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INSIDE THIS ISSUE

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OSHA sharpens focus on employer safety incentives and disincentives

BY NATHAN WHATLEY

The Occupational Safety and Health Administration (OSHA), the federal agency charged with assuring safe and healthy working environments, recently issued a memorandum which takes aim at employer safety incentive policies and practices. According to OSHA, some of the programs which employers frequently implement as a way to encourage safe workplace practices may be viewed by the agency as discouraging employees from reporting job-related injuries.

The stated purpose of the March 2012 memorandum issued by DOL Assistant Deputy Secretary Richard Fairfax is to "provide guidance to both field compliance officers and whistleblower investigative staff on several employer practices that can discourage employee reports of injuries and violate section 11(c), or other whistleblower statutes." Section 11(c) of the Occupational Safety and Health Act specifically prohibits an employer from discriminating against any employee because the employee reports a work-related injury or illness.

The OSHA memo voiced concerns that safety programs which provide some sort of an incentive – particularly those with rewards such as financial bonuses or prizes – may intentionally or unintentionally provide employees an incentive NOT to report injuries. It goes on to say that, as a result, workplace safety may be compromised, those who report injuries may be subject to unlawful discrimination or harassment, and "whistleblowers" may be unfairly targeted for retaliation. OSHA also states that the policies and practices of these safety programs may violate recordkeeping regulations, specifically the requirement associated with employee injury reporting.

So does that mean an end to monthly pizza parties? Or that employers should remove signs which tout the company's current safety record ("___ Days Without An Accident")? The OSHA memo offered no clear-cut answers, but did say, "One important factor to consider is whether the incentive involved is of sufficient magnitude that failure to receive it might have dissuaded reasonable workers from reporting injuries."

Instead, OSHA suggests that companies offer incentives that focus on individual and corporate efforts to improve safety, not on the results of those efforts. For example, several recommendations

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mentioned in the memo include offering modest rewards to employees who suggest ways to strengthen safety or "throwing a recognition party at the successful completion of company-wide safety and health training."

The OSHA memo also identified three other types of workplace policies that will be subject to increased scrutiny because of their potential for discouraging reporting, constituting unlawful discrimination, and violating section 11(c).

First, the memo states that because reporting an injury is always a protected activity, any employer whose policy it is to discipline all employees who are injured, regardless of fault, is automatically in violation of section 11(c). The fact that the employer disciplines all – and not just some – injured workers does not make the practice nondiscriminatory.

Second, employers should exercise caution when disciplining an employee for not reporting an injury according to the employer's established procedures. While OSHA recognizes that employers have a legitimate right to establish specific reporting procedures and timelines so that they can respond accordingly in a timely and appropriate manner, "such procedures must be reasonable and may not unduly burden the employee's right and ability to report." Examples cited in the memo include instances where an employee does not immediately realize his injuries are serious enough to report, or that he is injured at all. OSHA suggests employers investigate these issues on a case-by-case basis before determining whether employee discipline is justified.

And finally, the memo even cautions employers about imposing discipline on employees who were injured as a direct result of violating company safety rules, as OSHA believes some employers "may attempt to use a work rule as a pretext for discrimination against a worker who reports an injury." Again, a case-by-case investigation is recommended to determine, among other things, whether the employer consistently imposed equivalent discipline against workers who violated the same policy but did not get injured, and whether company safety rules are enforced consistently among injured and non-injured workers.

OSHA's memorandum continues the trend among federal agencies of increased scrutiny and stepped-up enforcement against employers. The employee discipline issues addressed in the memo are fairly straightforward. The impact on safety incentive programs will take more time to discern. In the meantime, employers should examine their policies with attention to issues such as: the role of recordable injuries in measuring the effectiveness of safety programs; whether it is possible to include recordable injuries along with other safety and non-safety factors in bonuses which consider productivity, quality, safety, and other operational factors; and whether the employer has reviewed supervisor and management bonuses to determine if the factors going into determining such bonuses may unintentionally result in management discouraging employees from reporting injuries, or be perceived as a discouraging such reports.

McAfee & Taft is continuing our analysis of the memo and its likely long-term impact, and how programs might be revised to address the issues raised above. We will be presenting a webinar on June 13 that will feature an in-depth review of the memo and offer tips on staying clear of OSHA penalties while maintaining a program that has a positive impact on safety.

