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Workplace Safety and Health Update

Week of ***June 1, 2015***

MSHA, OSHA Plan Nine New Rules by End of Year

The Mine Safety and Health Administration is projecting two final rules this year, including the release in December of a controversial amended rule on assessing civil penalties, and the Occupational Safety and Health Administration has scheduled eight new rules for completion by year's end, according to the agencies' recent regulatory agendas (http://resources.regulations.gov/public/custom/jsp/navigation/main.jsp).

Under MSHA's regular penalty assessment scheme, the agency allocates numerical points to various penalty criteria in proposing a fine for a violation of a mine safety or health standard. The point total equates to a proposed fine from a penalty table. The agency, however, has proposed reallocating the weight of key criteria. For instance, the proposed penalty point structure gives increased weight to total negligence and violation history factors, while reducing the weight for mine size and gravity.

Mine operators have been critical of the proposed changes, because they suspect the revisions will lead to higher fines. Operators also object to another provision of the rule that could restrict greatly the ability of the Federal Mine Safety and Health Review Commission to set the amount of final penalty assessments independently.

MSHA has indicated it will release a final rule addressing fees for testing, evaluating, and approving mining products in August. Further, it also plans to issue proposed rules governing proximity detection devices in mobile machines underground in July and on respirable crystalline silica in April 2016.

OSHA plans to soon update its standards on eye and face protection based on national consensus standards. A final rule on slips, trips, and fall protection is coming in August, and a rule to improve tracking of workplace injuries and illnesses is now slated for September. In January 2016, the agency also plans a final rule to amend rules of agency practice and procedure concerning OSHA access to employee medical records (29 CFR § 1913.10). The revisions are intended to improve OSHA's efficiency in obtaining and using personally-identifiable employee medical information during investigations.

In addition, in July and September, OSHA plans to finalize procedures to implement whistleblower provisions contained in three statutes dealing with transportation, health care, and motor vehicles, respectively, and a fourth law covering food safety, consumer finance, and protection of seamen.

OSHA also plans to propose seven rules before the end of 2015. The agency has missed its May target to release proposed rules on beryllium and on clarifying the employer's ongoing obligation to make and maintain accurate records of each recordable injury and illness. June is the scheduled release date for a proposal to amend its rule on state plans (29 CFR § 1952) to eliminate the requirement for rulemaking to make changes to a state plan's coverage or other descriptive language.

In July, OSHA plans to propose an amendment to its general industry respiratory standard, at 29 CFR § 1910.134, to permit new quantitative fit testing protocols. September is the target for rulemaking to identify unnecessary or duplicative provisions or paperwork requirements primarily in its construction industry standards. Amendments and corrections to the cranes and derricks in construction standard are set to come out in November and a proposal addressing crane operator qualifications in construction, in December.

OSHA did not set a date for release of a final rule on crystalline silica. The agency issued a proposed rule in September 2013 and took comments and held hearings in the months that followed. OSHA said it would analyze comments from the rulemaking process in June.

Revisions to OSHA Whistleblower Manual a Mixed Bag for Employers

The latest iteration of the Occupational Safety and Health Administration's whistleblower investigations manual contains changes employers might welcome and not. The manual, which has not been revised since 2011, became effective on April 21, 2015, even though OSHA released it in May. The manual can be found at https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-03-005.pdf.

The revisions may bring more predictability and uniformity to investigation practices and settlements, addressing criticism from attorneys handling whistleblower cases about inconsistency among OSHA regions and offices.

Further, the agency has decided to recognize a respondent's potential good faith defense to punitive damages. In this defense, the employer would need to show that retaliating managers were acting on their own, and that the employer had a "clear and effectively enforced policy" against retaliation, according to the manual.

"Punitive damages may not be appropriate if the respondent had a clear-cut policy against retaliation which was subsequently used to mitigate the retaliatory act," the manual states.

Another change could bring settlements within easier reach. Under the previous language, OSHA expected employers to acknowledge in settlements that whistleblower violations had occurred. However, in the revised sixth chapter of the manual, which covers settlements and determines what OSHA calls "appropriate remedies," settlements are allowed without the employer's admission of any violations.

