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Workplace Safety and Health Update

Week of ***August 4, 2014***

MSHA Proposes Far-Reaching Penalty and Citation Changes

MSHA has proposed profound changes to its Part 100 penalty assessment process and seeks to change how inspectors determine "serious" violations. It appears the changes would bypass controlling law on "significant and substantial" violations. MSHA also proposes to limit the authority of the Federal Mine Safety and Health Review Commission (FMSHRC) to review contests of a violation or penalty.

MSHA said its intent in the proposal, released July 31 in the *Federal Register*, is to promote consistency, objectivity and efficiency in its citation- and order-issuing process and to facilitate improved compliance and early resolution of enforcement matters. According to the agency, the proposed changes also would hold operators more accountable and encourage them to be more proactive in addressing safety and health concerns. Mine operators should voice their concerns with the proposal within the 60-day comment period.

The agency estimates that total penalties and their distribution by mine size will remain about the same under the proposal. The existing penalty minimum and maximum for non-flagrant violations, $112 and $70,000, would not change. However, the statutory minimum fines for unwarrantable failure violations under Sections 104(d)(1) and 104(d)(2) would increase by 50%, to $3,000 and $6,000, respectively. The proposal does not cover the agency's controversial special assessment procedures under which MSHA uses its discretion to select a penalty amount up to statutory maximums.

MSHA proposes fines under the current "regular assessment" process by assigning penalty points based on the six criteria listed in the statute and in 30 CFR Part 100. These are mine size, violation history, negligence, gravity, the operator's effort to abate violations and the effect of the penalty on the operator ability to remain in business. The points are then converted to a dollar amount using a penalty conversion table containing a maximum of 208 points. The proposal would cut that number to 100 points, reweigh some of the criteria and cut out some subcategories. The reweighing would place greater emphasis on negligence, the severity subcategory of gravity and violation history, including repeat violations. Less emphasis would be given to the gravity factor of likelihood of occurrence, as well as mine size.

In addition, negligence and gravity would be streamlined by reducing the number of subcategories. For instance, the five subcategories of negligence would drop to three: not negligent, negligent and reckless disregard. Under the proposal, mitigating circumstances no longer will be considered in evaluating negligence. The operator's work to abate a violation currently allows a 10% penalty reduction for a good faith abatement effort. MSHA would encourage the operator not to contest alleged violations and to pay the fine within 30 days by offering another 20% reduction, bringing the total to 30%.

Under existing practice, if a violation or penalty is contested, FMSHRC administrative law judges would take a fresh look at the case and issue decisions based on an independent evaluation of the violation and the six statutory criteria. The judges' decision often differs from what MSHA had proposed. The agency asserts the resulting inconsistencies have undermined its efforts both to achieve evenhanded and predictable treatment of

alleged violators and to promote deterrence; therefore, the ALJ review should be constrained. It proposes several alternatives to limit ALJ authority, apparently seeking deference to its statutory interpretations.

The agency's proposed changes are significant. For instance, the narrowing of choices for negligence may brand operators as negligent for nearly every violation. The proposed changes to gravity are likely to result in higher penalties, because nearly all violations may be classified as "serious," bypassing the significant and substantial (S&S) definition. Long-established case law, initially established in a case involving National Gypsum, which Jackson Lewis shareholder Henry Chajet argued for the mining industry, requires inspectors and judges to apply a test to determine S&S. For years, MSHA has chafed over the test. The test requires a showing that the facts and circumstances associated with the alleged violation *are reasonably likely to lead to an injury and that the injury is reasonably likely to be a serious injury*. The proposal narrows the five current choices for inspectors to address injury likelihood to three: unlikely, reasonably likely and occurred. If there has been no injury, inspectors may be expected to choose "reasonably likely." How inspectors and judges would react to the new penalty criteria remains unclear. MSHA proposes to define as serious a "condition or practice" that is "*likely to cause an event that could result* in an injury or illness" (emphasis added).

Jackson Lewis' Workplace Safety and Health practice is prepared to assist mine operators and trade associations prepare comments on this important rulemaking.

More Sites Added to OSHA's Severe Violator Enforcement Program

The number of sites added to OSHA's Severe Violator Enforcement program (SVEP) has increased by 23% from last year.

A total of 423 sites were SVEP-listed as of July 1, when the program entered its fifth year, compared to 343 last year, an increase of 80. The agency actually had added 85 sites, but five were dropped after the companies successfully contested violations that made them eligible for the program. SVEP was launched in June 2010.

Employers want no part of SVEP, because OSHA can increase its oversight of their operations by scheduling return inspections to monitor compliance or open new inspections of companies' other workplaces and seek settlements with additional requirements. OSHA told *Bloomberg BNA* it had finished reviews of 39 employers who completed the three-year probationary period. These employers have undergone follow-up inspections, but OSHA has yet to make a final decision in any of the cases.

