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

Workplace Safety and Health Update

Week of ***February 3, 2014***

OSHA Issues Guidance for Inspectors on Combustible Dust

OSHA inspectors must consider a manufacturer's or importer's use of information gained from actual explosion events, lab testing, published data on similar materials or particle size to assure they have properly classified their products for combustible dust hazards under the revised Hazard Communication Standard (HCS), OSHA said in a recent guidance memorandum.

The agency's HCS was revised to bring it into harmony with a global standard. Since that standard does not contain a classification for combustible dust hazards, OSHA amended the standard's definition of "hazardous chemical" to include combustible dust so as to maintain coverage of the hazard under its HCS.

That move has put the agency in conflict with industry stakeholders who claim inclusion of combustible dust in the new rule amounts to backdoor rulemaking. A lawsuit over the agency action is currently playing out in federal appeals court.

Marc Freedman of the U.S. Chamber of Commerce said the memo perpetuates problems OSHA created by including combustible dust in the standard. He noted that the agency did not give stakeholders a full opportunity to comment on its inclusion of combustible dust during the HCS rulemaking. Freedman also complained that OSHA still does not have a definition of combustible dust, yet employers are expected to identify combustible dust hazards and train their employees about it.

"The way the memo reads, it is effectively implementing a non-OSHA, consensus organization's definition without the benefit of rulemaking, without a feasibility analysis, economic analysis or examination of its effect on small business. That's not how it's supposed to be done," Freedman said.

In its memo, OSHA noted the HCS does not define combustible dust. OSHA explained that this omission results from ongoing OSHA rulemaking on the substance and efforts underway at the United Nations. Instead, the agency has provided interim guidance, including a definition in a national emphasis program (NEP). A number of voluntary consensus standards, most notably from the National Fire Protection Association (NFPA), also provide guidance, according to the agency.

The HCS requires manufacturers and importers, called "classifiers" in the guidance memo, to "identify and consider the full range of available scientific literature and other evidence concerning the potential hazards" of their products in the form they are shipped and which might stem from normal use and foreseeable emergencies. There is no testing requirement.

Actual experience following a deflagration or dust explosion often offers the best information about the product, OSHA said. In such cases, the product should be classified as a combustible dust unless it can be shown conditions surrounding the event are not expected to occur under normal conditions of use or in foreseeable emergencies.

Absent that information, classifiers may rely upon reliable laboratory test data. The memo cites ASTM methods as well as an OSHA method found in its NEP. Another option is published test data, such as that distributed by NFPA and public databases, such as one from Germany called the "Gestis-Dust-EX" database. Data may be relied upon provided it derives from a material substantially similar to the classifier's product, OSHA said. If laboratory data or positive published test data for similar substances are available but not used by the classifier, the inspector must ask why, according to the guidance.

Where no test data are available or testing is inconclusive, the classification may be based on available particle size, the agency said. If the material will burn and contains a sufficient concentration of particles that would pass through No. 40 or No. 35 sieves to create a fire or deflagration hazard, it should be classified as combustible dust.

The guidance was not meant to be all-inclusive, since other reliable methods may be available, according to the agency, encouraging its inspectors to consult agency resources in those instances. OSHA also pointed out that the guidance is not intended for downstream users. Rather it must be applied when inspecting manufacturers and importers, usually from referrals concerning inadequate or inappropriate labels or safety data sheets. Companies must comply with most provisions of the rule by June 2015.

Congress Tells Regulators to Back Off Small Farms

A bipartisan group of senators, joined by Republican lawmakers in the House, have called for OSHA to halt an unprecedented effort to regulate small farms. EPA has not been spared either.

Forty-two senators wrote to Labor Secretary Thomas Perez earlier this month urging OSHA to stop what they called unlawful regulation of family farms. In separate correspondence, majority members of the House Committee on Education and the Workforce took their complaint directly to OSHA Assistant Secretary David Michaels. Congress has exempted farms with 10 or fewer employees from OSHA regulations since 1978, Committee members said.

Lawmakers' concerns arise from a June 2011 OSHA memorandum that removes on-farm grain storage and handling operations from exempted farm operations. In their letter, the senators said the use of grain bins and grain drying equipment is an integral part of many farming operations and cannot be separated as a non-farming activity.

Perez was asked to respond by February 1 with a list of small farms that reportedly had been fined thousands of dollars because of being incorrectly categorized as non-farming activities. The House members gave OSHA until January 28 to deliver documents and communications regarding its policy change.

At the same time, legislators have gone to bat for farmers against EPA over a spill prevention, control and countermeasures (SPCC) rule the agency was to begin enforcing in September 2013. The regulation would require farmers with an aggregate above-ground storage capacity of 1,320 gallons or more for petroleum and animal fat products to have a written spill plan and a containment dike around containers of 55-gallons or larger. EPA has notified farmers it would enforce the act retroactively.

