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EPA's Final Rule Defining Waters of the U.S. Triggers Extensive Litigation & Action By Congress

By: **Tina M. Stanczewski, Esq., MSP & Nicholas Scala, Esq., CMSP**

The EPA published the controversial Waters of the United States rule ("WOTUS") on June 29, 2015. In WOTUS, the EPA attempts to clarify confusion over recent Supreme Court decisions regarding what are navigable waters. The rule takes effect August 28, 2015. According to EPA Administrator McCarthy, the rule establishes "clear boundaries" on which wetlands, streams, and ditches are subject to the Clean Water Act. The EPA believes that jurisdiction is not being expanded but being exercised over waters the EPA already was tasked with protecting; industry and many in Congress strongly disagree.

Since its inception, the proposed rule, and now its final form, spurred staunch opposition from industry and state governments facing new and economically cumbersome requirements. Opponents believe the rule makes it even harder to determine compliance with the Clean Water Act. Since the June 29 publication, 27 states have filed law suits, in four federal circuits, challenging the rule. The states have filed together in the following sets, at this time: 1) North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, and Wyoming; and the New Mexico Environment Department and State Engineer; 2) Texas, Louisiana, and Mississippi; 3) Ohio and Michigan; 4)

Georgia, West Virginia, Alabama, Florida, Kansas, Kentucky, South Carolina, Utah, and Wisconsin.

At this time, the legal challenges are based on claims that WOTUS violates one or more of the following items: 1) the Clean Water Act; 2) The Administrative Procedure Act; 3) the National Environmental Policy Act; and 4) the commerce clause of the U.S. Constitution. It is expected that these matters will eventually be decided by the U.S. Supreme Court, but each case must navigate the appeals process through the Federal Court system before requesting an audience before the Supreme Court.

In addition to legal challenges from the states, Congressional representatives have been pushing for action to block the enforcement of WOTUS. The House of Representatives passed the Regulatory Integrity Act on May 12, 2015, in an attempt to block the rule. Additionally, the Senate Environment and Public Works Committee passed a comparable action on June 10, unfortunately the Senate has not cast a vote on the bill at this time. Recently, several members of the House Science Committee have raised concerns regarding the ethics of the EPA's publicity campaigns in support of WOTUS, including the widespread use of social media platforms.

For states with agriculture-based economies, the rule's extended definition of navigable waters could make permitting requirements costly and difficult for not only agriculture, but mining and other businesses. The states are requesting that the court set aside

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the rule, issue an injunction to stop its enforcement, and require the EPA and Corp to develop a new rule within the scope of the Clean Water Act and Administrative Procedures Act. In addition to the state lawsuits, a collection of twelve national industry associations filed a lawsuit on July 2, 2015 in Texas federal district court challenging the EPA's new rule. The twelve groups filing suit include American Farm Bureau Federation, American Petroleum Institute, American Road and Transportation Builders, Leading Builders of America, National Alliance of Forest Owners, National Association of Home Builders, National Association of Manufacturers, National Cattlemen's Beef Association, National Corn Growers Association, National Mining Association, National Pork Producers Council and Public Lands Council.

Particularly, the rule defines the term "significant nexus," thereby codifying the test for determining "what is a water of the U.S." Traditionally a "water of the U.S." meant one that by itself, or in combination with similarly situated waters from the area connect or have a "nexus" with a downstream navigable water. It states that similarly situated waters are ones that "function alike and are sufficiently close together in affecting downstream waters." This means that all wetlands in an area may be similarly situated. Expanding the definition of water means water that was previously thought to be exempt from EPAs permitting requirements and jurisdiction is now subject to it. Water that may have been assessed as disconnected and exempt may now meet the significant nexus test. Permitting costs mean higher costs for businesses and in turn consumers. If businesses produce less revenue the state collects less tax.

Those subject to the rule will require new guidance from the EPA and those granting permits will require policy guidance when assessing an application. It appears that the rule's coverage might includes:

- *Effect on downstream water:* waters that have an effect on downstream water may be subject to jurisdiction.
- *Tributary:* a tributary would include waters whose volume, duration and frequency of flow is sufficient to create certain well-known and easy to observe and document, hydrologic characteristics that typically take years to form, such as the formation of a clear channel with bed and banks and an ordinary high water mark.

