** sponsored by Swingle supports ongoing efforts for education and sustainability across Colorado. The garden, covering 2,500 sq. ft., was designated the 200,000th Certified Wildlife Habitat by the National Wildlife Federation.

Photos courtesy Swingle Lawn, Tree & Landscape Care



Brian Aucone, senior VP for animal care and conservation at Denver Zoo, John Gibson, Swingle president, and Brian Kurzel, regional executive director at National Wildlife Federation

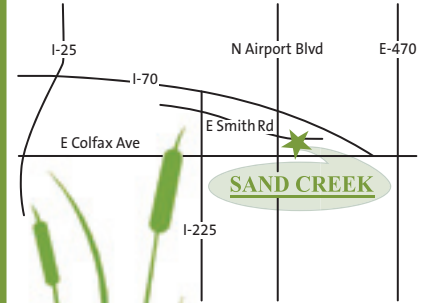


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Industry Calendar

Nov. 3: ALCC CEO Exchange - Lessons learned from the California drought with Chris Angelo, CPS Distributors, Inc., Westminster, register, info@alcc.com

Nov. 17: Denver Chapter Company Tours and Happy Hour, various member company locations; Happy Hour, Comrade Brewing Co., Denver, info@alcc.com

Dec. 6-8: RMRTA Annual Conference and Trade Show, Crowne Plaza Hotel, Denver International Airport, www.rmrtat.org

Feb. 7-10: 2017 ProGreen EXPO, Colorado Convention Center, progreenexpo.com

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green News

LawnAmerica merges with Swingle



Swingle Lawn, Tree & Landscape Care announced in September that LawnAmerica, an Oklahoma-based lawn care company, has merged with them. Swingle became the majority owner of LawnAmerica, which employs approximately 60 people.

Both companies will continue to operate as independent businesses, while also exploring new ways to combine resources, experience and sharing of best practices to improve efficiencies where possible.

Brad Johnson, founder and former majority owner of LawnAmerica said, “After lengthy discussions with many industry advisors, I’ve decided Swingle is the best fit for the next steps for LawnAmerica.”

“Combining our businesses provides an opportunity to grow stronger as multi-regional businesses, providing additional opportunities for team members and expanded service offerings to customers,” said **Thomas Tolkacz**, Swingle CEO.



In memoriam: Dick Marshall

Richard (Dick) Marshall, former owner and principal at DHM Design for 35 years, passed away in September. Marshall was a landscape architect and urban designer who earned the designation of Fellow from the American Society of Landscape Architects (ASLA) in recognition of exceptional accomplishments.

Marshall’s career is marked by service and leadership. He worked on behalf of the profession and the community and served the Colorado Chapter of ASLA on various committees. He was honored by The Denver Partnership as Volunteer of the Year, in 2011, for his efforts to make Downtown Denver a more walkable and livable neighborhood.

After growing up in Kansas, Marshall and his family made Colorado their home in the 1970s. He was a leading light in the industry and will be missed.



Dick Marshall

Photo courtesy Monarch Society



Dot Miller is new CALCP executive director

Dot Miller was selected as the new executive director at Colorado Arborists and Lawn Care Professionals (CALCP) in October. Miller brings a mix of experience from the private and public sectors. After serving as president of the Arvada Chamber of Commerce and CEO of the state trade association for the independent insurance industry, Miller started her own company, The Solution, to support associations and chambers of commerce in doing great work. She also serves on several boards of directors in the Denver Metro area and has been recognized for her achievements with several awards in recent years.

Miller’s appointment follows the retirement of former CALCP executive director Donna Ralston.



Dot Miller

Photo courtesy Dot Miller



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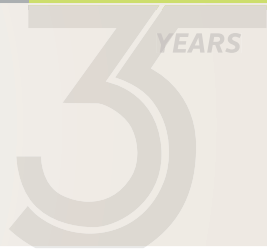
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▲ 2016 Senninger

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Ethics, social changes influence landscape design

By Michael J. Hommel

For decades, the state of Colorado has led a coalition to conserve water through the use of the principles of Xeriscape. Though the name did not quickly catch on, the water conservation principles for sustainable landscape practices that it outlined are more widely used in landscape design today than even a decade ago.

Waking up to reality

Emphasis on sustainable and smart water-use landscapes is a welcomed trend. As green industry professionals, we have finally woken up to the fact that without available water, our industry does not survive. We have a moral and ethical obligation to protect our natural resources. We must focus our attention on the proper design, implementation and maintenance of landscapes centered around the use of best management practices, as specified in the principles of Xeriscape.

Smart design, client education

Proper soil prep, proper selection and location of plant material and professionally designed and installed smart irrigation, are all examples of smart design practices that will create a more sustainable landscape. These are just a few areas where industry professionals have stepped up our commitment to ensuring we are good stewards of our natural resources. By educating our clients through proper design and implementation of sustainable landscapes, we are sharing knowledge and demonstrating our felt responsibility for conservation. We want all of us to realize the value of water before the tap goes dry.

Growing population

Another trend we have witnessed, particularly in the last two decades, is the increase of landscape renovations on existing homes in older, more established neighborhoods. As Colorado's population increases, the supply of new homes isn't keeping up, many new homeowners are moving into older neighborhoods with established landscapes. Once these homeowners renovate the inside of the home, renovation of their landscape follows.




Photo courtesy Designs By Sundown

Landscape design styles follow architecture styles

Also growing in strength as a trend in landscape design is the request for more modern/contemporary landscapes since the modern/contemporary trend in architecture is gaining a foothold. These design concepts focus on clean lines in the landscape with fewer varieties of repeating plant material versus beds of many different varieties of plants.

