

Week of **June 9, 2014**

OSHA and NLRB Get Together on Whistleblower Complaints

OSHA and the National Labor Relations Board (NLRB) have teamed up to handle whistleblower complaints.

According to a May 21 NLRB memorandum, whistleblowers who miss OSHA's statutory 30-day deadline for filing a complaint under Section 11(c) of the Occupational Safety and Health (OSH) Act will be advised to consider filing an unfair labor practice grievance with NLRB. Section 11(c) prohibits an employer from discriminating against an employee because the employee reports an injury or illness. According to the memo, OSHA estimates some 300 to 600 cases per year are rejected as untimely. The much longer deadline for filing a charge with the NLRB is six months.

"It is likely that some of these cases may also raise claims arising under the National Labor Relations Act; for example, instances of employer retaliation for group complaints concerning unsafe working conditions," the memo stated.

Besides advising complainants to consider contacting NLRB, OSHA also will provide them with a toll-free number for that purpose.

The NLRB action comes in response to a March 6 decision memorandum from OSHA administrators outlining a cooperative effort between the two agencies, *Bloomberg BNA* reported. The OSHA memo stated that although there may be safety and health activities by individuals that are protected solely under the OSH Act, employee safety efforts that involve group activities are protected by

the National Labor Relations Act. It noted, in particular, Section 7 of the NLRA, which states that employees have the right to "engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."

OSHA administrator David Michaels and some lawmakers have pushed Congress to extend the OSHA deadline for filing discrimination complaints to 180 days, but with no success to date. The OSHA-NLRB cooperative arrangement could be viewed as a way to get around congressional inaction.

Employers could face tougher sanctions from NLRB than from OSHA. Since NLRB is focused on groups of workers, not individuals, it could demand changes to personnel policies and seek injunctions, labor activist Eric Frumin told *Bloomberg BNA*. Frumin is also a member of OSHA's whistleblower advisory committee. OSHA typically does not take either action in whistleblower cases.

The OSHA-NLRB arrangement seems ill-advised. The vast majority of OSHA 11(c) complaints are likely to be solo claims—that could not be considered by NLRB as concerted activity.

In addition, according to a recent analysis of OSHA 11(c) complaints, more than half of the 12,502 claims filed between fiscal years 2011 and 2013 were rejected. Of these, most ended because the worker either withdrew the claim or the claim was dismissed, making it even less likely that involving NLRB in OSHA whistleblower complaints represents sensible policy.



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MSHA Asks Group Suing It for Help with Coal Dust Rule

MSHA is asking for cooperation on its new respirable coal dust rule from the coal sector, the very group that has sued the agency to overturn the regulation.

The rule requires operators to take immediate corrective action when a sample meets or exceeds the exposure limit. Operators will be required to take five samples bimonthly until 2016, when more stringent sampling requirements go into effect.

The uneasy relationship made for a tense meeting last month when the agency called coal officials to MSHA's headquarters to collaborate on the rule and take questions about how MSHA expects operators to comply. One participant immediately asked MSHA chief Joe Main to explain Main's expectations about the nature of the interaction about the rule between the regulator and the regulated community.

Bruce Watzman of the National Mining Association (NMA), a lead plaintiff in litigation over the regulation, asked whether MSHA envision the interaction as involving "mutually charting a course forward" or a one-way dialogue where operators present issues and MSHA responds. Main answered that the agency intended to adhere to the regulation and was seeking information on what MSHA needed to do to ensure a smooth transition to the rule and plug "holes that we need to plug."

John Gallick of Alpha Natural Resources then asked Main to consider a delay of several months in the August 1, 2014, interim effective date for what he called administrative challenges. The rule becomes fully effective on August 1, 2016; however, certain provisions have to be met before then.

Gallick's request was repeated by other corporate representatives and by Dennis O'Dell, Occupational Health and Safety Administrator of the United Mine Workers of America, who asked for a short delay so union miners have time to become familiar with the new mandate. O'Dell noted that union miners take their annual vacations

between June and August and thus may not be available for training. Main suggested he might be flexible on the upcoming deadline only after Lou Barletta of Consol Energy pointed out that the agency had shown flexibility in previous rulemakings.

The agency will continue to review progress between now and the August deadline, Main said, then added, "We'll look at where we are then."

Gallick expressed concern inspectors might want to see adjustments to engineering dust controls and ventilation plan changes based on a single elevated result when a minor change to a work practice may be all that is necessary.

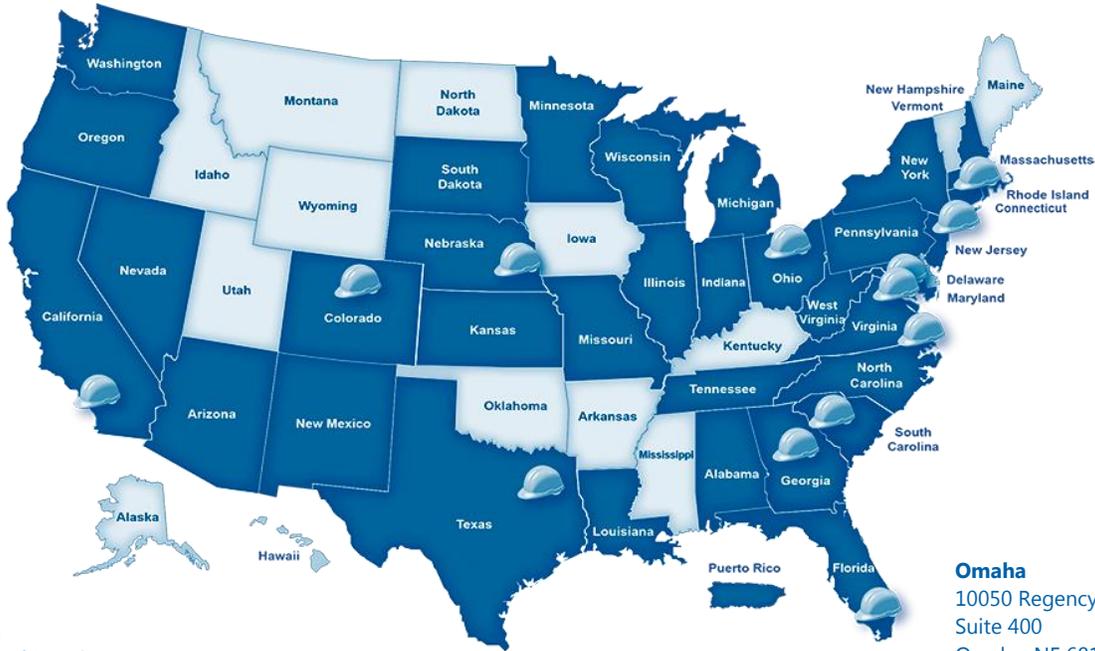
"I believe that's going to be the first battle with the enforcement group," Gallick said. "That's my first concern administratively."

MSHA's Coal Administrator Kevin Stricklin replied that inspectors will give operators the benefit of the doubt in that case. But if over-standard results persist, MSHA would insist operators investigate more thoroughly to identify and correct the problem.

MSHA completed a series of six regional stakeholder meetings on the rule in May. Regulators offered to make their experts available for additional outreach meetings with individual operators, even at mine sites. Main said the agency also would schedule monthly sessions in June and July with meeting participants.

NMA, several state coal associations, and Murray Energy Corp. and its subsidiaries have gone to the court of appeals to overturn the rule. In addition to claiming the rule is economically infeasible, critics complain the agency ignored evidence that an increase in black lung disease is not widespread but found only in clusters and that MSHA has ignored proven, yet cost-effective approaches for controlling dust.

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