- *Ditches:* the ditch must have the features of a tributary to be considered a Water of the U.S., and what once was considered a ditch and exempted may no longer be exempted and require a permit.
- *Case specific review:* prairie potholes, vernal pools and playa lakes will be reviewed case by case. The EPA has said if the water functions as a collective group of similar waters then the significant nexus test may be met and jurisdiction asserted.
- *Water that does not flow year round:* waterways that dry up for part of the year may be regulated.
- *Groundwater, shallow subsurface flows, or tile drains:* EPA has said they will not regulate these waters.
- *Construction and quarry pits:* are exempted.

With legislation pending and over five lawsuits, the rule remains scheduled to take effect on August 28, 2015, however, as the EPA asserts the rule clarifies jurisdiction, opponents claim that it is an unconstitutional intrusion of jurisdiction and overreach by the federal government on land use, which will significantly affect business, especially agriculture, mining and construction.

For more information about the rule or to discuss potential impact to your business, please contact the Law Office.

MSHA Expands Task Training Requirements to "Competent Persons" Conducting Workplace Exams By: Nicholas W. Scala, Esq., CMSP & Tina Stanczewski, Esq., MSP

MSHA plans to release a new Program Policy Letter (PPL) affecting all Metal and Nonmetal (M/NM) mines around the country in the near future. The PPL outlines new requirements that MSHA will enforce regarding the examination of workplaces (30 C.F.R. §§56/57.18002). Specifically, the PPL requires that mine operators conduct and document task training on the "competent persons" assigned to conduct workplace examinations around the mine during each shift.

Competent Person, Con't

Although MSHA itself defines a “*competent person*” as “*a person having the abilities and experience that fully qualify him to perform the duty to which he is assigned,*” (§§56/57.2), and the person has always been deemed competent by the mine operator, MSHA will now enforce task training requirements for all competent persons performing workplace exams in M/NM mines. It is suspected that enforcement efforts under this interpretation have already begun.

MSHA has also been unhappy with other aspects of the standard: 1) the fact the standard doesn't require an examination before the start of a shift, like the coal standard and 2) the standard doesn't require the operator to keep a list of the alleged hazards, just the fact of examination. In MSHA's view the inability of the inspector to confirm corrective action has been taken or to assess alleged hazards for recurring trends, is not in the best interest of the miner.

Under the PPL, MSHA considers a competent person to be one who can “recognize hazards and adverse conditions that are known by the operator to be present in a work area or that are predictable to someone familiar with the mining industry.” According to MSHA in the PPL, if multiple alleged safety hazards are not identified or if multiple trained examiners fail to identify similar safety hazards, a task training citation may be issued.

MSHA relates these new requirements, like most enforcement trends in the last 18 months, to the increase in fatalities in the M/NM sector since late 2013. In most, if not all of the fatalities MSHA has cited task training as a root cause. Rank and file miners often perform examinations of their assigned areas, and MSHA often attempts to impute agent status to these miners who conduct examinations. If supervisory status can not be directly imputed to the hourly miner, MSHA often attempts to argue the foreman or other managerial agent should have known of the alleged condition through the workplace examination process.

For example, many operators require notification to management of safety hazards that are not immediately corrected. However, sometimes an hourly miner conducting a workplace examination may document an item for maintenance but does not consider it a safety hazard that required immediate attention. Management may agree with this assessment. However, an inspector may review the examination records and if this item has been documented, the inspector may argue that the

operator had inadequate processes in place to address hazards listed in the workplace exam.

The result of these scenarios is often high negligence citations issued to the operator. With this new policy, MSHA is discouraging, as a best practice, the examination by rank and file and suggesting operators only use managers whom MSHA will consider competent. This also allows MSHA to assert agent status against those conducting workplace examinations, issue 104(d) citations, and pursue personal 110(c) penalties against the agent if the the inspector believes the allegation meets the requirements.

Although MSHA policy states that inspectors will not cite 56/57.18002 automatically if multiple citations are issued, operators know this is often not the case. With this additional change to policy, operators who receive several citations within a workplace or even throughout the mine, may face a citation for inadequate examination, failing to use a competent person, failing to task train the examiner or a combination of these allegations.

Industry Awaiting Long-Term Transportation Bill By: Tina M. Stanczewski, Esq., MSP

As of July 14, 2015, the Senate was expected to discuss a long-term transportation bill that would provide funding for infrastructure projects. Funding for such projects may mean stability and positive forecasts for company's involved in selling aggregate all the way to building the infrastructure. The House and Senate are currently at odds with the House considering a six month extension and the Senate proposing a long-term funding bill. Many proponents would like six years of funding.