Boomers and millennials influence design

Another trend in demographic movement influencing the green industry is that aging baby boomers now desire to leave the suburbs and move into the inner-city, a reversal of suburban flight we saw in the 1960s. This has created a greater demand for rooftop gardens on top of high-rises where this new population has taken residence. This influx into the city is driven not only by boomers but also by young millennials who are finding their own in the business world and desire to live and work within the city limits, creating a greater need for residential high-rises and, in turn, spurring the growth of rooftop landscapes. 

—Michael Hommel is founder and president of Designs By Sundown



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Outstanding new annuals from 2016 trials



Get ahead of the curve in the 2017 growing season. Learn about some of the outstanding annuals from the 2016 Colorado State University Annual Flower Trials. The trials included over 1000 different varieties, many of them new, with more than 500 planted in containers. Approximately 150 industry professionals evaluated the plants to help determine these preliminary winners.

The Colorado State University trial garden is maintained by the Department of Horticulture and Landscape Architecture and receives

input from industry growers, and flower and seed companies. Twenty-four plant and seed companies worldwide participated and partially funded the 2016 trials along with many donations and volunteer hours provided by Colorado Master Gardeners.

This article features eight outstanding varieties from the 2016 trials that should be available for spring planting. For more information visit www.flowertrials.colostate.edu. 



Argyranthemum – ‘White Butterfly’ from Proven Winners

This plant is noted for its uniform, vigorous growth habit and abundant white flowers throughout the entire growing season.

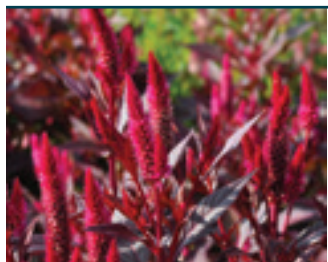
Tips & Tricks: Plants were so vigorous and full of white flowers without deadheading that it looked like a hedgerow of white flowers.



Canna - ‘CannaSol™ Lily’ from Dummen Orange

This canna is tall, reaching 5 feet, and has outstanding large yellow flowers. The plants were quite uniform in height and growth habit.

Tips & Tricks: The plant’s height, rigidity and long lasting flowers make it a great background annual.



Celosia - ‘Kelos Atomic Purple Pink’ from Beekenkamp

This celosia has red/purple foliage with rather large purple/pink flowers, which make it eye-catching from quite a distance.

Tips & Tricks: This is a great plant for adding foliage color and unique flowers to containers. Its flowers can be used both fresh and dried in bouquets.



Coleus - ‘Flame Thrower Habanero’ from Ball Flora Plant

The fiery orange leaves have a touch of purple at the center and the edges. They were heat-tolerant and performed well throughout the season.

Tips & Tricks: This plant is ideal for small pots and mixed containers due to its unique foliage color.



Ipomoea - 'Rosso' from Dummen Orange

Cyperus - 'Graceful Grasses King Tut' from Proven Winners

This novelty tallgrass grows to 4.5 feet. It is graceful as it sways in the breeze and creates a sense of the exotic.

Tips & Tricks: This grass would enhance both container plantings and most any landscape situation.



Dahlia - 'XXL Veracruz' from Dummen Orange

Abundant large flowers in shades of purple/white were held above dark green foliage. Plant stems were quite strong and had little lodging, even with overhead irrigation.

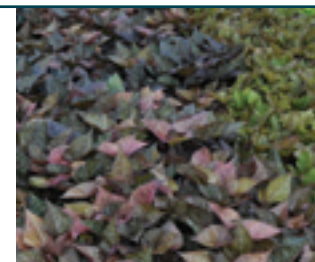
Tips & Tricks: The large bicolor flowers would make an excellent cut flower.



Ipomoea - 'Rosso' from Dummen Orange

Plants had various shades of bronze/purple foliage creating a mottled look with lots of interest. Rosso bears very few flowers and is mainly grown for its unique foliage color.

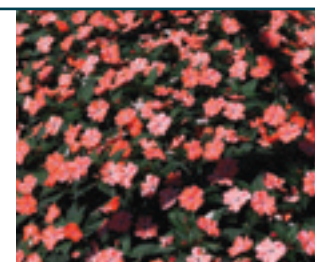
Tips & Tricks: This variety of *Ipomoea* had more of a controlled vigor, which allowed a very uniform appearance.



Impatiens - New Guinea 'Sunstanding Salmon' from Dummen Orange

These interspecific New Guinea *Impatiens* bring versatility to the landscape market due to their adaptability to both sun and shade. Plants were uniform in growth habit with a unique light salmon flower color.

Tips & Tricks: This plant is a vigorous grower with many flowers and adapts to both shade and sunny locations.



Legend



Full sun



Prefers/adapts to part shade



Prefers shadier conditions



Useful for containers



Requires moisture



Requires more moisture



Xeric



—Contributed by James E. Klett,
Colorado State University, Department of
Horticulture and Landscape Architecture

Government shakedown: Grip of government regs gets tighter



Many reputable businesses trying hard to play by the rules admit they feel beaten up.

Regulatory challenges and changes that have come down the pike in recent years include health care, H-2B program, OSHA reporting requirements and, effective this year, the new federal overtime rules. Add DOT, DOL and OSHA audits to the mix and yes, the cost and aggravation of being in business has escalated, and for some, almost exponentially.

It's a shakedown. And it's not the mob wanting kickbacks or protection payments. It's the government tightening its grip and unabashedly looking for excuses to impose fines. Many reputable businesses trying hard to play by the rules admit they feel beaten up.

That's why we have focused this issue on government regulations, changes and practices that could come back to bite you if you are not aware of them. Mulligans with government agencies are rare, especially when their mission is to find and fine for non-compliance.

In this issue, we summarize the new "Final Rule" that applies to overtime. It requires businesses to update employee pay and job classifications to be compliant. We clarify some of the nuances and also report on how some business owners are handling the pay and reclassification changes in their respective companies.

