

Week of December 2, 2013

NIOSH Draft Cancer Policy Merits Response

The National Institute for Occupational Safety and Health (NIOSH) has issued a draft current intelligence bulletin significantly updating its 35-year-old policy for classifying chemical carcinogens. NIOSH proposes to evaluate for occupational relevance the hazard assessments that have been made by the U.S. National Toxicology Program (NTP), Environmental Protection Agency (EPA) and the International Agency for Research on Cancer (IARC). If NIOSH finds the scientific basis of a carcinogen classification to be occupationally relevant, it will list the chemical as an occupational carcinogen along with the NTP, EPA or IARC classification.

NIOSH also will determine the appropriate carcinogen category under the Globally Harmonized System (GHS) classification system used by OSHA in its Hazard Communication Standard.

NIOSH said this approach will allow it to develop recommended exposure limits (RELs), replacing its current

practice of recommending that cancer-causing chemicals be reduced to the lowest feasible level. The RELs will be health-based and designed to keep exposures below a target cancer risk level of 1 in 1,000 over a 45-year working lifetime, NIOSH said. In addition, the technical feasibility of controlling exposures in developing RELs will no longer be considered. Rather, NIOSH will provide recommendations, which will note whether existing controls are available or effective, including alternative risk management practices.

The changes regarding the RELs are especially significant since community advocates and tort attorneys often cite them to advance their particular agendas. Comments on the proposal will be accepted through February 13. Affected employers should weigh in. Jackson Lewis attorneys are available to provide assistance in preparing remarks.



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Trivial Fines, but Expensive Consequences

OSHA fines can sometimes seem trivial, but they often represent just the tip of the iceberg as far as costs to employers are concerned.

For example, at SeaWorld in Orlando, a trainer died after being pulled under water by a killer whale in 2010. OSHA cited the employer for three safety violations, totaling \$75,000. A judge later reduced the fine to \$12,000. The company also was directed to abate the alleged hazard by allowing trainers to work with killer whales only if there is a physical barrier between them and by creating a minimal distance between trainer and whale.

SeaWorld appealed, but lost its case before the Occupational Safety and Health Review Commission. The company has taken the dispute to a federal appellate court, and the two sides are engaged in court-ordered mediation. SeaWorld and OSHA also continue to disagree

over OSHA's wish to interview three managers during a follow-up abatement inspection and over public disclosure of safety protocols for working with killer whales, which SeaWorld considers proprietary. The company also seeks to introduce other methods of abatement besides those OSHA recommended.

For a company that boasts hundreds of millions in profits annually, the fine is not really the issue. Rather, it is concern that, if the government prevails, the business may face additional legal liability as well as take what it believes are unnecessary, additional safety precautions.

OSHA citations and abatement requirements can have a huge impact on businesses despite the seemingly trivial fines. Companies should always include any potential long-term impact of OSHA citations or abatement in their cost-benefit analysis of any OSHA citation.

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