The House bill funds transportation through December 18, 2015 with about \$8 billion allocated. The Senate has not determined where to obtain funding for the bill or decided on specifics. However, long-term funding is under consideration. The President has asserted that a short-term bill would be vetoed. Industry has been awaiting a bill with long-term funding in order to make decisions about hiring and capital investments. Continued uncertainty is promoting an economic freeze for many employers.

For more information or help contacting your Senators or Representatives concerning this matter, contact the Law Office.

Colorado Decision Favors Employer in Medical Marijuana Matters

By: Adele L. Abrams, Esq., CMSP

Medical Marijuana: In the past month, the topic has made the cover of both Time and National Geographic magazines, both of which had stories highlighting the growing research into determining the substance's efficacy in treating a variety of ailments such as cancer, multiple sclerosis, PTSD, AIDS, glaucoma, and severe pain. But this is not really a new issue: marijuana was used by healers in ancient China, India and Greece, and it was a common component of patient medicines in the United States in the 1800s and early 1900s.

Currently, 23 states and the District of Columbia have legalized medical use of cannabis (some in all forms, other states have legalized CBD oil only) while 4 states (Colorado, Oregon, Washington and Alaska) and D.C. have legalized recreational use. Recent data indicate that 21 million Americans now use marijuana recreationally, while about a million more use it for medical reasons. The majority of these people are employed. Legal marijuana sales (medical and recreational) have reached \$22 billion per year in the U.S.

These data (along with additional ballot initiatives in more states for legalized use and sale coming up) suggest that the trend toward more expansive "legal" use of marijuana will only increase, and this creates a quandary for employers. When substance abuse prevention programs (whether voluntarily adopted by the employer or mandated by laws including US Department of Transportation requirements for commercial drivers and those affecting government contractors) prohibit the use of "illegal" drugs by employees and job applicants, what limitations do employers face in areas with liberal recreational and/or medical marijuana laws?

Should the employer regard any level of THC measurable in a worker's system as a zero tolerance violation, or should the focus be on impairment while on duty. At present, there's no "bright line" test for cannabis impairment, although some states have adopted 5 nanograms as an "impaired" threshold for driving purposes. Of course, clearly an employer in "legal" cannabis state can bar use and impairment during working hours, just as they can also ban drinking alcohol and smoking tobacco in the workplace (two other "legal" substances). The issue is that, while impairment may quickly fade if an employee smokes or consumes cannabis off-duty, and there is no "hangover" effect the next day, marijuana

metabolites can remain in the system for days or even weeks. Current tests can capture past use but are not necessarily indicative of the state of a worker's fitness for duty.

While each state that has "legalized" marijuana in some way or another has a unique statutory scheme and language used to define parameters of the laws and the scope of protections, a recent decision on medical marijuana use in Colorado indicates how the matter will be viewed by the courts in that jurisdiction. The decision is not binding outside of the state of Colorado, although it could be viewed as persuasive authority in similar cases with similar legislative verbiage.

On June 15, 2015, the Colorado Supreme Court issued its long-awaited decision in a controversial medical marijuana case, *Coats v. Dish Network*, holding that a quadriplegic employee with a valid medical marijuana card could be terminated for off-duty use of the herb that caused him to flunk the employer's random drug test. The employee worked as a telephone representative and apparently was not in a "safety sensitive" position. He sued Dish Network, alleging that the termination for medical marijuana off-duty use that was legal under Colorado state law violated the Colorado "Lawful Activities Statutes" ("LSA," Section 24-34-402.5). The LSA prohibits Colorado employers from discharging an employee based on his engagement in "lawful activities" off the premises of the employer during nonworking hours.

The court considered two issues: (1) whether the LSA protects employees from discretionary discharge for lawful use of medical marijuana outside the job where the use does not affect job performance; and (2) whether the Medical Marijuana Amendment ("MMA") makes the use of medical marijuana "lawful" and confers a right to use medical marijuana to persons lawfully registered with the state [as the plaintiff was].