We present the inside scoop from a former OSHA officer – turned business consultant – about what to expect and how to handle an OSHA inspection.

We also tell the story of an OSHA investigation at a Front Range company last year, including lessons learned and the challenge of staying current with OSHA regulatory and reporting changes, which are constantly moving targets. Quite possibly, a new OSHA regulation regarding silica dust exposure will take effect next year, so stay current if your company does construction.

Finally, we share the experiences of Colorado companies targeted by Department of Labor (DOL), according to them, because they participate in the H-2B guest worker program that brings foreign nationals to work legally in the U.S. DOL audits have extended into years and companies have been threatened with fines up to \$250,000. And, yes, these owners say it's an unfair government shakedown.

Read more to learn about new rules and how some companies are responding.



New overtime rule: A swift kick to some companies

No exceptions apply

AS of December 1, 2016 all employers nationwide must comply with the new federal overtime rule which doubles the salary threshold for exempt and non-exempt employees. Many of Colorado's 73,000 employees affected by this ruling will be in the green industry, and business owners are likely to see significant impact on their payroll and scheduling as a result.

The rules, known as "Final Rule"¹ apply to all businesses—there are no exceptions. The rules fall under the Department of Labor's (DOL) Fair Labor Standards Act (FLSA). Regardless of the size of your business, your annual income or the number of employees you hire, you must comply with the FLSA. As the saying goes, "ignorance of the law excuses no one." You are liable for violations of these rules regardless of whether you were aware that you are subject to them.

In little time, landscape company owners and managers will need to update salaries, hourly wages, employee responsibilities and even your workday. As a result, you will need to adjust reporting procedures, how you work with your payroll service – and ultimately, how you bid jobs going forward. This is a big change with big consequences, and you can't afford to ignore it.

Word on the street is that DOL is hiring additional staff to monitor businesses for compliance. Make sure you know how the rule could apply to your firm.

The Final Rule applies to overtime exemptions for executive, administrative, professional, outside sales and computer employees. The rule does not affect employees who are currently non-exempt and eligible for overtime pay.

By Cherie Courtade

**As the saying goes,
"ignorance of the
law excuses no one."**





Be able to explain why certain employees may work overtime and others may not.

Understand your situation, know your options

Before you implement the changes, it's important to evaluate your staff, take stock of what exempt employees are earning, and decide the best way to reach compliance. The options boil down to three basic ways to comply:

1. Bring currently exempt employees up to the new salary level so they remain exempt. The previous annual salary level was \$23,660 and is now \$47,476. Consider: How will the new threshold impact your business?
2. Re-classify exempt employees who fall below the new salary threshold as non-exempt and pay them time-and-a-half overtime for time worked in excess of 40 hours in a week. Consider: How will this overtime impact your overhead, job costs and bids?
3. Re-classify exempt employees who fall below the new salary threshold as non-exempt employees and restrict them to working only 40 hours per week to avoid overtime costs. Consider: How might fewer hours worked by these employees impact your ability to get work done?

Some employers may choose to implement a combination of these options to fit their business needs and budget restrictions. It's important to consider the implications of each method by looking at the workload of affected employees. If an employee regularly works overtime, you'll need to find a way to meet productivity goals without incurring greater costs through overtime pay or increased salary. This could also mean shifting responsibilities to other, related positions that are exempt or increasing responsibilities for those employees who earn an increased salary.

For managers and administrative personnel, consider how you can manage staff who might be tempted to put in extra hours. Do they have a mobile phone or computer that allows them to work outside the office? Make a plan to ensure that they do not check their email or make phone calls beyond the 40-hour work week, or you will be required to pay overtime for those minutes or hours spent on the laptop or the phone.

It is crucial that management and employees understand the changes and be aware of how to track and manage overtime. There are no specific reporting requirements; you simply need to

Know the basics

The Final Rule updated the salary and compensation levels needed for executive, administrative and professional workers to be exempt. The duties tests remain unchanged. The key changes are:

- The standard salary level for exempt employees will be set at \$913 per week or \$47,476 annually for a full-year worker.
- The total annual compensation requirement for highly compensated employees (HCE) subject to a minimal duties test will be \$134,004.
- The salary and compensation levels will automatically be updated every three years to maintain the levels at the percentiles used to set the current levels: 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region and for HCEs the annual equivalent of the 90th percentile of full-time salaried workers nationally.
- Employers may use nondiscretionary bonuses and incentive payments, including commissions, to satisfy up to 10 percent of the new standard salary level if paid quarterly or more frequently.

record hours worked for employees and have them available for inspection by DOL. But improved tracking and internal reporting of employee hours will be critical documentation to have in the event of an audit.

Avoid morale issues

If not addressed properly, these changes have the potential to greatly impact your employees' morale. Team members may be confused by changes in their compensation and may not understand these changes are the result of government regulation.

Put a plan in place for explaining the rule to employees impacted by it – this includes managers of those who may be reclassified as non-exempt and those who work closely with others to whom the rule applies. Let your team know that the rules were enacted by the federal government and must be incorporated into company policy about overtime. It is not a punishment placed on your workplace based on any labor-related infractions and not a change in company culture.

If you don't have a full-time human resources manager, be sure to have someone on staff available to answer questions about exemption status or about reclassification. Be able to explain why certain employees may work overtime and others may not. Make sure everyone understands how to track their hours worked in order to comply with the new rule.

Help reclassified employees understand what the rule is, why it is in place and that the changes are not a reflection of their work performance. Otherwise, there is potential for misunderstandings and resentment. An employee who is reclassified as non-exempt may perceive this change in status as a demotion or a sign that his or her position is no longer a professional one. While you understand why you must carefully track hours worked, employees may resent changes in procedure and think you don't trust them or that you have suddenly become more controlling. Assure them the changes are made to comply with the law, not to punish any wrong behavior.

