jackson|lewis
Preventive Strategies and Positive Solutions for the Workplace
All We Do Is Work.℠

Workplace Safety and Health Update

Week of ***June 23, 2014***

NIOSH Withdraws Recommendations for Upgrading OSHA Chemical Safety Standard

NIOSH has backed away from comments it provided to OSHA on how to expand OSHA's process safety management (PSM) standard, saying it did so based on a re-evaluation of the science underpinning its earlier recommendations.

OSHA issued a public call for comments last December seeking suggestions for upgrading its PSM standard and preventing major chemical accidents. The request followed an explosion and fire at a Texas fertilizer facility in April 2013 that claimed 15 lives and resulted in millions of dollars in property damage. OSHA's initiative was in response to a presidential Executive Order for federal agencies to develop better ways to prevent chemical accidents.

On March 6, NIOSH made three recommendations in comments it submitted to OSHA. One suggestion called for OSHA to include a "safety case" approach in its PSM standard. The safety case regime, NIOSH said, is "proactive" and "performance-based," requiring employers to define appropriate controls for safe operation, evaluate their adequacy for the facility and decide how to implement and maintain them.

"The employer is responsible for ensuring safe operation of the facility and a license is required to operate the hazardous process/facility," wrote NIOSH, which referenced a publication about the safety case system in Australia.

One provision of the safety case approach requires employers to implement safer designs, and NIOSH recommended that as well. The organization called designing out risks "[o]ne of the best ways to prevent and control occupational injuries, illnesses and fatalities." It pointed out that NIOSH leads a national initiative called Prevention through Design.

However, NIOSH submitted a second letter to the OSHA comment docket saying it wished to substitute new comments for the ones it had submitted earlier. The revision retained a recommendation for a qualified person to be a part of the team conducting process hazard analysis, but stripped out the safety case and inherently safer design suggestions.

The second letter was dated June 6, which was more than two months after the March 31 close of OSHA's comment period and the day a White House multi-agency federal task force made public its chemical safety and emergency response recommendations.

The substitution "was based on a re-evaluation of the evidentiary basis foundation for the March 6, 2014 comments," Paul A. Schulte, Director of NIOSH's Education and Information Division, said in a cover letter. Schulte told the *Charleston Gazette* "a variety of stakeholders" had told NIOSH Director Dr. John Howard at scientific conferences of their concerns about the March recommendations.

"The director called for a re-review of what we had said," Schulte told the newspaper. "Upon looking at it further, while there are advocates for those positions, we didn't see that there was actually a scientific basis that attested they were more effective than what was currently being done. We didn't want to be in a position of recommending something to OSHA that didn't have a good evidentiary basis."

One advocate favoring the safety case approach is the U.S. Chemical Safety Board (CSB). However, the task force dismissed CSB's proposal, saying that "nearly all comments received regarding the adoption of the safety case regulatory model were negative," according to the newspaper.

Frustrated Judge Sets Criteria for Repeat Flagrant Violations

Frustrated by "vague and inconsistent criteria" MSHA has offered to support a repeated flagrant violation, a Federal Mine Safety and Health Review Commission administrative law judge has taken upon himself to fill the "void" so he can adjudicate an order the agency issued against an Alabama coal operator.

MSHA was handed a flagrant violation enforcement weapon for the first time when Congress passed the MINER Act in 2006. Lawmakers defined "flagrant" in the statute as a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury. The maximum fine was set at $220,000 per violation, since increased to $242,000 to account for inflation.

MSHA's job is to take such language and turn it into objective criteria for enforcement and legal purposes. However, the agency's effort to do so remains a work in progress. For instance, MSHA now holds that a violation may be flagrant if it leads to a lost-time injury, whereas previously the injury had to be at least permanently disabling, according to Administrative Law Judge Jerold Feldman. The agency also has departed from its initial guidelines requiring at least two prior violations of the same mandatory standard cited as aggravated conduct within the previous 15 months, the judge noted.

Feldman has taken the lead because in a case before him MSHA charged Oak Grove Resources, LLC with a flagrant violation for excessive coal dust accumulations at its Oak Grove Mine in 2012. The agency proposed a $146,400 fine. The enforcement action was written as flagrant, in part because MSHA said the operator had been cited 91 times during the previous two years under MSHA's accumulations standard.