GAO issues report on safety of federally unregulated gathering pipelines

BY HEIDI SLINKARD BRASHER

The Government Accountability Office recently issued a report on the safety of federally unregulated gathering pipelines using information, data and surveys gathered from PHMSA, state pipeline safety agencies, pipeline companies, and industry groups from February 2011 to March 2012. The GAO report, "Collecting Data and Sharing Information on Federally Unregulated Gathering Pipelines Could Help Enhance Safety," was released in March 2012.

While noting that the vast majority of the nation's natural gas and hazardous liquid gathering lines are unregulated because they are seen as less risky than their non-rural or high-pressure counterparts, a lack of adequate recording of data to understand the actual risk associated with such lines was noted. While property damage claims alone are in the millions of dollars for regulated gathering lines, the GAO report estimates that more than 200,000 miles of unregulated onshore gathering lines exist with no corresponding method to account for the costs associated with incidents involving these pipelines.

Citing a lack of communication, information sharing, and awareness of safety practices, the GAO suggested that PHMSA begin to collect data on currently unregulated gathering pipelines and establish a clearinghouse online to share pipeline safety practices associated with such unregulated lines.

The complete report identifies the safety risks the GAO believes are associated with the gathering lines PHMSA does not currently regulate and notes state practices which are being used to ensure such pipelines operate safely, including damage prevention and public awareness programs and targeted inspections of high-risk areas or operators.

- **Read the complete GAO report here**

Advisory bulletin issued to natural gas cast iron distribution pipelines

BY VICKIE BUCHANAN

On March 23, 2012, the U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration (PHMSA) issued an advisory bulletin to reiterate two alert notices previously issued by PHMSA, ALN-91-02 (Oct. 11, 1991) and ALN-92-02 (June 26, 1992) which addressed the continued use of cast iron pipe in natural gas distribution pipeline systems and to remind owners and operators and state pipeline safety representatives of the need to maintain an effective cast iron management program. Recent explosions in Philadelphia and Allenstown, Pennsylvania, which killed 6 people, injured many others and caused significant property damage, involved cast iron pipelines installed in 1942 and 1928, respectively. These incidents emphasized the need for safety improvements to aging gas pipeline systems in the United States.

ALN-91-02 was issued to provide notice to owners and operators of the National Transportation Safety Board's recommendation, P-91-12. The recommendation advised gas operators to (1) implement a program based on factors such as age, pipe diameter, operating pressure, soil corrosiveness, existing graphitic damage, leak history, burial depth and external loading, (2) identify cast iron piping systems that may threaten public safety, and (3) replace these systems in a planned, timely manner. ALN-92-02 was issued to remind operators that the surveillance, pipeline facility assessment and mitigation requirements stated in 49 CFR 192.613 apply to cast iron pipelines.

In the March 23 advisory bulletin, PHMSA reminds owners and operators and state pipeline safety representatives that these two alert notices continue to be relevant and urges owners and operators to conduct a comprehensive review of their cast iron distribution pipelines and replacement programs and to accelerate repair and replacement of high-risk pipelines. Specifically, PHMSA requests owners and operators to (1) review current cast iron replacement programs and consider establishing mandated replacement programs, (2) establish accelerated leakage survey frequencies or leak testing, (3) focus pipeline safety efforts on identifying highest-risk pipe, (4) use rate adjustments to incentivize pipeline rehabilitation, repair and replacement programs, (5) strengthen pipeline safety inspections, accident investigations and enforcement actions, and (6) install interior/home methane gas alarms. Owners and operators are further reminded of their responsibilities under 49 CFR 192.617 to establish procedures for analyzing incidents and failures to determine the causes of the failure and to minimize the possibility of a recurrence.

Finally, the advisory bulletin notes that the Department of Transportation, in accordance with the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, will continue to monitor the progress made by operators to implement plans of safe management and replacement of cast iron gas pipelines and identify the total miles of cast iron pipelines in the United States.

- **Read the supplementary advisory bulletin (77 *Federal Register* 17119) here**

PHMSA'S FY 2013 budget focuses on hiring more inspectors

BY HEIDI SLINKARD BRASHER

The U.S. Department of Transportation's fiscal year 2013 budget request includes $276 million and 647 positions to increase oversight of hazardous materials transportation and the process of repairing, replacing and rehabilitating existing pipelines. This request is $75 million more than what DOT received for FY 2012.