Communicate with employees who receive a salary increase

Be sure that employees understand why they are getting an increase in salary. Let them know of any additional responsibilities that may be required with them at the new salary level.

Communicate with supervisors and managers of impacted employees

Supervisors and managers should receive training about the rule so they communicate accurately and consistently with employees about your business's overtime policy and en-

Why is this happening?

The federal overtime exemption rules had not been updated since 2004, when the standard salary level was updated to \$455 per week, \$23,660 annually for a full-year worker. The new rules sought to bring the salary minimum up to a level commensurate with cost-of-living increases.

Unfortunately for employers, the DOL chose to make 12 years' worth of increases with one update, thus increasing the new salary level to \$913 per week or \$47,476 annually—slightly more than double the previous threshold. The new rule will require automatic updates every three years, which might make subsequent updates a bit more manageable.

force it. Train them to properly track and monitor employee hours worked and comply with the new overtime policies you may have implemented.

Staff should also be on alert for non-exempt employees who try to work outside their regular hours. Let them know that they should not take work calls or check email outside of their work time.

Accentuate the positive

Remember to tell your employees about the purpose behind the overtime rule. It is meant to give them better work/life balance. While tracking hours may seem like a burden, a more structured workplace insures they are paid for the hours that they work. If they are not approved for overtime, they enjoy more time for family and leisure.

Brace yourself for audits

Once you've put a plan in place for compliance and communicated the plan to your employees, you should focus on keeping accurate records. With DOL hiring additional staff to monitor businesses for compliance, having good time-keeping records and updated job descriptions can help protect your company's interests in the event of an audit.



Yes, it is possible that a salaried person is due overtime.

How do you know which method of compliance is best for your company?

Take stock:

- Evaluate your staff by tracking hours worked, including overtime.
- Review those hours and salaries to see who will be affected by the Final Rule.
- Decide which of the three options (raising salary, reclassifying an employee and paying overtime, or reclassifying an employee and restricting overtime) best fits your budget and your labor needs.

There are a multitude of ways to adjust your staffing and payroll to comply with the new rule.

Some employers have chosen to get creative in their restructuring in order to comply. In listening to employers discuss their options, we've heard:

- Some may raise salary levels but expand the duties of employees who have received a substantial pay increase.
- Others are considering eliminating positions in order to offset the higher salary level needed to keep some employees exempt.
- Others may choose to hire part-time employees to supplement the labor needs that arise when reclassified employees are no longer able to work overtime.

It is crucial, though, to be sure that however you adjust your staffing, your changes must not only comply with the Final Rule, but that they also comply with other DOL rules. Your business may benefit from the advice of a Human Resource consultant or a lawyer before moving forward with any restructuring of pay rates and duties. This can become a complex employee issue, and you don't want to leave your company vulnerable to a lawsuit from employees or fines from DOL.

— Cherie Courtade is ALCC's marketing manager.

¹ The full, official title is "Final Rule to Update the Regulations Defining and Delimiting the Exemption for Executive, Administrative, and Professional Employees"

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Pay salaried people overtime – really?

Rules may center around employees and their status as exempt from overtime.

One point of confusion about the upcoming changes to the federal overtime rules may center around employees and their status as exempt from overtime. Are you aware that simply being a salaried employee does not make one exempt from overtime pay? Yes, it is possible that a salaried person is due overtime because in addition to the salary test, an employee must meet certain “duties tests” to qualify as exempt. In other words, if the duties of a job do not meet the requirements set forth by the Fair Labor Standards Act (FLSA), an employee is entitled to overtime pay despite being salaried.

If your landscape foremen are in the field working alongside laborers they supervise, they may be eligible for overtime despite being salaried. The exemptions do not apply to manual laborers or other “blue collar” workers “who perform work involving repetitive operations with their hands, physical skill and energy,” according to the Department of Labor. These jobs include production, maintenance, construction and similar occupations.

The new federal overtime rules apply to employees often referred to as “white-collar workers.” These jobs require a high level of discretion, critical thinking, and often require advanced training or a college degree. The jobs often involve hiring or managing one or more employees.

For jobs such as foreman, whose duties appear to fall into a gray area, it might be worthwhile to consult with a lawyer or human resources expert to be sure that your job descriptions and compensation categories are in compliance with FLSA and the new federal overtime rules. Spending the time and money now to be sure you are following the rules correctly could save you substantial penalties in the future.



But I’m just a small family-owned business?

It seems many employers have not yet paid attention to the upcoming changes to the federal overtime rules. Perhaps one reason is that they don’t believe the rules apply to small businesses or to family-owned businesses. That’s a misconception—the Fair Labor Standards Act applies to just about everyone.

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How some firms adjust to new overtime rule

Wisely, many industry business owners are already considering the implications of the DOL overtime Final Rule on their companies. Of the handful of company leaders ALCC talked with, the way they handle overtime going forward depends on where they are now.

Payroll impact

Owners and managers who think the rule will have little impact on their businesses have employees with wages above threshold and meet the “duties test” requirements for overtime exemption. One small company will see little impact because only the owner is salaried.

For employees whose salaries have been or will be raised to the new threshold, one company is asking an employee to manage time to avoid working more than 40 hours per week. Another company is asking an employee to start tracking overtime and expects to pay a little extra on payroll.

Another company with salaried office employees earning less than the threshold will convert their current salaries to hourly – by dividing by 2080 – and pay the overtime for the 32 peak-weeks of the year. During the 20 weeks of the slow season, the hours of these employees will scale back to around 28-30 hours per week. The company anticipates that the extra paid in overtime during summer season will be roughly offset by the decrease in winter hours.