The employee, Mr. Coats, contended that Dish Network violated the LSA by terminating him based on his outside-of-work medical marijuana use, which he argued was lawful under the MMA and its implementing legislation. In affirming a ruling in Dish Network's favor issued by the Colorado court of appeals, the court rejected the worker's argument that his drug use was a lawful activity, based on

Medical Marijuana, Con't

marijuana's still-illegal status as a Schedule 1 Controlled Substance under federal law.

The court interpreted the MMA's "lawful activity" as providing registered patients with an affirmative defense to state criminal prosecution without making their use a "lawful activity" within the meaning of the LSA. The court looked at the definition of "lawful" as "that which is permitted by law" and found that, for purposes of the LSA, activities that are governed by both state and federal law must "be permitted by, and not contrary to, both state and federal law."

Given that the federal Controlled Substances Act prohibits all marijuana use, Coats' conduct could not be deemed a protected "lawful activity." While a dissent opinion at the lower court level had urged that the term "lawful" must be interpreted only according to state law (under which marijuana use would be a "lawful activity"), the state supreme court refused to engraft a state law limitation onto the term.

Federal law currently designates marijuana as "having no medical accepted use" and "a lack of accepted safety for use under medical supervision." There is no exception under the CSA for medicinal purposes, and the Supremacy Clause of the US Constitution provides that if there is any conflict between federal and state law, federal law shall prevail.

There are indications of movement at the federal level: In December 2014, Congress passed an appropriations measure barring the Department of Justice from using any funds to prevent Colorado and similar states from implementing their own state laws that authorize use, cultivation and distribution of medical marijuana. For its part, the Justice Department announced it will not prosecute cancer patients or those with debilitating conditions who use medical marijuana in accordance with state law.

For now, while federal policy and even laws on this issue may change before long, the Dish Network case provides a basis for employers to continue enforcement of their drug-free workplace rules ... at least in Colorado.

This is an evolving area of law, and some state medical marijuana laws (e.g., those in Delaware, Rhode Island and Arizona) have more specific protections for workers who legally use the drug at the state level.

Recently, a Michigan high court held that workers terminated for off-duty use of legal medical marijuana

were entitled to receive unemployment benefits, as the use did not constitute disqualifying "misconduct." Other trend may be to consider whether positions are "safety-sensitive" in determining the reasonableness of a medical marijuana ban, and a rise in cases under the federal Americans with Disabilities Act (or analogous state laws) is also anticipated. Employers are advised to watch the trends in new case decisions as a guide toward developing policy which may, in some instances, need to be state-specific in terms of what is and is not permitted.

U.S. Department of Labor Proposes Rule that Would Make Millions More Eligible for Overtime Pay By: Amged M. Soliman, Esq.

The U.S. Department of Labor's Wage and Hour Division (DOL) has published a proposed rule that amends regulations under the Fair Labor Standards Act (FLSA) that exempts "white collar" employees from overtime pay. Essentially, the rule would more than double the salary threshold below which workers automatically qualify for time-and-a-half overtime wages (hours worked beyond 40 hours per week), from \$23,660 per year (\$455 per week) to \$50,440 per year (\$970 per week). The DOL has estimated that 4.6 million workers in the U.S. would be directly affected by this amendment.

While proponents of the change have celebrated the proposal as being good for middle-class wage earners, business groups have generally been against this proposal arguing that it will cost jobs by adding to employer costs. Small business owners have stated that they would likely have to reduce worker's hours as a means of saving money in overtime pay. Otherwise, owners might also begin hiring new employees at a lower base of pay to compensate; However, whether or not that option will be available to them depends largely on the status of the job market at any given point in time.

Ultimately, it is expected that this policy will be challenged in court and possibly in Congress too. In the meantime, comments by interested parties are invited and are due to the DOL on September 4, 2015. Those who would like to comment and seek assistance in doing so, or who seek assistance in navigating these changes as they are implemented moving forward, are encouraged to contact this law office.

Update on 2016 Appropriations

By: Gary Visscher, Esq.

The February newsletter included an article about the then-recently released President's Budget for funding for OSHA and MSHA for fiscal year 2016 (beginning October 1, 2015). The President's Budget is, of course, only a request; it is up to Congress to pass the actual appropriations of funds.

The next step in the process occurred last month, when the House and Senate Appropriations Committees reported their respective appropriations bills for the Departments of Labor, Education and Health and Human Services. The bills must yet to be passed by the full House and Senate, and then any differences reconciled, before a bill is presented to the President, who may well veto the bill on any number of grounds. So while the legislative process is far from complete, it is interesting to compare the Appropriations Committees proposals to the President's budget proposal, as some indication of where next year's funding for workplace safety agencies may eventually settle.