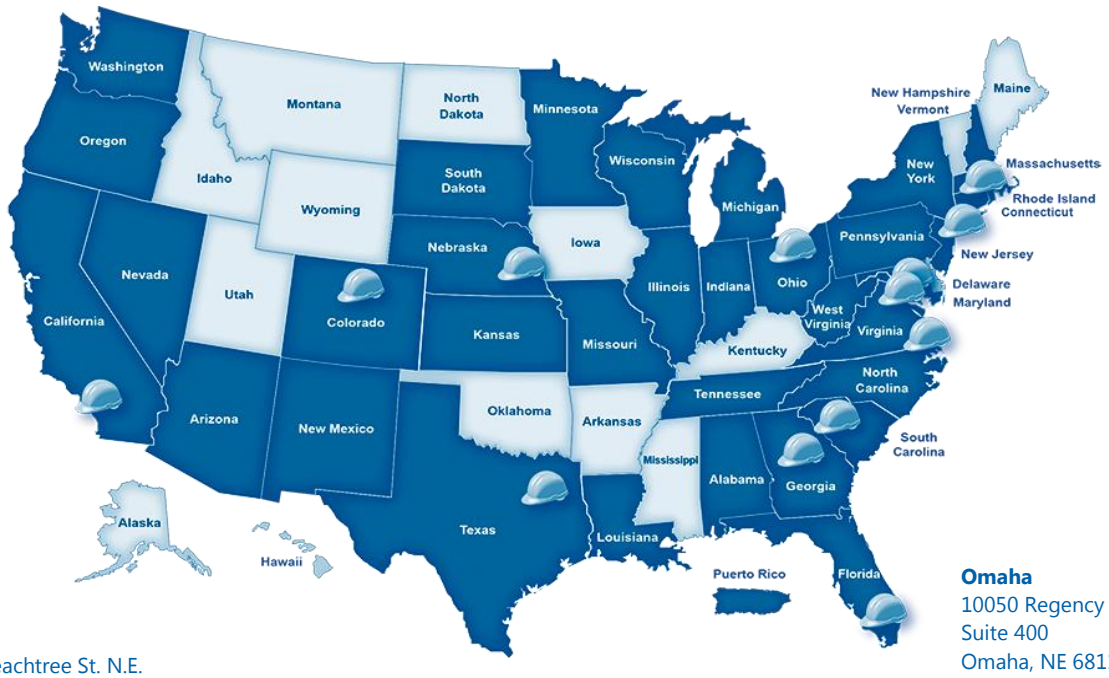
Feldman issued an order in March directing MSHA to respond to questions on substantive issues he believed MSHA needed to explain to support a repeated, flagrant violation. He followed up the March order with another on June 11 after MSHA's submitted its responses in April.

In his latest order, Feldman held that Congress had made clear the flagrant violation provision could be reserved only for the most blatant and egregious violations. In addition, he concluded that MSHA's characterization of gravity as the agency applied it to flagrant violations was neither reasonable nor persuasive and thus was not entitled to deference.

Since the agency had failed to provide what Feldman called "evidentiary criteria" to enable him to adjudicate the Oak Grove case, he spelled out the criteria himself and ordered the agency to respond to it with supporting evidence within 21 days.

With experienced OSHA and MSHA attorneys located strategically throughout the nation,

Jackson Lewis is uniquely positioned to serve all of an employer's workplace safety and health needs:



Atlanta
1155 Peachtree St. N.E.
Suite 1000
Atlanta, GA 30309
Dion Y. Kohler, Esq.

Boston
75 Park Plaza, 4th Floor
Boston, MA 02116
Stephen T. Paterniti, Esq.

Cleveland
6100 Oak Tree Blvd.
Suite 400
Cleveland, OH 44131
Vincent J. Tersigni, Esq.

Dallas
3811 Turtle Creek Blvd.
Suite 500
Dallas, TX 75219
William L. Davis, Esq.

Denver
950 17th Street
Suite 2600
Denver, CO 80202
Donna Vetrano Pryor, Esq.
Mark N. Savit, Esq.

Greenville
55 Beattie Place
One Liberty Square
Suite 800
Greenville, SC 29601
Robert M. Wood, Esq.

Los Angeles
725 South Figueroa Street
Suite 2500
Los Angeles, CA 90017
David S. Allen, Esq.
Benjamin J. Kim, Esq.

Metro New York
58 South Service Road
Suite 410
Melville, NY 11747
Ian B. Bogaty, Esq.
Roger S. Kaplan, Esq.

Miami
One Biscayne Tower
2 South Biscayne Blvd.,
Suite 3500
Miami, FL 33131
Pedro P. Forment, Esq.

Norfolk
500 E. Main Street
Suite 800
Norfolk, VA 23510
Thomas M. Lucas, Esq.
Kristina H. Vaquera, Esq.

Omaha
10050 Regency Circle
Suite 400
Omaha, NE 68114
Kelvin C. Berens, Esq.
Joseph S. Dreesen, Esq.

Orlando
390 N. Orange Avenue
Suite 1285
Orlando, FL 32801
Lillian C. Moon, Esq.

Washington, D.C. Region
10701 Parkridge Blvd.
Suite 300
Reston, VA 20191
Henry Chajet, Esq.
Tressi L. Cordaro, Esq.
Garen E. Dodge, Esq.
Bradford T. Hammock, Esq.
R. Brian Hendrix, Esq.
Avidan Meyerstein, Esq.
Michael T. Taylor, Esq.

jackson|lewis

For more information on any of the issues discussed in this newsletter, please contact:

Brad Hammock at HammockB@jacksonlewis.com or (703) 483-8316, Henry Chajet at henry.chajet@jacksonlewis.com or (703) 483-8381, Mark Savit at mark.savit@jacksonlewis.com or (303) 876-2203, or the Jackson Lewis attorney with whom you normally work.

Mail regarding your subscription should be sent to contactus@jacksonlewis.com or Jackson Lewis P.C., 666 Third Avenue, New York, NY 10017. Attn: Client Services. Please include the title of this publication.