The downside of employee perception — to be classified as salaried just so a company can avoid paying overtime.

People impact

For year-round employees who are moved to hourly and earn more in the peak season with overtime, the challenge for them will be to manage their money to accommodate for a lower income during the slower season.

One business owner mentions the downside of employee perception saying he wouldn't want to be classified as salaried just so a company can avoid paying overtime if he is putting in extra effort. He says that we need to treat employees the way we want to be treated. “We should charge for our services in accordance with the labor laws,” he says. 🌿

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OSHA targets landscape industry

What can happen to you in an OSHA inspection

By Jack Seybert



Photo courtesy ALCC

After spending more than 13 years in the field as an Occupational Safety and Health Administration (OSHA) Compliance Safety and Health Officer (CSHO), I shifted my focus to working with employers. Using my experience, I now partner with employers, helping them develop and implement safety programs for day-to-day work, and train their employees to ensure compliance. My knowledge and experience can help guide companies toward better informed compliance. Nevertheless, several questions persist among employers concerning OSHA inspections and this article addresses the three most common.

Recommendations come from my observations and experience as an OSHA compliance officer and are not intended to be legal advice.



Jack Seybert

Why me?

There are a variety of reasons OSHA opens an inspection. One is that OSHA has a National Emphasis Program (NEP) for amputation, and landscaping is one of the targeted industries because of the type of work performed and equipment used. Any company using tools that could cause an amputation may be inspected.

Other common reasons for company inspections include: an employee was injured; an employee, former employee or employee representative made a complaint to OSHA; a referral for an inspection made by another government agency or by a CSHO; an anonymous complaint by anyone who thinks they see a hazard; and more.

Simply by falling under the jurisdiction of the Occupational Safety and Health (OSH) Act, your company may be subject to an inspection. Just because you have not yet been inspected by OSHA does not mean you will not be inspected in the future.

Any company using tools that could cause an amputation may be inspected.

Do I have to allow the inspection?

The answer is “yes” for the path of least resistance. Chapter 3, paragraph IV C of the Field Operations Manual (FOM) reads, “...CSHOs may enter without delay... for the purpose of conducting an inspection. Unless the circumstances constitute a recognized exception to the warrant requirement (e.g. ...plain view, open field...)...an employer has the right to require that the CSHO seek an inspection warrant prior to entering...” This means that under normal conditions in which landscaping tasks are performed, OSHA does not need a warrant to enter your jobsite because the jobsite is usually in plain view or in an open field.

Nevertheless, you may refuse to speak with the officer and require them use OSHA’s subpoena authority to gain access to documents and/or company employees for formal interviews. Each company makes the decision about how to handle an OSHA inspection. In my experience, most produce the required documents and allow access to employees.

When OSHA requests the OSHA 300 logs, 300A’s or 301’s, the law specifies employers have four business hours to produce these required documents. When it comes to

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supplying documents, the key word is “required.” Companies can control what documents they give to OSHA beyond those required. Providing any other documents is up to individual employers, unless under subpoena.

If OSHA requests additional documents, I typically recommend that employers ask the officer to send a written request listing the specific documents. By doing this, an employer has time to review the request and make an informed and unhurried decision about whether to provide the documents.

The law specifies employers have four business hours to produce these required documents.

Most employers supply requested documents. But, be aware that there may be instances when it is not in the employer’s best interest to provide specific documents. For example internal safety audits or internal accident reports may tempt an officer to go on a fishing trip through a company’s documents.

Do I have to allow OSHA to shoot video during the inspection?

Since most landscape work is outside and is easily seen from the public way, it is likely that OSHA has video recordings of a hazard before you even know they are close by. Each CSHO is issued a small video camera and anything recorded goes a long way when the CSHO documents the elements of a violation. Officers are instructed to get permission from the employer before recording and this is usually settled during the opening conference. If your worksite is in the public way, officers are free to record on the job site before and as they enter it.

A company manager has the right to refuse site video recording. Since it is OSHA policy that all inspections are recorded, officers will try to persuade employers to allow it. Officers know you are not thrilled to see them, so one of the primary reasons they give for the recording is that it makes the inspection go faster. They may also tell you it is agency policy and if you do not allow the recording it could be considered a refusal of entry according to the Field Operations Manual.

If you persist, the CSHO will call the Area Office for advice. A determination will be made

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No matter how friendly officers are... they are there to gather information to validate a citation.

about whether video recording is necessary to document the violations. If not, the officer may be instructed to take still photos. The truth of the matter is that CSHO notes and still pictures will provide all the documentation needed to write the citations. OSHA greatly prefers video because the audio and video recordings of employer statements and the hazard can be indisputable if legal action follows.

On the other hand, if a video recording is deemed imperative to document a citation, the officer will usually tell the employer that not allowing the recording is employer interference and will come back with a warrant forcing the employer to allow the recording. An employer can continue to deny the recording, but will be required to comply after the warrant is obtained, usually within 3-5 days.

An employer who holds out for a warrant causes the inspection to drag on because OSHA probably already has, or can get, all the information needed to issue a citation. I recommend that employers allow recording but it's imperative to remember that everything that is said and seen can appear on video. That means, answer only the question asked – do not elaborate and do not talk any more than necessary. Always remember; no matter how friendly officers are, they are not there on a social call. It is all business and they are there to gather information to validate a citation. 🌿

—Jack Seybert is owner at X-OSHA LLC and may be contacted at jack@x-oshallc.com or 970-381-4154.

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Owner shares about OSHA inspection



Photo courtesy -ALCC

Says his scar tissue may help others

“The contrast between our relatively recent OSHA inspection and our Colorado DOT audit a few of years ago is like night and day,” says a Front Range landscape company business owner, who will remain anonymous. “Though we were fined by DOT, the state trooper wanted to help us out and to tell us how to stay compliant. The OSHA inspector had no interest in helping us out.”