OSHA. The President's budget requested a nearly 7% increase in funding for OSHA, from \$553 million for FY 2015 to \$592 million.

OSHA would receive considerable less under both the House and Senate Appropriations Committee bills. The Senate bill would fund OSHA at \$524 million, and the House Appropriations Committee bill would provide \$535 million.

Both the House and Senate bills maintain appropriations "riders" that have been part of previous years' appropriations bills. The "riders" exempt small farms and partially exempt small employers in industries with below average injury and illness rates from OSHA inspections.

The House bill includes about \$5 million more than the Senate bill does for funding for the State OSHA programs. The House bill provides no new funding for Susan Harwood grants, while the Senate provides about \$10 million for Harwood grants, and directs the agency to allocate funds from the grants program to training for workers in the nail salon industry. Both the House and Senate Committees recognize the value of OSHA's Voluntary Protection Program (VPP). The House Committee Report requires OSHA to submit a report to the Appropriations Committee on the "participation, costs and effectiveness" of VPP, while the Senate bill sets a minimum level of spending (\$3.5 million) on VPP.

The Senate bill includes legislative language that bars OSHA from promulgating or implementing a silica standard until after (1) a new SBREFA panel review is completed, and (2) an independent study by the National Academy of Sciences is completed. The House Committee Report expresses concerns about the impact of the silica standard on small business and urges OSHA to provide "maximum flexibility" with available technology, specifically, allowing the use of respirators and airstream helmets in order to limit workers' exposure.

Both the House and Senate Committee Reports encourage OSHA to maintain regulation of ammonium nitrate under the Explosives and Blasting Agents standard (29 C.F.R. 1910.109), rather than regulating it under the Process Safety Management (PSM) standard (29 C.F.R. 1910.119).

The House bill includes legislative language barring OSHA from implementing any policy that allows persons affiliated with a "third party organization" from accompanying OSHA during an inspection, except when approved by vote of the employees of the affected worksite. In 2013, OSHA reversed its previous policy and began allowing union agents to serve as employee representatives during inspections at non-union worksites.

MSHA. The President's budget similarly requested a significant increase for MSHA, from \$375.9 million in FY2015 to \$394.9 million in FY2016. The Senate Appropriations Committee recommends FY2016 funding of \$356.9 million, or about \$19 million less than MSHA received for FY2015. The House Committee bill recommends \$371 million, or \$4.887 million less than FY2015 funding. Both the House and Senate bills provide continued funding for state grants, which MSHA has sought to eliminate. The House Committee Report also states that the Committee believes that MSHA "needs to offer a more formal voluntary protection program," though it does not direct MSHA to take any specific action to implement such a program.

Related to current employment conditions in coal mining, the Senate Committee bill would also create a separate dedicated fund for training for dislocated coal mine workers. Funding would be set at \$19 million for FY2016.

NIOSH. The President's request for NIOSH had

Appropriations, Con't

included a reduction of about \$51 million in discretionary spending by eliminating funding for the Education and Research Centers (ERCs) and the Agriculture, Forestry and Fishing sector research programs. The House bill maintains both programs, and increases overall NIOSH funding by \$6.2 million, to \$341.1 million. Overall discretionary funding for NIOSH in the Senate bill is \$305 million, which includes funding for the Education and Research Centers but not for separate Agriculture, Forestry and Fishing sector research programs.

NACOSH 2015 Meeting

By: Tina M. Stanczewski, Esq., MSP

The Occupational Safety and Health Administration (OSHA) held a meeting of the National Advisory Committee on Occupational Safety and Health (NACOSH) on June 18, 2015. The meeting included an update from Assistant Secretary of Labor for OSHA, Dr. David Michaels, a report from the NACOSH Temporary Workers Work Group, and other matters.

NACOSH advises the Secretary of Labor and the Secretary of Health and Human Services on occupational safety and health programs and policies, such as the temporary worker initiative. Dr. Michaels presented two specific factors related to increased temporary worker injuries and fatalities: 1) a lack of safety training and job information and 2) financial incentives for employers to use temporary workers such as worker's compensation insurance.

