

Week of **March 3, 2014**

Leak Prompts Chemical Safety Board Call for New Rules

Citing “a gap in the regulatory framework that fails to cover aboveground storage tanks,” the chairman of the U.S. Chemical Safety Board (CSB) has urged lawmakers at a congressional field hearing in Charleston, West Virginia, to approve legislation to prevent major chemical spills.

CSB Chairperson Rafael Maure-Eraso’s remarks came on February 10, a month after some 10,000 gallons of 4-Methylcyclohexane methanol leaked into the Elk River from a storage tank situated upstream from the capital city’s water treatment plant. The river is a tributary of the Kanawha River, which supplies water for 300,000 people. Residents were told not to drink the water or use it for cooking or bathing. The directive was lifted after about two weeks.

“While there are laws prohibiting polluting to waterways with a spill, there are not really any clear, mandatory standards for how you site, design, maintain and inspect non-petroleum tanks at a storage facility,” Maure-Eraso said. Tanks at the leak site were not covered by either state or federal regulations. He called for “urgent steps” to address the regulatory gap.

Noting that CSB has investigated previous hazardous releases in the Kanawha Valley over the past five years, Maure-Eraso revisited the agency’s previous

recommendations that county officials, working with the state, establish a hazardous chemical release prevention program to enhance safety and optimize emergency response. The program would operate under a new industrial authority funded from fees assessed on the companies processing or handling potentially dangerous chemicals. While officials considered the recommendation, it was not adopted for several reasons, including funding, he stated.

CSB’s investigation into the accident will include inspection practices, state and federal oversight of similar tanks, industry best practices and response to the emergency, in addition to examining the tank and containment structure. Maure-Eraso said a particular focus would be on the adequacy of toxicity data on the chemical that was available to emergency responders.

Maure-Eraso recommended that any legislative reform consider the hierarchy of controls, an effectiveness rating used to control hazards and the risk they represent. Under that approach, the first question to ask in this situation, he said, is “Do the tanks need to be near the water supply?” Unfortunately, in this case, “the answer would have been ‘no,’ ” he said.

Timely Contest of Penalties Essential as Commission Rebuffs Late Attempt to Challenge

As an Arizona mine operator has learned, a casual regard for procedural rules in challenging administrative penalties may have undesirable consequences.

According to MSHA's files, Gila Rock Products, LLC, a sand & gravel producer, received a proposed penalty assessment from the agency in May 2012 for citations written at its Reymert Mine. It had 30 *calendar* days to file an appeal with the Federal Mine Safety and Health Review Commission. When none was filed within that period, the assessment became a final order of the Commission.

In August 2013, over a year later, Gila asked the Commission to reopen the penalty assessment. The company claimed it had mailed a pre-penalty notice of contest to MSHA. It also claimed its owner was not served with the proposed assessment. The Commission said it did not receive a contest notice, as required.

In evaluating requests to reopen penalty cases, the Commission takes guidance from federal civil court rules.

A mistake, inadvertence, excusable neglect or other reason showing good cause may justify reconsideration of a decision. Nonetheless, action must be taken within a reasonable time, defined in the rules as within one year after the final order is rendered. Gila did not meet that standard. As a result, the Commissioners unanimously rejected the request as untimely.

The lesson here is to know the rules and adhere to them strictly. Failing that, aggrieved parties must submit a detailed justification to the court to explain why a case should be reopened. In many instances, as occurred here, MSHA will oppose it. Employers must act promptly to protect their rights.

Facilities under OSHA's jurisdiction also are under a specified time constraint. The filing deadline is 15 *working* days, and the notice goes to OSHA, not to the Occupational Safety and Health Review Commission, which adjudicates contests to OSHA enforcement actions.



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Q:

One of our employees left his laptop in an unlocked car, and it was stolen. Can we deduct the cost of the laptop from his paycheck? He signed a policy at the start of his employment agreeing to this deduction.



***Answer provided by Teresa Burke Wright,
a shareholder in the Washington, D.C. Region office:***

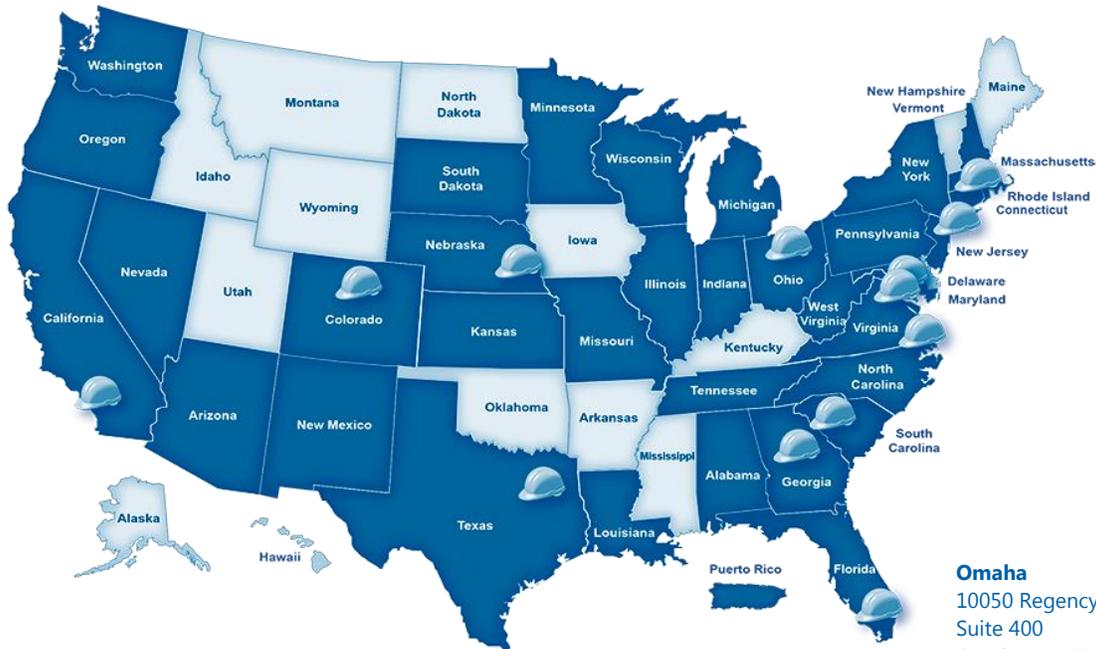
According to the U.S. Department of Labor, it is not permissible for an employee who is “exempt” from the Fair Labor Standards Act (FLSA). Requiring an exempt employee to repay the employer for the cost of lost equipment violates the “salary basis” test and therefore, jeopardizes the employee’s exempt status. For non-exempt employees, the deduction is permissible under the FLSA so long as it does not reduce the employee’s pay below the minimum wage and does not reduce any overtime pay to which the employee may be entitled.

State wage payment and collection laws also apply in this scenario. In some states, this type of deduction is permissible outright; in others, a written policy or a signed authorization may be needed. Further, some states require certain specific language or format for the authorization. Finally, in some states, a deduction may not be permitted even with a signed authorization from the employee. Remember to check the laws, guidance and regulations in the state in which the employee works.

Do you have an employment law question that may be of interest to other employers? If so, please send it to Regan Harrison at Regan.Harrison@jacksonlewis.com for consideration in upcoming issues of this newsletter.



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