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Retail exemption for PSM standard must undergo rulemaking process, appeals court rules

OSHA failed to follow federal rulemaking requirements when it used a memorandum to announce a revised definition of retail facilities exempt from the Process Safety Management Standard, the U.S. Court of Appeals for the District of Columbia Circuit has ruled.

Prior to the revision, farm supply facilities that sell bulk chemical fertilizers to farmers – as well as retail establishments such as gas stations that sell hazardous chemicals in small quantities – had been exempt from the PSM standard.

However, OSHA amended its definition of retail facilities following a deadly explosion in April 2013 at the West Fertilizer Co. facility in West, TX. The facility, which possessed more than 50,000 pounds of ammonium nitrate that exploded and killed 15 people, had been exempt from the standard because more than half of its earnings came from direct sales to end users. In August 2013, President Barack Obama issued an Executive Order that, among other actions, directed the secretary of labor to determine necessary changes to the retail exemption in the standard.

OSHA responded with the revised standard interpretation, released in a July 2015 memorandum. It stated that only retail facilities with North American Industry Classification System codes of 44 and 45 – such as hardware stores, automotive dealers and office supply stores – would be exempt. Farm supply facilities would no longer be exempt, exposing them to new requirements for handling highly hazardous chemicals. Up to 4,800 facilities may have been affected by the new definition, OSHA estimated.

The Agricultural Retailers Association and The Fertilizer Institute filed suit last year, claiming that the Occupational Safety and Health Act requires OSHA to undergo the formal rulemaking process, including notice and comment periods, before issuing a revised interpretation. In addition, a bipartisan group of lawmakers sent a letter to Secretary of Labor Thomas Perez in October 2015, noting that the changes would be costly to small and medium-sized businesses.

During a March 2016 hearing of the Senate Labor, Health and Human Services, Education, and Related Agencies Subcommittee, Perez admitted that OSHA was not undergoing a formal rulemaking process, but claimed quick action was needed due to the Executive

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DOL: Federal contractors must provide paid sick leave to their workers

Beginning in 2017, employers with federal government contracts must provide their workers with up to seven days of paid sick leave per year, according to a Department of Labor final rule announced Sept. 29.

The final rule, published in the Sept. 30 *Federal Register*, was prompted by Executive Order 13706 on Sept. 7, 2015. It pertains to all contracts solicited and awarded on or after Jan. 1.

Under the rule, employees will accumulate one hour of paid sick leave for every 30 hours worked in relation to a covered contract. The rule also will:

- Provide a maximum of 56 hours of paid sick leave each year to about 1.15 million federal contract workers – approximately 594,000 of whom now have no paid sick leave.
- Allow employers to offer options "in how to best adapt the paid sick leave requirement to their businesses." Employers may allow workers to accrue paid sick leave over time or "frontload" it for "ease of administration."
- Offer flexibility with employers' current paid time-off policies and maintain provisions in current collective bargaining agreements.

"Part of the basic bargain of America is that if you work hard, you should be able to take care of your family," Secretary of Labor Thomas Perez said in a press release.

Earlier this year, the Small Business Administration Office of Advocacy sent a letter to DOL asking the department to consider alternatives to paid sick leave and stating that compliance with the rule would be costly – as much as $70,000 per year – to some small businesses.

According to the National Partnership for Women & Families, a Washington-based nonprofit organization, five states and several cities already require employers to provide paid sick leave to their employees.

ASK THE EXPERT

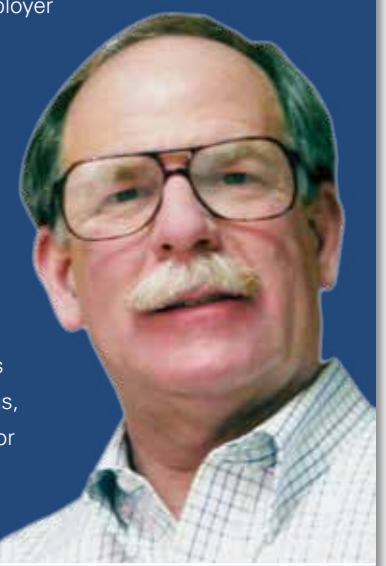
with Rick Kaletsky

Q: *Everyone in the occupational safety business knows something about the importance of PPE for eyes, ears, head, hands, face, feet and (in a more complex way) lungs. Are you aware of an OSHA citation regarding PPE for any other part of the body?*

A: OSHA has required personal protective equipment for arms, legs and other exposed skin areas when (for instance) there is a significant thermal or corrosive burn potential.

Perhaps more interesting was a citation item that may have been unique. When I was with the Department of Labor/OSHA, our office inspected a factory that "worked" and handled sheet metal. There was a large machine that, by design and intent, ejected (essentially) small, rectangular metal plates through large rollers or a similar setup. An employee was positioned at the "payoff" end of the machine, where he/she would crouch and be the catcher. The hazard lay in the invariably sharp edges of the quickly thrust metal pieces. The employer claimed the plates were so delicate that careful, manual handling was needed. Suitable gloves and arm protectors were in use, but workers had sustained lacerations in the upper thigh area.

Our office cited 29 CFR 1910.132(a) and required chaps-type thigh protectors, as well as "cups" (rigid jockstraps). As always, the employer had the option of abating the hazard by changing the process so there would be no catcher involved. Thus, there would be no exposure and no need for personal protective equipment.