The state trooper involved in the DOT citation provided his phone number and an invitation to call about DOT related questions anytime and this business owner says he has easily recuperated the money from the fine in the calls and assistance he has received. The OSHA inspector was interested only in the fines, not in educating about compliance.

Stay current with filing requirements

The story of this company’s Occupational Safety and Health Administration (OSHA) investigation began when a crew member was injured on the job with a severe cut and near amputation of a finger. The company filed an injury report with OSHA, as well as reported an overnight hospital stay, within the required 24-hour period. The 24-hour OSHA reporting

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requirement had recently changed from reporting an amputation to include reporting an overnight hospital stay. Had they not reported to OSHA in a timely way, the fine could have been much worse. The injured worker, who has recovered, remained in the hospital overnight.

At OSHA's mercy

A week later, an OSHA inspector showed up at the company. OSHA opened an internal investigation that involved a review of paperwork including four years of OSHA 300 logs, the current accident report, the company's safety and health programs, and training on the machine on which the injury happened. Additionally, OSHA officers conducted a series of interviews with employees, the business owner and the crew at the site of the accident. While the investigation is active, the company must devote time to it.

Then it's wait-and-see. When the inspector wrapped up, the company was told to wait for the outcome, which could take up to 90 days. If they did not receive a letter within 90 days, there would be no citation.

Hire an expert

Here's the rub. When a letter arrived within 90 days stating the citation, the company was found to be in compliance with regard to the accident and injury. The \$7,600 fine – cited as a serious offense – was for not having a Lockout/Tagout program in place. In other words, the citation had nothing to do with the accident and injury.

The business owner found and hired an OSHA consultant – a former OSHA officer. He was very familiar with the regulations, having worked for the "other side" for more than a decade. With the consultant's assistance, a new Lockout/Tagout program was written.

The consultant, with his insider experience and perspective, also let the owner know that OSHA fines can be negotiated. They were able to negotiate it down to \$3,400.


Learn as we go

The owner says his company doesn't try to skirt the regulations, but they need professional help to understand the rules, to stay compliant and to keep the workers safe. He strongly rec-

The OSHA inspector was interested only in the fines.

ommends if you get a citation letter, and you don't have a consultant, it's time to get one.

"If you're ever cited by OSHA, hire an ex-OSHA officer as a resource," says the owner. "Hiring this guy was some of the best money ever spent."

He also learned from his consultant that OSHA isn't as big and scary as we may perceive. There is room for negotiation but you may need an insider's experience to learn what you can do. 



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DOL audits: Shakedown or smack down?



H-2B companies say they're **on the line**

Auditors showing up on their doorstep, scouring company files, issuing counseling warnings and threatening six-figure fines have left a few Colorado landscape companies reeling. Each company that spoke with *Colorado Green* about extensive Department of Labor (DOL) audits echoed the same experience.

Here's how one owner described their audit: "The auditor was unfriendly right from the start. It was clear from his attitude and body language we were guilty until proven innocent." Said another, "Requests for information were at first fairly benign. When they couldn't find anything negative, the scope of questions changed." Another described the audit as a predictable "good cop/bad cop scenario plus a neutral person who took notes and recorded everything."

What these companies share is their participation in the H-2B guest worker program and they believe their hiring of H-2B workers made them targets in audits where exploitation and non-compliance was assumed from the start. When auditors found companies were H-2B users, the process escalated. One company had five auditors simultaneously interviewing employees in every available space – the owner's office, a training room, a storage room and even an auditor's own car.

By Becky Garber-Godi

We are targeted because we use a program DOL and Homeland Security want to go away.

The auditor was unfriendly right from the start. It was clear from his attitude and body language we were guilty until proven innocent.

Auditors also extended the timeframe of the audits to put more company records under scrutiny. Companies responded differently. One firm complied since they were sure they had done nothing wrong and were "choosing our battles." Another firm following legal counsel declined to provide documents outside the audit period. He said their firm was "fortunate to have the resources to pay for advice – but it's unfair that smaller companies without those resources will cave in. DOL's intimidating factor is unfair," he says.

A common complaint from all companies was DOL's assertion that employees hired and paid as general labor were in fact "front line supervisors." DOL maintains when a general laborer drives, answers a question from a co-worker about how to do something, or asks a questions like, "did you mow the back corner?" – then that employee becomes in fact a first line supervisor who should be paid \$26/hour instead of the Denver area prevailing wage of about \$13.64/hour. Companies do pay long-time experienced H-2B workers more, but not \$26 per hour.

One owner has been warned by DOL that the first line supervisor ruling will be enforced in 2017. According to another owner, DOL "made it very clear that we have been warned about what a first line supervisor is and that all companies are misrepresenting their "lead" and "foreman" positions. He believes this ruling is meant to kill the program because companies cannot pay the inflated wages and remain competitive. The auditors, say all, have created rules and gray areas that create unfair burdens and defy common sense.





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They are raising hair-splitting nuances to create violations where there are none – when common sense would say, **'You can't do that!'**



Photo courtesy ALCC

One owner described their audit as “two years of worry and wondering what gray area was going to be enforced.” Ultimately, the company was not fined, but “counseled” on several gray areas they were told will be enforced in the future – including compliance with DOL’s position on first-line supervisors.

“DOL’s stance is they will enforce these gray areas until challenged by H-2B users – meaning when companies with deep pockets are willing to challenge DOL in court. It’s the only way DOL will look at the rules,” he said.