The SVEP list is dominated by construction and manufacturing firms. There are 257 construction firms, up from last year's 204, and 117 manufacturing sites, an increase from 97 in 2013. In addition, small employers make up more than half of the list. A total of 235 SVEP sites employ no more than 10 workers. Only 61 SVEP-listed employers have at least 100 workers. Neither the industry or size profiles of companies in the program changed from last year.

Also unchanged is the likelihood that employers will appeal the designation to the Occupational Safety and Health Review Commission. Companies in the program are eight times as likely to contest citations as employers generally. For both 2013 and 2014, contest rates were

about 48%, compared to 6% for all OSHA-inspected companies in FY 2013. Employers seek to have the citations that put them on the list dismissed, removing them from the program.

If triggering citations are not withdrawn or dismissed in a contested case, the company must settle with OSHA and spend at least three years in the program. Thereafter, if there are no other negative inspections, OSHA may delist the site.

At least two willful or repeat citations or failure-to-abate notifications considered to be of a "high gravity" and related to "high-emphasis hazards" will earn an employer a place in the program (CPL 02-00-149). High-emphasis hazards include falls, amputations, grain entrapment, trenching and exposure to lead, silica or combustible dust.

But other circumstances can land an employer in the program, too. One is a workplace fatality or a catastrophic accident that hospitalizes at least three workers, provided the resulting inspection finds at least one alleged willful, repeat or failure-to-abate violation.

A second instance is when an inspector cites an employer as an "egregious" violator and every violation is treated as a separate citation.

The final possibility is when at least three willful or repeat violations or failure-to-abate notices, or any combination, are written during an inspection that is based on high-gravity serious violations related to potential releases of a highly hazardous chemical.

Once a site gets into the SVEP, it is not easy to leave. One critic described OSHA's exit criteria as "fairly mythical" and noted that while it takes alleged willful, repeat or failure-to-abate violations to get into the SVEP, only a serious violation is needed to keep the site there. Since about 75% of all OSHA inspections result in a serious violation, it is unlikely a site will get off the list after three years.

OSHA is studying issues related to its removal criteria and the probationary period, but the agency has not set a timetable for making changes.

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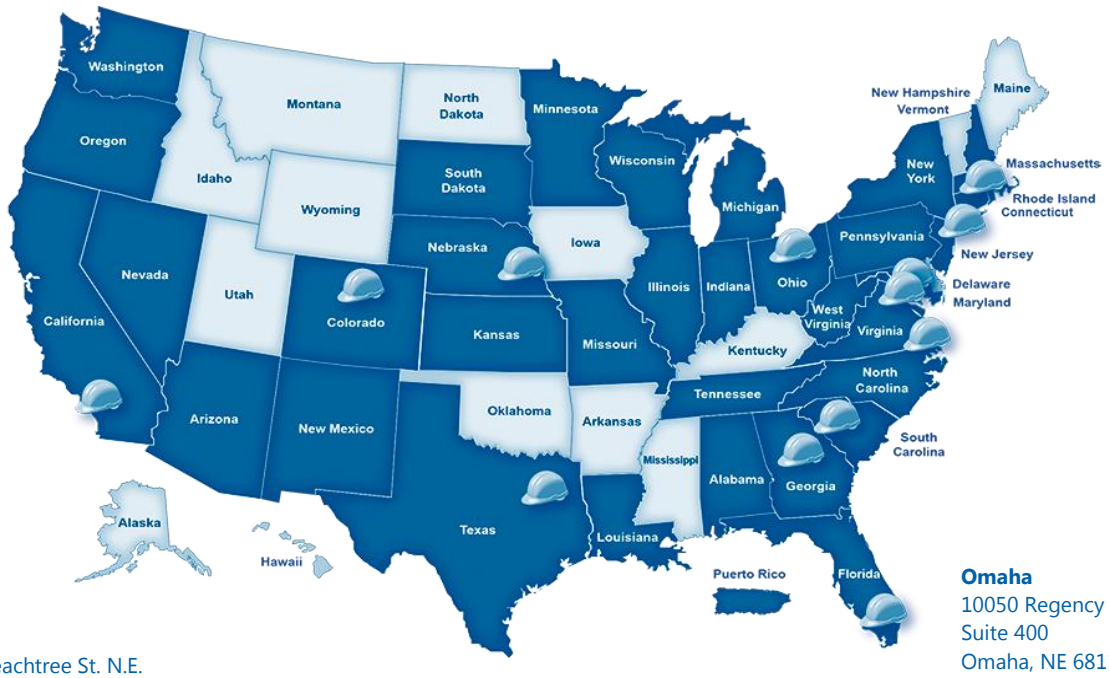

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