The manual encourages investigators to consider in a settlement whether to require the employer to provide training for employees or managers on whistleblower rights. The manual states that training may be appropriate, "particularly where the respondent's misconduct was especially egregious, the adverse action was based on a discriminatory personnel policy, or the facts reflect a pattern or practice of retaliation."

"This is a more aggressive step from the traditionally included non-monetary remedy of posting a notice," Meagan Newman, an attorney specializing in whistleblower cases, told *Bloomberg BNA*.

The new approach also expands circumstances for considering when to award so-called front pay (i.e., paying an employee not to return to work). Previously, the guidance referenced only compensating workers who did not return to their positions when the employer concluded reinstatement would be too disruptive. The revised guidance makes clear that in cases where returning to work would cause debilitating anxiety or other risks to the complainant's mental health, front pay may be considered. It also may be considered when there is a determination that an offer of reinstatement was not made in good faith, the complainant's job or a comparable one is no longer available, or if "extreme hostility" exists between the two parties.

"This type of front pay award is distinct from compensatory damages for emotional distress and mental anguish, including damages for aggravation of a pre-existing condition," Newman said.

Regarding awards for emotional distress and pain and suffering, the manual states that "[e]motional distress is not presumed." Generally, a complainant must provide objective evidence of distress: mental disorders, sleeplessness, harm to relationships, lessened self-esteem, and the like. There also must be a causal connection between the alleged retaliation and the distress. Provided it is credible, a complainant's own statement may be sufficient to prove distress, according to the manual. While statements from health care providers are not required to recover emotional distress damages, they can buttress a complainant's case, the guidance states.

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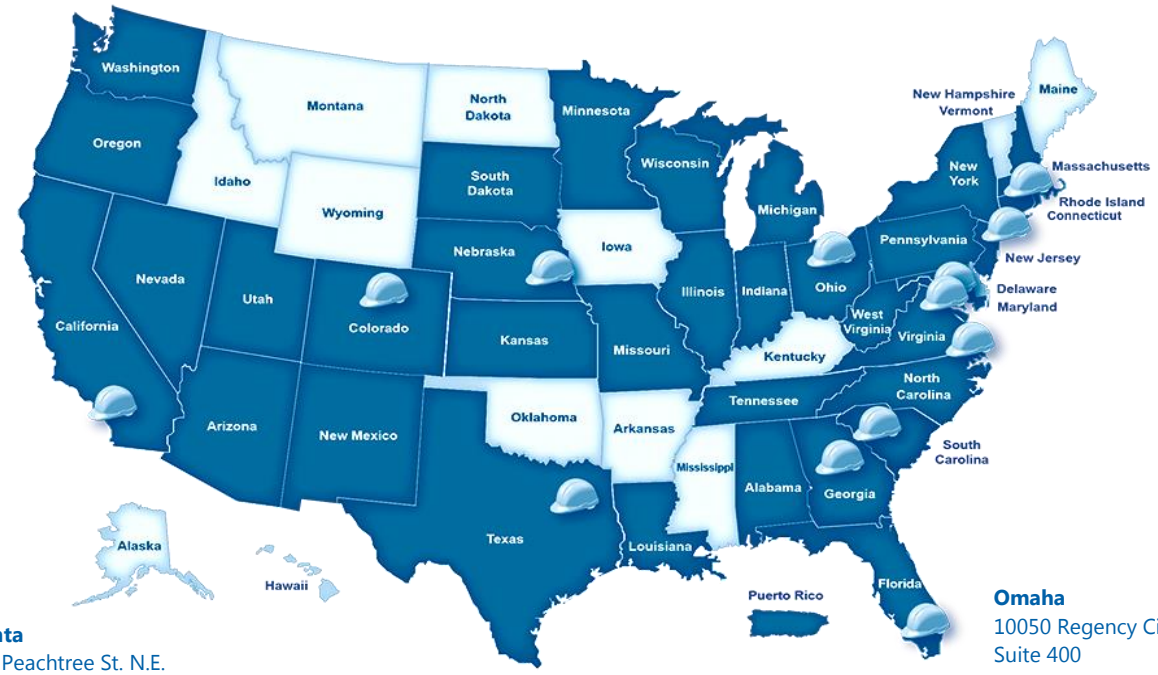

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