Similar to the first-line supervisor issue is an employee sharpening mower blades full-time. The DOL position is that even though the landscape laborer job description includes doing this kind of minor mechanical maintenance, dedicating an employee to do work full time reclassifies this employee as a mechanic’s helper. Therefore, DOL said the company should have filed a separate application, with all the applicable fees, in order to attempt to recruit an American mechanic’s helper.


Companies “counseled” about these violations and others are now put on notice. If companies committed them as an oversight, then fines might not be levied. But once counseled, if a company continues as before, it becomes subject to “willful” violations with each occurrence subject to as much as \$10,000 per violation.

One company was told by DOL’s lead investigator their immediate fines could be as high as \$250,000. Auditors came and went over about 18 months. Now, 15 months after they left, the company is still awaiting the final outcome.

One company was counseled for not running background checks on its workers from Mexico as it does on U.S. workers. Owners tried to explain these workers do not have a background in the U.S. to be checked and that background checks conducted in Mexico will be different than those conducted here. The company also showed how a background check on Juan Garcia, for example, resulted in more than 20 people with the same name with warrants in California and none of them were the person they had hired. Nevertheless, DOL insisted these checks still needed to be done. Said the owner, “They are raising hair-splitting nuances to create violations where there are none – when common sense would say, ‘You can’t do that!’”

Though speaking individually, all companies asserted that DOL started the audits knowing what the outcome would be. Said one, “DOL is a government entity which at its own discretion sets policy not overseen or vetted by anyone.” In other words, DOL has claimed the authority to shape policy and create rules outside of legislation. As one owner put it, “We are targeted because we use a program DOL and Homeland Security want to go away.”

Owners say they spend considerable money and go through a lot of red tape to participate in a program that brings workers into the country legally. Some firms have had the same core workers returning for nearly 20 years and they are regarded like family. These owners say they work hard to follow wage guidelines and other rules set by the government that companies hiring illegally and paying under the table don’t follow.

“Investigators could have respected us like partners and told us what to do rather than imposing fines,” said one owner. “For years, we’ve invested in a huge good-faith effort and in return we’ve been slapped down by the Feds.” 



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Colorado's Cost Containment Certification

Here's one government program that works **FOR businesses**



What is it?

The Premium Cost Containment Program is an effort from the Division of Workers' Compensation to partner with employers to protect Colorado's workforce. Through this program, employers will find ways to control work-related injuries while qualifying for a workers' compensation premium discount by having a certified Safety and Loss Control Program.

The Cost Containment Program was born out of the need for change in the face of some troubling workers' compensation trends. In 1989, the growing number of work-related injuries was resulting in increased workers' compensation costs to Colorado employers. To combat these trends, the state legislature enacted the Premium Cost Containment Program. Under this program, employers who implement and maintain a standardized safety program and achieve certification status are eligible for a reduction on their workers' compensation premiums. By preventing injuries and lowering the costs of claims, these employers also contribute to the stabilization and possible reduction of the standard rates set for their respective industries.

What's in it for me?

Currently, more than 7,000 Colorado employers participate in the program. Employers certified in the Cost Containment Program collectively saw a total of \$22,093,184 in the overall reduction of total claim costs in 2015. This is in addition to the 5% discount applied to the workers' compensation premiums for each company.

Unlike with an experience rating, the Cost Containment discount is not directly affected by the number or severity of injuries experienced over time. What matters is that an active safety program has been implemented and continues to be maintained demonstrating that employee safety is the number one priority. And while the Cost Containment Certification is not related to a company's experience rating, having a safety program in place can have a positive effect on an existing experience modification (e-mod). Reducing claim frequency and severity can improve a business's experience rating over time. Over the course of time, many landscape companies have indicated that general contractors specifically ask if they are certified in the Premium Cost Containment program prior to awarding bids.

By Miriam Evangelista

Safety can also have a positive effect on other intangibles such as morale and productivity. Employers who are curious about the benefits can check out OSHA's "Safety Pays Calculator":

<https://www.osha.gov/dcsp/smallbusiness/safetypays/estimator.html>



Steps to become certified

While the Cost Containment program must be in place for one full year before a business can apply for certification, becoming certified may not be as difficult as some employers think. A great place for companies to start is with their workers' compensation carrier or insurance agent who often provide safety services and consulting at no charge. Some carriers, agents, consulting firms, etc. even have "plug and play" templates for each of the 6 required steps. Businesses can customize these templates to fit their company's safety needs. Once the templates are filled out and distributed, it is simply a matter of implementation and maintenance as the safety program grows. Within one year, the business will be eligible to apply for the Cost Containment discount.

For further resources, the Division of Workers' Compensation also has an online employer's guide to Cost Containment at:



<https://www.colorado.gov/pacific/cdle/safety-and-loss-control>

Employers may also call the Premium Cost Containment Department directly at: **(303) 318-8644** for assistance.



—Miriam Evangelista is Cost Containment Advisor at Colorado Division of Workers' Compensation.

The Premium Cost Containment Program is an equal opportunity program meaning that there are no requirements based upon the size of the business or how many years they have been in operation. Companies large and small are all subject to the same basic **6 steps**:

1. Declaration of a Safety Policy signed and dated by top management and conspicuously posted for employees to read

- 2.** Designation of a Safety Committee or Coordinator
- 3.** Safety/Loss Prevention Rules
- 4.** Ongoing Safety/Loss Prevention Training
- 5.** Designated Medical Providers
- 6.** Written Claims Management Procedures

Why Swingle keeps cost containment 25-year priority



John Gibson

“One of the first things I worked on 25 years ago when I came to Swingle was cost containment,” says John Gibson, president at Swingle Tree, Lawn & Landscape Care. “We started it because we wanted to continue a culture of safety and to change the behavior of our teams.”

Swingle’s focus is on safety awareness and prevention. That is why crew members conduct a job hazard analysis, on-site, before starting a job. They are looking for potential hazards and ways to reduce the risk of an injury or incident.