According to Michaels, many temporary workers have been killed on their first day of work. These are vulnerable workers. Some are entering hazardous jobs without the traditional training that a full-time employee would receive from the host employer. Workers in need of employment may not speak up when a job is beyond their ability or knowledge due to personal economic factors.

Enforcement efforts are on the rise. If a violation is found, both the host and temporary employer may be cited. Inspectors are on alert to ensure sites with temporary employees are following the OSH Act. A special code will denote whether the temporary worker is exposed to safety and health violations enabling the agency to track exposures better.

OSHA suspects that these workers injuries are underreported. Concerning the 300 Log, Michaels opined that the logs are for the employer to understand the activities on their site, not as a survey

tool for OSHA. To capture real injury rates, data from emergency room visits or workers compensation claims may be necessary.

The Temporary Worker Workgroup for NACOSH provided several guidelines for employers including a sample procedures for the host employer, injury and illness prevention program recommendations, and best practice language for protection of temporary workers. The workgroup is expected to present final draft of its report to the board in December 2015.

The scope of the report includes contractors and non-traditional employees but will be expanded to multi-employer sites after the first release. Guidance is expected to include 1) including responsibilities for host and temporary employer, including sample contract language and 2) acceptance of shared responsibilities. Department of Labor attorneys provided some guidance on the current legal responsibilities of the host versus temporary employer. It is an emerging area of law. The key question is what is an equitable distribution of responsibility. Various state laws define the issue, including California.

The current test for an employee was developed in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992). These factors are applied on a case by case basis and application to the host versus temporary agency remains an emerging area of law. These factors include 12 items some of which are: the contractor's right to control when, where, and how the individual performs the job, the skill required for the job, location of work, and duration of the relationship.

The Ebola outbreak and the fear that it could change from an epidemic to an endemic was discussed. NIOSH leads the Worker Safety and Health Team which developed guidance for health care workers and non-health care industries on Ebola management. The work group for emergency responder preparedness presented also. The group is working to update the text of the fire brigade standard, 29 CFR 1910.156 in its entirety. Comments from the NACOSH board included expanding the focus to cover emergency preparedness more broadly.

For more information on the temporary worker initiative, the use of temporary agency staffing, and its effect on your business, contact the Law Office.

Changes to the OSHA Whistleblower Investigations Manual

By: Sarah Korwan, Esq.

On May 21, 2015, OSHA released an updated version of its Whistleblower Investigation Manual, last updated in September, 2011. The biggest changes are found in Chapter 6, which provides guidance regarding remedies and settlement agreements. Also, the whistleblower statutes enacted since the 2011 revision are included.

The discussion regarding front pay is significantly expanded. Notably, the Manual identifies additional situations in which front pay, rather than reinstatement, may be appropriate. Specifically, those situations include cases where the complainant's return to work is prohibited due to medical issues resulting from the retaliatory conduct complained of; the complainant's former position no longer exists; the offer of reinstatement was not made in good faith; debilitating anxiety or other risk to the complainant's health would result from return to work; or hostility between the respondent and complainant would make continued employment unbearable. The Manual further notes that where front pay is appropriate, the investigator should set an appropriate time frame such as the length of time complainant expects to be out of work and identify the compensation received prior to the retaliation.

OSHA has also expanded the section on back pay to include a discussion which details lost wages; bonuses, overtime and benefits; interim earnings; mitigation considerations; and social security. The Manual discusses complainants' duty to mitigate damages by exercising reasonable diligence in seeking alternate employment. Although complainants need not succeed in finding new employment, they must make an honest, good faith effort to do so.

In addition, the section on back pay devotes a subsection to interim earnings. Specifically, the Manual provides that interim earnings, those earnings that the complainant earned from interim employment subsequent to his termination and before assessment of damages, will be deducted from a back pay award. As discussed in the prior version of the Manual, the interim earnings would be reduced by expenses incurred in obtaining an interim job. However, new to the Manual is clarification that complainant's interim earnings should be deducted from the back pay calculation using the period mitigation method.

The updated Manual provides a comprehensive discussion regarding compensatory damages (the discussion is two pages in length, compared to a single paragraph in the 2011 version). Discussed at length is compensation for emotional distress/mental anguish, and factors which will be considered in determining an award.