Former OSHA inspector turned consultant ***Rick Kaletsky*** *is a 45-year veteran of the safety industry. He is the author of "OSHA Inspections: Preparation and Response," published by the National Safety Council. Now in its 2nd edition, the book has been updated and expanded in 2016. Order a copy at* **www.nsc.org**, *and contact Kaletsky with safety questions at* **safehealth@nsc.org**.

In Other News…

OSHA, Health Canada create work plan for hazcom effort

OSHA and Health Canada have developed a work plan intended to align U.S. and Canadian requirements for classifying – and sharing information about – work-related chemical hazards.

The work plan, available at *www.osha.gov/dsg/hazcom/rcc_work_plan.pdf,* stems from a 2013 Memorandum of Understanding signed by OSHA and Canada's Department of Health to create a coordinated system that permits using one label and one Safety Data Sheet in both countries. The 2016-2017 Workplace Chemicals Work Plan includes:

- Creating materials to help stakeholders implement the Globally Harmonized System of Classification and Labeling of Chemicals, as well as understanding technical matters and requirements in the United States and Canada
- Coordinating opinions on issues that result from international discussions about GHS
- Maintaining alignment when changes are made

OSHA awards $10.5 million in training grants

OSHA has awarded a total of $10.5 million to 77 organizations to develop safety and health training programs. The funds are part of the Susan Harwood Training Grant Program, which aims to help nonprofit organizations create programs that protect workers across industries. The one-year grants fund efforts for employers and workers to recognize, avoid and prevent hazards.

According to OSHA, the Susan Harwood Training Grant Program, created in 1978, has helped about 2.1 million workers. For a list of grant recipients, go to *https://www.osha.gov/dte/sharwood/2016_grant_recipients.html.*

OSHA STANDARD INTERPRETATIONS

OSHA requirements are set by statute, standards and regulations. Interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. Enforcement guidance may be affected by changes to OSHA rules.

Whether handling of stones for foundation work is considered a construction activity

Standard: 1926.32(g)
Date of response: July 14, 2016

Thank you for your Oct. 6, 2014, letter to OSHA in which you ask for an interpretation of the Cranes and Derricks in Construction standard. Your company delivers granite and marble monuments to gravesites. You also clarified that you are only requesting guidance with respect to headstones and other small monuments weighing between 100 and 1,700 pounds. You note, however, that even some of these small monuments can consist of several pieces. These pieces are then placed separately on top of each other, arranged in their final formation, and the joints between them are then sealed with a water-resistant compound. The monuments that you describe are typically placed on a precast concrete or granite foundation pad. A crane is used to move the monuments or their pieces from the bed of a delivery truck to either the foundation directly or to a heavy duty cart that will be manually pushed/pulled to the designated grave site. You describe several related worksite scenarios and ask OSHA to determine if they are considered construction activities. Please note that consideration of whether a work activity is covered by 29 CFR 1910 (OSHA's General Industry Standards) or 29 CFR 1926 (OSHA's Construction standards) is based on a case-specific factual analysis. An example of some of the factors used to determine whether a work activity is covered under OSHA's Construction standards is discussed in a letter of interpretation that can be accessed from OSHA's website at *http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24789.*

Question No. 1: *When a crane is used to move headstones and other small monuments from a truck bed to particular foundations at designated grave sites, is that a construction activity?*

Answer: Generally, no. Pouring or installing the concrete foundation pad at the grave site creates a new structure and would typically be considered construction work, which is defined in 29 CFR 1910.12(b) and 1926.32(g) as "work for construction, alteration, and/or repair, including painting and decorating." Simply moving a completed monument from the bed of a truck to the ground (or a completed foundation pad) would generally not be considered construction if it is done so without facilitating any alteration or improvement to the pad or monument following its placement on the pad. In contrast, construction work would typically include hoisting and positioning of: a completed monument onto or within formwork on the ground as the foundation is being constructed; a completed monument to where it would otherwise be joined or connected to another structure (including physically securing it to a precast foundation or securing its footings); or several pieces of a monument during its assembly.

Sincerely,
Jeffrey A. Erskine, Acting Director
Directorate of Construction

Excerpted from: ***https://osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=30938***

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In This Issue

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Order and the need to prevent a disaster similar to the West, TX, explosion. He said the agency requested stakeholder feedback before releasing the interpretation.

A provision in an appropriations bill in December 2015 prohibited OSHA from enforcing the interpretation during fiscal year 2016 until the agency promulgated a new rule. In an additional memo, OSHA stated that it would not enforce the interpretation until after the end of the fiscal year on Sept. 30, 2016.

On Sept. 23, the court sided with the Agricultural Retailers Association and The Fertilizer Institute, concluding that OSHA's new definition "amounts to a standard."

"Nothing in our decision necessarily calls into question the substance of OSHA's decision to narrow the exemption for retail facilities and correspondingly to expand the scope of the PSM Standard," the court stated in its opinion. "We hold only that, insofar as OSHA does so, it must follow the notice-and-comment procedures for standards set forth in the OSH Act."

ARA praised the court's decision. OSHA's rulemaking process will likely take several years, the association noted.

"It's a big win," ARA Chairman Harold Cooper said in a press release. "Given the significant economic costs and absence of any safety benefit, the court made the correct decision. The retail exemption has been in place for more than 20 years and OSHA should not have redefined it without an opportunity for stakeholders to comment."