Analysis and communication are key

When there is a safety incident, it is analyzed in detail to see what can be learned for future prevention. The team does a “freeze-frame” analysis on the event to fully evaluate the situation. The crew notifies the supervisor, who reports to the site, meets with the crew, documents the conditions, takes pictures, investigates what happened and talks about first thoughts on how to prevent.



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Our focus on safety has had a huge impact on our business.

Photos courtesy Swingle Tree, Lawn & Landscape Care



As a follow-up, the crew attends a safety review session where the incident is reviewed by a panel of peers who provide their input on what could have been done differently to prevent the incident. The panel provides recommendations to leadership on changes to policy or practices/training to prevent future events. This kind of detailed analysis feeds continuous improvement and the results are shared company wide. Discipline for the incident is covered only with supervisors and crew members individually.

Managers also study the frequency of incidents in six different categories. They study the frequency for the current year, by quarter, compared to the past three years. The frequency calculation correlates the number of incidents against the hours worked to balance seasonal variations in staffing. What is learned from these studies can help predict upcoming incidents and the information is shared with the team. "We use this information for visual trending of leading and trailing indicators," Gibson says.

- Incident categories:**
- Personal injuries resulting in doctor visit
 - First report of personal injury not resulting in doctor visit
 - Vehicle accident
 - Property damage
 - Wrong properties
 - Spills

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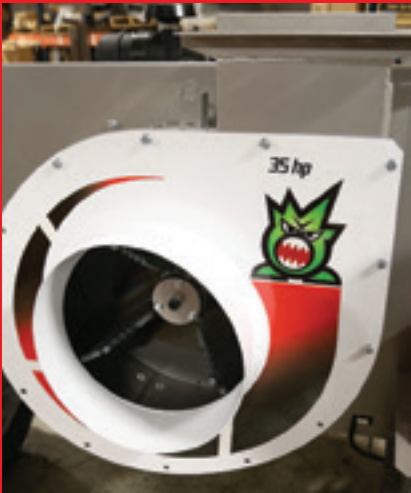
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When there is a safety incident, it is analyzed in detail to see what can be learned for future prevention.

Safety focus pays off

A foundation of safety is not just a concept touted by senior managers but is at the core of the company culture. According to Gibson, in Swingle's 2016 Employee Engagement survey, 56 percent of employees rate the company's attention to safety as above average in the industry.

Swingle is certified in the Colorado Division of Workers' Compensation Premier Cost Containment Program and is one of only seven companies that have participated in the program since its inception. Gibson was part of the team that participated in the enrollment of Swingle into the program. Earlier this year, the company received an award from the state in recognition of its safety record.

Gibson says it is hard to put a number on the dollar savings for the company since implementing the cost containment program. There is no doubt that savings are there when considering the reduction in injuries and accidents – not to mention a reduction in premiums. "Our focus on safety has had a huge impact on our business – safety is our foundation," he says. "It's not about the money as much as it is about our people and our impact on the communities we serve. And I wouldn't have it any other way." 🌿



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Keynote:

Lance Secretan, Ph.D.

Wednesday, Feb. 8, 9:00-10:30 a.m.

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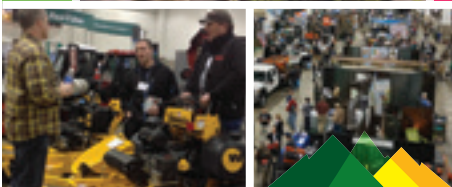
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Photo courtesy Winger Photography, LLC




Photo courtesy Harriett McMillan

Baby Blue dwarf rabbitbrush attracts pollinators in late summer

It's hard to beat Colorado native plants when designing both for site adaptability and for pollinators, but sometimes our native shrubs are perhaps a bit “scruffier-looking” than some clients are looking for. Rabbitbrush, a common Colorado shrub, usually grows quite large over time if left untended. This works well for commercial and industrial sites, but residential and high visibility landscapes often benefit from smaller, more compact forms that offer greater ornamental features.

Across the state many forms of rabbitbrush are found. Many years ago, several Colorado wholesale growers started collecting seed from a few isolated stands of a dwarf form with silvery-blue stems and leaves and simply listed it as “dwarf blue” in catalogs. But when Plant Select® selected it as a winning plant in 2011, it was dubbed Baby Blue to help raise its visibility and marketability. Nothing better than a catchy name to help get the word out about a wonderful

plant that should be used more!

Baby Blue dwarf rabbitbrush provides a compact mound of silvery blue for most of the summer until around mid-August when flower buds form and the shrub bursts into a glowing golden globe. Flowers last for several weeks, maturing to buff-colored seed heads. These seeds provide food for songbirds and browsing mammals, but can be sheared off if self-seeding becomes problematic. 

Size: 16-24” tall x 20-30” wide

Form: mounding

Light: full sun to partial shade

Culture: dry to xeric watering in clay, loam or sandy soil

Hardiness: USDA Zones 4-9

Pollinators: small bees, butterfly adults and larvae

Deer resistance: yes

Design/Maintenance tips:

- Full sun and dry conditions keep plants most compact.
- Plants can be sheared in spring for tidier or more formal appearance.
- Self-seeding can be an issue in irrigated areas - remove faded flowers before seed-set to avoid.
- Avoid spraying - small caterpillars often found on the plants may be important butterfly larvae!

- Easy care, low maintenance and water-wise.
- Use the silvery foliage to play off brightly colored perennials such as blanket flower, Prairie Jewel® penstemon and Furman’s Red salvia.
- For a prairie-inspired design, mix with Blonde Ambition blue grama and Standing Ovation little bluestem.

For more information, explore www.plantselect.org

—Contributed by Pat Hayward, executive director, Plant Select®

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