Notably, the complainant must provide evidence which demonstrates "(1) objective manifestations of distress, and (2) a causal connection between the retaliation and the distress." The investigator may rely solely on the complainant's own statement to prove objective manifestations of distress if the complainant's statement is credible. If complainant is alleging a specific and diagnosable condition, evidence from a healthcare provider is required to prove such condition. Conditions include, but are not limited to depression, post-traumatic stress disorder, and anxiety disorders. Objective manifestations may also include conditions that are not classified as mental disorders such as sleeplessness, harm to relationships, and reduced self-esteem.

Factors which will be considered when determining the amount of the award include the severity of the distress, degradation and humiliation, length of time out of work, and comparison to other cases.

In addition, the Manual offers detailed guidance on punitive damages. Specifically, the Manual provides that punitive damages may be appropriate when "respondent's conduct is motivated by evil motive or intent or conduct demonstrates reckless or callous indifference" to protected rights. In addition, punitive damages may be appropriate when the management involved in the adverse action knew that such action was illegal. Also, when the respondent's conduct is found to be "egregious", punitive damages may be awarded. The Manual provides a substantial list of what behavior may constitute "egregious".

However, punitive damages are not necessarily appropriate in every successful retaliation case. Specifically, the Manual states that punitive damages may not be awarded if the respondent can establish good faith, such as a clear-cut policy against retaliation or if it can be demonstrated that managers who retaliated were acting on their own.

Calculation of the amount of a punitive damage award is also discussed. There are numerous factors which will be considered in assessing such an award, which may be mitigating or aggravating, and are not

Whistleblower Manual, Con't

limited to the list.

In addition to monetary relief, the Manual proposes potential non-monetary remedies. For example, management training may be considered, especially when the misconduct is found to have been particularly egregious, the adverse action was based on a discriminatory personnel policy or there was a pattern or practice of retaliation. Finally, the Manual permits a change from previous practice and allows for settlements without acknowledging whistleblower violations.

OSHA Issues Guidance on Process Safety Management Engineering Practices

By: Diana R. Schroeder, Esq.

In early June, OSHA issued new guidance on OSHA's Process Safety Management (PSM) standard for the chemical industry, and specifically addresses an employer's engineering practices. The OSHA PSM standard is designed to prevent, or minimize the consequences of, catastrophic releases of toxic, reactive, flammable, or explosive chemicals. Covered employers may now want to reevaluate their engineering and management programs to ensure compliance with the new guidance issued.

The PSM standards at 29 CFR 1910.119 require that management utilize and comply with what is known as "recognized and generally accepted good engineering practices" or "RAGAGEP". RAGAGEP applies to process equipment design, installation, operation, and maintenance; inspection and testing practices and testing frequency. The PSM standard requires employers covered under the PSM standard to comply with RAGAGEPs, but has allowed employers some flexibility in how they can comply with RAGAGEP. OSHA has traditionally accepted RAGAGEPs published as consensus standards, which are considered voluntary guidelines developed by organizations specializing in producing industry standards. Examples of RAGAGEP producing entities include the National Fire Protection Association (NFPA), and the American Petroleum Institute (API).

OSHA has also accepted an employer's internally designed standards as RAGAGEP, but only when no standardized RAGAGEP exists, or when the standardized RAGAGEP is otherwise inapplicable to an employer's worksite. Now, the new guidance tightens the restrictions on use of an employer's internal

standards, and specifies that they must meet or exceed the protective requirements of any existing published RAGAGEP.

The new guidance also serves as a warning shot to employers – it announces 16 key focus areas for OSHA inspectors when evaluating RAGAGEP compliance, and when considering citations. These include close scrutiny of the RAGAGEP the employer has selected, including use of the most recently published, most uniquely applicable to the employer's worksite, most protective, most stringent RAGAGEP based on the characteristics of the employer's process. The employer is warned not to use inapplicable RAGAGEP, not to mix-and-match provisions from different sources, and to closely review the recordkeeping provisions requiring documentation of compliance with applicable RAGAGEP. The employer is now on notice that the age and installation date of the relevant process and equipment will be carefully reviewed by the OSHA inspector. Proper testing and inspection procedures consistent with selected RAGAGEP must be followed and documented, or the employer risks being cited. These are just a few of the focus areas announced in the new guidance.