Legislation currently before Congress, if approved, would settle the matter. The latest version of a bill calls for a professionally written spill plan for farmers with above-ground storage of more than 20,000 gallons, a single container holding more than 10,000 gallons or a past reported spill. If the aggregate above-ground storage capacity is between 6,000 and 20,000 gallons, the plan may be written by the farmer personally.

The measure further directs EPA to consult with the Department of Agriculture to study the effect of exempting facilities with above-ground storage between 2,500 and 6,000 gallons based on the risk of discharge to water. The Senate has passed the measure, which now awaits House action.

OSHA Law Blog Nominated for a Best Blog Award

We are pleased to announce that Jackson Lewis' OSHA Law Blog has been nominated for a **"Best Construction Blog"** award! Be sure to stay up to date on all OSHA-related news and information by signing up at **www.oshalawblog.com**.

Employment Law Q&A

Q:

Last week, we terminated a problem employee for falling asleep on the job. This week, one of our long-time employees also was caught sleeping! Do we have to fire this employee? He is one of our best workers.

A:

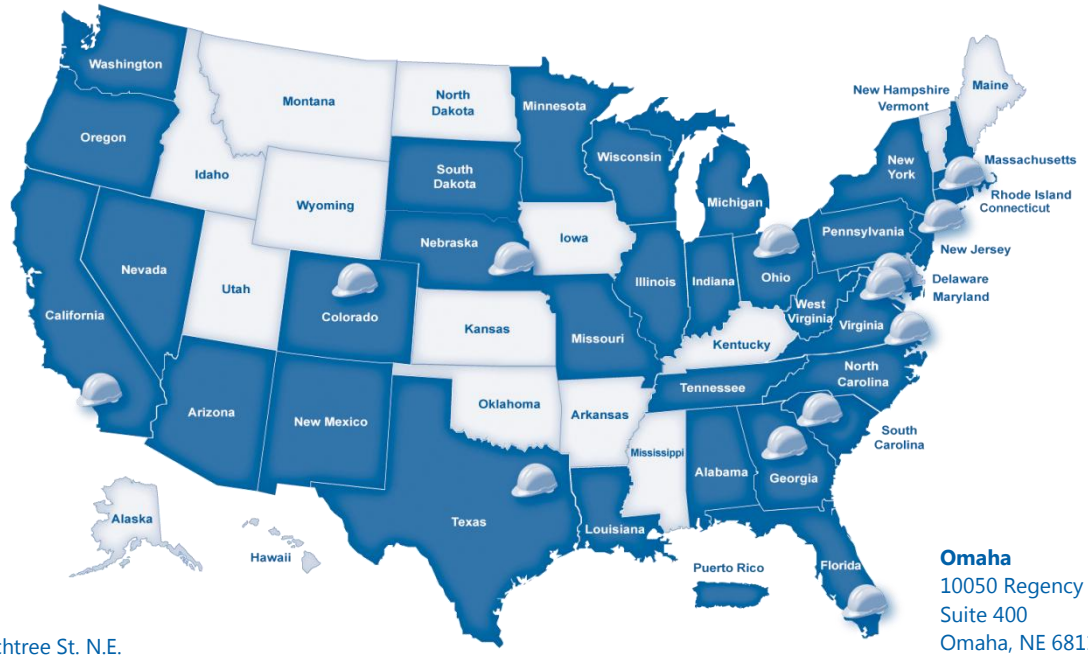
Generally speaking, employment policies should be enforced in a consistent way that treats employees the same when they are "similarly-situated." If the employee terminated last week was terminated for one incident of sleeping at work, it could be hard to justify retaining the second employee, who was found to be sleeping this week. If, on the other hand, the terminated employee had already been counseled for sleeping at work, and/or was on a performance improvement plan or final warning for this incident or other misconduct, and the second employee only fell asleep once, then the latter employee can be counseled just like the former employee was originally. Essentially, any differences in how employees are treated for the same or similar infractions, should be based on legitimate business reasons.

Failure to treat employees the same when they commit the same infractions, without a legitimate business explanation for the difference, can give rise to claims of discrimination. For example, if the employee terminated last week was a female over age 40, and the employee caught sleeping this week was a 30-year-old male, any "special" treatment of the latter employee could be viewed as discrimination against the first – unless, as stated above, the situations are not the same due to objective, nondiscriminatory criteria. Such criteria may include their employment history, whether this is the first or a subsequent infraction, whether disciplinary warnings have already been provided, tenure, or other factors.

Finally, always make sure to check your own company policies. If, for example, there is a "zero tolerance" policy for sleeping at work, then no employee caught sleeping should get a pass, absent extraordinary circumstances such as a protected medical issue. Enforcing employment policies and practices uniformly also improves morale and promotes fairness, because employees understand the rules and have an incentive to follow them.

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.