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Workplace Safety and Health Update

Week of ***September 15, 2014***

Committee Approves Changes to OSHA's Whistleblower Statute

OSHA's Whistleblower Protection Advisory Committee wants to improve safeguards for employees who experience retaliation after making workplace safety and health complaints, but most of the changes it recommends will take congressional action.

In a series of unanimous votes, the Committee on September 4 called for changes to the Occupational Safety and Health (OSH) Act's whistleblower provision, Section 11(c). They are similar to recommendations OSHA chief Dr. David Michaels urged Congress to consider when he testified before a Senate oversight panel in April.

The recommended changes include:

- lowering the burden of proof requirement so a complainant need only show the complaint was "a contributing factor," as opposed to having to prove dismissal was a result of raising a safety complaint;
- allowing temporary reinstatement following an initial finding favoring the employee;
- permitting appeals to Labor Department administrative law judges rather than through an internal OSHA review process;
- permitting complainants to take their cases to federal court;
- increasing opportunities to seek punitive damages and attorneys' fees;
- increasing the filing deadline following an alleged retaliatory action to 180 days, from the current 30 days; and
- forbidding pre-dispute arbitration agreements with employers from limiting a worker's right to file a Section 11(c) complaint.

One Committee member expressed reservations, despite the unanimous vote. Attorney George Keating questioned the recommendations lowering the burden of proof and allowing preliminary reinstatement, according to *Bloomberg BNA*.

Keating noted that in a 2013 discrimination case brought under the Civil Rights Act, the Supreme Court rejected an appeals court opinion that lowered the burden of proof. Among the Court's concerns were that a lower burden of proof would encourage employees to make unfounded claims as a way to cover their dismissal for poor performance, Keating said. That could further burden OSHA's resources, he noted, which already are taxed by a large caseload. Regarding temporary reinstatement, Keating remarked that requiring employers to reinstate workers before the appeals process had ended was not consistent with due process, *Bloomberg BNA* reported.

However, Billie Garde, a fellow committee member and attorney, countered that other whistleblower laws permitting the "contributing factor" burden of proof and temporary reinstatement have not brought a rush of whistleblower complaints.

There is no indication Congress will take up OSH Act reform, including its Section 11(c) provision, anytime soon.

Judge Throws Out MSHA Citation for Lack of Jurisdiction

A mine operator's decision to challenge an MSHA citation and proposed $121 fine was rewarded when a judge threw out the violation for lack of jurisdiction.

When the citation was written in September 2011, two separate businesses run by the same family operated on property in North Carolina: a private open pit gold mine run by Pickett Mining Group (PMG), which received the citation, and a recreational campground and "pan for gold" commercial venture called Cotton Patch Gold Mine that are open to the public. Some facilities on the property were shared by the two entities.

An inspector cited PMG because of unguarded parts on a tractor. The tractor was a 1942 model year vehicle with an attached mower that the operator said was used exclusively to cut grass in the public area. It was not used at the mine because there was no grass there. Besides, the mower had been connected to the tractor for so long it was not readily detachable, and the tractor could not be used on mine property because of the unguarded engine parts, the operator stated.

MSHA argued the tractor fell under its jurisdiction because a miner had driven it, it was parked on mine property and it could be used to do mining work. During a hearing on the case, it was revealed that a miner had indeed parked the tractor, but he doubled as a Cotton Patch employee on weekends.

Administrative Law Judge Priscilla Rae disagreed with MSHA, relying on a 2009 decision by the D.C. Circuit in a similar case, and vacated the citation in a decision issued September 8. In that 2009 landmark litigation, the circuit court ruled MSHA had jurisdiction over a private road used by a California cement producer and several non-mining interests, but only over vehicles that traversed it for mining purposes.

ALJ Rae found that the access road and the storage area where the tractor was parked were used by both Pickett family businesses. Thus, as dual-use areas, neither the road nor the storage area was exclusively on mine property. Moreover, there was no evidence to support MSHA's contention the tractor could be used at the mine.

That the mine is under MSHA's jurisdiction was beyond dispute. "However, a mine's MSHA-covered status does not give the Secretary authority to regulate equipment that is not within the boundaries of the extraction area, is not a component of an appurtenant road or way, is not used by the operator's employees and bears no relation to its mining operations," Rae said.

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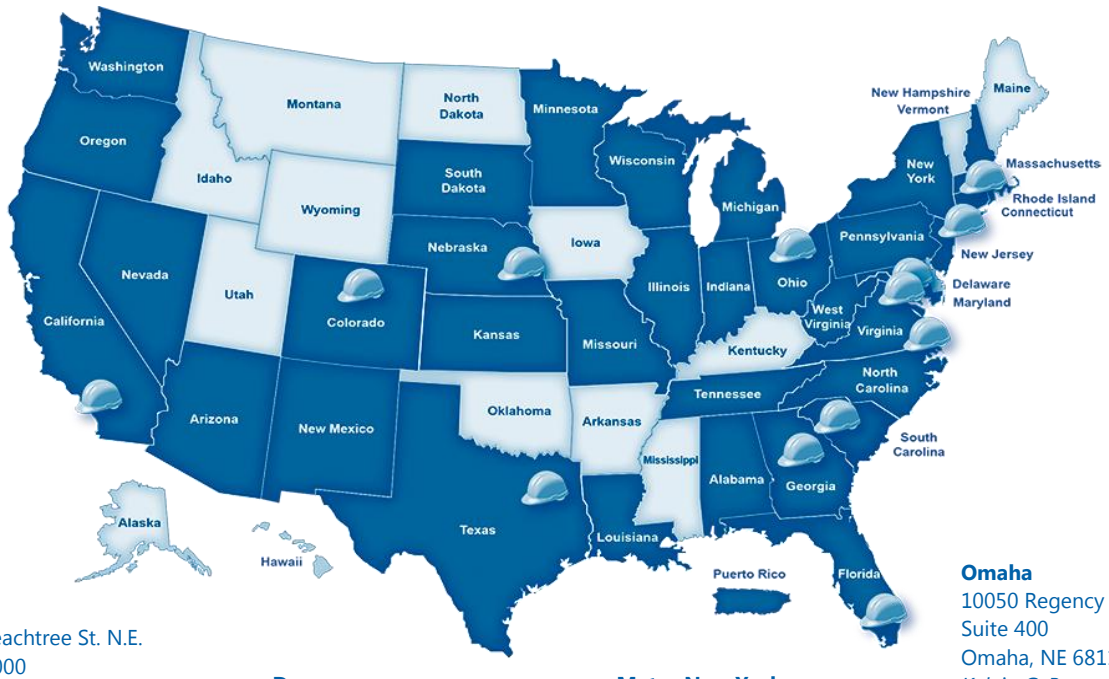

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