OSHA's new guidance document clarifies that if a published RAGAGEP is selected by the employer, the mandatory and permissive language must be followed to the letter. If the published standard uses the words "shall" or "must", then OSHA will consider that a minimum requirement to control a hazard. A violation will be presumed if the employer fails to follow the mandatory language, and the employer will be cited. Conversely, language in the published RAGAGEP indicating prohibition of certain actions, words such as "shall not" must also be followed by the employer, or the employer risks being cited. Employers must consider and apply updated information applicable to the published and selected RAGAGEP, such as any appendices, supplements or annexes which may contain new requirements.

The PSM standard requires employers to comply with RAGAGEPs, but has traditionally allowed employers flexibility in how they could comply with RAGAGEP. Employers are still permitted to select the RAGAGEP applicable to their equipment and processes. But -- this new guidance tightens the grip with respect to use and application of what OSHA will consider the most applicable RAGAGEP for the employer's specific worksite. For more information, please contact Diana Schroeder. For the link to the OSHA guidance, see below: [PSM](#).

OSHA Delays Enforcement of Confined Space in Construction for Certain Operators

By: Nicholas W. Scala, Esq., CMSP

OSHA released its final rule for Confined Space requirements for the Construction industry in May 2015. The rule had an effective date for enforcement of August 3, 2015. With the date for compliance quickly approaching and substantial industry pushback on the rule, OSHA has extended the deadline 60 days to October 2, 2015. However, this extension comes with conditions as OSHA did not pushback the effective date, but is instead placing a 60 day hold on enforcement for companies who fit the following:

“During this 60-day period, OSHA will not issue citations to an employer making good faith efforts to comply with the new standard, as long as the employer is in compliance with either the training requirements of the new standard” or the former standard.

Additionally, when determining whether or not a employer has demonstrated good faith, and therefore could be exempt from enforcement until October 2, OSHA will look to see that if training is not completed, is it planned? If equipment required for compliance is not on site, is it ordered? Has the employer taken any other steps to educate and protect the workers regarding potential hazards of confined space.

SPEAKING SCHEDULE

Adele Abrams

July 23: BLR Webinar on Safety Incentive Programs

July 29: ISMSP conference, W. Palm Beach, FL, presentation on Rules to Live By

Aug 6: BLR Webinar on Legal Management of RIF and Layoff Programs

Aug 11: Business 21 Webinar on OSHA's New Reporting and Recordkeeping Requirements

Aug 12: ASSE Webinar on Legal Aspects of Starting a ESH Consulting Practice

Aug. 19: Oregon Independent Aggregates Assn., training on MSHA Emerging Issues

Aug 27: BLR Webinar on Reconciling ADA Compliance with Safety Management

Sept. 29: National Safety Council Annual Congress, Atlanta, GA, presentation on Temporary Worker and Contractor Safety

Sept 30 & Oct. 2: ASSE Region VI PDC, Myrtle Beach, SC, presentations on Temporary Worker Safety and Roundtable on Safety & Medical Marijuana

Oct 6: ND Safety Conference, Grand Forks, ND

Oct 7: Chesapeake Region Safety Council Annual Meeting, Laurel, MD, presentation on Temporary Worker Safety

Oct. 16: United Safety Associates (USA) Group, Ontario, CA, workshop on MSHA enforcement

Nov. 3: Safepro Inc., Savannah, GA, Mine Safety Training

Nov. 4: MSHA Southeast Safety Conference, Birmingham, AL, presentation on Safety & Health Management Programs

Nov. 6: MSHA Southeast Safety Conference, Birmingham, AL, Lawyer's Roundtable

Nov 9-10: NRASP Conference, Fargo, ND

Nov. 12: ASSE Construction Safety Symposium, New Orleans, LA

Dec. 8: Associated General Contractors, Fargo, ND, Keynote Presentation

Dec. 9: National Business Institute, Rockville, MD, presentations on Employment Law

Tina Stanczewski

Sept. 18: National Drilling Association Convention, MSHA/OSHA Regulatory Update, Ellicott City, MD

Sept 28: ASSE Region VI PDC, Myrtle Beach, SC, presentation Contractor Responsibilities: Safety and Training, Risk Management, and Legal Obligations

Nicholas Scala

July 29: ISMSP Critical Issues Conference, Palm Beach, FL presentation on Accident Prevention and Safety Culture

Sept. 1: 3rd Frac Sand Conference – Minneapolis, MN, presentation on MSHA/OSHA Regulatory and Enforcement Updates

Oct. 5-8: Florida Mine Safety Training Conference – Tallahassee – MSHA Supervisor Responsibility Training