In addition to funding IT modernization for DOT, the budget requests the following:

- Pipeline safety funding would be allocated to:
  - » 150 new employees – 120 new inspectors and 30 program personnel
  - » Grants to states to standardize their pipeline safety programs
  - » Pipeline safety R&D, National Pipeline Information Exchange database of pipeline safety information
  - » National public awareness campaigns
  - » Pipeline safety design review user fees
  - » A new Accident Investigation Team which will review significant incidents not reviewed by the NTSB.
- Hazardous materials funding would be allocated to:
  - » 22 new employees
  - » A new Special Permit and Approvals user fee to be collected from those seeking special permits and approvals for transporting hazardous materials
  - » Special permit processing and evaluation
- **Read more about PHMSA's 2013 budget request here**

Implementation of national registry of pipeline and LNG operators begins

BY VICKIE BUCHANAN

On March 21, 2012, PHMSA issued an advisory bulletin to notify pipeline and LNG operators of the agency's plan for implementing a national registry and to provide updates regarding the online validation process. On November 26, 2010, PHMSA published a final rule, "Pipeline Safety: Updates to Pipeline and Liquefied Natural Gas Reporting Requirements," 75 FR 72878. This rule added sections 49 CFR 191.22 and 195.64 to the pipeline safety regulations and established the national registry of pipeline and LNG operators. New operators use the registry to obtain an Operator Identification (OPID) Number, while existing operators use it to notify PHMSA of certain matters, including company name changes and construction and project planning. The registry became effective on January 1, 2012.

OPID Assignment Requests: § 191.22(a): Currently, PHMSA is in the process of creating OPID Numbers for all master meter and small LPG operators with existing data in PHMSA's files. In anticipation of the collection of similar data in the future, PHMSA is now requiring that master meter and small LPG operators established after December 31, 2011, obtain an OPID. Master meter and small LPG operators should be allowed to request an OPID Number after May 1, 2012.

Notifications: §§ 191.22(c) and 195.64(c): As of March 27, 2012, operators have been able to submit notifications online using the Online Data Reporting System (ODES). Hazardous liquid pipeline operators have been advised to disregard notification requirements in § 195.64(c)(1)(iii) as PHMSA plans to remove this subsection in future rulemaking.

OPID Validation: §§ 191.22(b) and 195.64(b): As of March 27, 2012, operators have been able to complete the online validation process. Previously, the deadline for operators to complete the process was June 30, 2012; however, due to the delayed availability of the online validation process, PHMSA extended the deadline for validation to September 30, 2012. PHMSA recommends that operators submit their calendar year 2011 annual reports at least five days prior to completing the validation process.

- **You can read the advisory bulletin (77 *Federal Register* 16471) here**

SIDEBAR

First criminal charges filed in Deepwater Horizon spill

A former engineer for BP has been arrested and charged with obstruction of justice for deleting text messages related to how much oil was flowing into the Gulf of Mexico from the Deepwater Horizon spill in the spring of 2010. Kurt Mix, of Katy, Texas, is accused of deleting hundreds of text messages from his iPhone that he exchanged with a co-worker and a contractor. These are the first criminal charges brought against any worker involved in the accident. *[C. Paul]*

EPA proposes emissions rule for new fossil fuel-fired EGUs

The EPA published its proposed rule regarding carbon dioxide emissions for new fossil fuel-fired electric utility generating units (EGUs) in the Friday, April 13, 2012 *Federal Register* (77 *Fed. Reg.* 22392).

Under the proposed rule, only new sources which utilize fossil fuel-fired EGUs at greater than 25 megawatt electric (MWe) are required to meet the output-based standard of 1000 pounds of carbon dioxide per megawatt-hour (lb CO2/MWh), based on natural gas combined cycle (NGCC) technology. The proposed standard may be met either by use of carbon capture and storage of 50% of the CO2 in the exhaust gas at startup, or through use of 30-year averaging.

Comments on the proposed rule must be made by June 18, 2012. All comments should reference Docket Number: EPA-HQ-OAR-1022-0660. *[H. Brasher]*

» **The EPA's proposed emissions rule can be found here**

Stealth regulation?

For pipeline operators concerned about increased attention by the Pipeline and Hazardous Materials Safety Administration (PHMSA) on records related to pressure testing (the MAOP/MOP issue that was part of both the PHMSA advisory bulletin of January 2011 and the 2011 version of the Pipeline Safety Act - yes, it has a longer name but part of the name makes no sense given the decision on the Keystone pipeline) - it is highly recommended that review be made of the new annual reporting form for gas pipeline systems, specifically page 15. Data gathering by PHMSA regarding operator records is gathering steam, and operators which have not yet started looking at their records may be in for an unpleasant surprise. *[C. Paul]*

» **More information can be found here**

Many commercial vehicles now regulated by the FMCSA

BY JARED BURDEN

The Federal Motor Carrier Safety Administration (FMCSA) is the branch of the Department of Transportation that oversees rules and regulations regarding highway travel. The FMCSA is most widely associated with freight haulers and large passenger vehicles; however, it also plays an important role in overseeing larger commercial vehicles that do not fall within these traditional classifications. Many suppose that the FMCSA only regulates vehicles for which a commercial driver's license (CDL) is required, but this is not true. As a result, many businesses are unaware of the FMCSA's reach and, consequently, may be open to liability for failure to follow its regulations.

The FMCSA defines its regulatory scope through vehicle classification. Classifications may be made according to (1) the gross vehicle weight rating (GVWR) or gross vehicle weight, whichever is greater (i.e. truck only); (2) the gross combination weight rating or gross combination weight, whichever is greater (i.e. truck and trailer); and (3) the ability to transport a certain number of passengers. For most regulated industries, the important classifications involve vehicle weight.

GVWR is usually assigned by the manufacturer of the truck and/or trailer. For example, a 1-ton pickup truck (e.g. a Ford F-350) generally has a GVWR of between 10,001 to 14,000 pounds, depending on the make. Trailers will also have a GVWR and/or weight that must be taken into account when determining the full rating or weight. Together, the GVWR or weight of your truck and trailer will determine what kind of licenses your drivers are required to carry, whether a DOT number is needed, the applicability of hours of service regulations, as well as a host of other regulatory standards.

Generally, regulatory burdens fall into two categories. The more restrictive category includes larger vehicles. If a company operates a truck that has a GVWR or gross weight of more than 26,001 pounds, then all drivers must obtain CDLs. These vehicles include your typical tractor-trailers, but may also include larger trucks such as dump trucks or concrete trucks. A class A CDL is required where such a truck is used to pull a trailer with a GVWR or weight of more than 10,001 pounds; a class B license will be needed for smaller trailers or where the truck is not pulling a trailer. In addition to CDLs, falling into this category of regulated operators will require a company to comply with a many other regulations, including, but not limited to:

- FMCSA safety regulations;
- Hours of service regulations;
- FMCSA commercial motor vehicle marking rules;
- Maintenance of an accident register;
- Adoption of an alcohol and drug testing policy; and
- Compliance with hiring procedures for DOT regulated drivers.

This list is not exclusive and guidance should be sought to ensure compliance with all applicable regulations.

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If a company operates any vehicle that has a GVWR or gross weight of between 10,001 pounds and 26,001 pounds, then drivers are not required to have CDLs. However, it will be required to obtain a USDOT number and display it on each "self-propelled" commercial motor vehicle in its fleet (i.e. only the truck, not the trailer) with a weight or weight rating over 10,001 pounds. This rule extends to a variety of vehicles, including pickup trucks that are generally available to the public. In addition, the company will be required to comply with the following regulations:

- FMCSA safety regulations;
- Hours of service regulations;
- FMCSA commercial motor vehicle marking rules;
- Maintenance of an accident register; and,
- Establishment of procedures for preventive maintenance and inspections.

As with the previous list, this above list is not exclusive and guidance should be sought to ensure compliance with all applicable regulations.

As is readily apparent from these categories, many companies that utilize common equipment in their operations, such as a 1-ton pickup with a gooseneck trailer, may fall under the jurisdiction of the FMCSA. As such, they may unknowingly be open to inspections and/or fines. A review of the composition of your fleet and an understanding of the FMCSA's reach will go a long way in ensuring compliance.

U.S. Department of Labor publishes proposed tribal consultation policy

BY CHRISTINA M. VAUGHN

The U.S. Department of Labor published its proposed tribal consultation policy in the Wednesday, April 18, 2012 Federal Register (77 *Fed. Reg.* 23283).

This issuance of the proposed policy is in compliance with Executive Order 13175 of November 6, 2000, which charged executive departments and agencies with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of federal policies that have tribal implications. Following issuance of the order, departments and agencies were slow to establish and follow through with tribal consultation policies. To reemphasize the importance of this policy, President Obama issued a memorandum to the heads of executive departments and agencies on November 5, 2009, directing each agency head to establish a detailed plan for implementing the policies and directives of the executive order.

Under the proposed policy, the DOL will, to the extent practicable and permitted by law, consult with affected Indian tribes with regard to "proposed legislation, regulations, policies or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes." The proposed policy sets forth the manner, method and timing of departmental consultation with tribes, focusing on transparent and meaningful consultation in processes that have tribal implications.

Comments on the proposed policy must be made by June 18, 2012. All comments should reference Docket Number: DOL-2012-0002.

- **The DOL's proposed tribal consultation policy can be found here**

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