U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210

DEC 19 2016

Mr. James Krueger
Chair
Occupational Safety and Health State Plan Association
Minnesota Department of Labor & Industry
443 Lafayette Road North
St. Paul, Minnesota 55155

Dear Chairman Krueger: Jim

Last year, Congress passed the Federal Civil Penalties Adjustment Act of 2015, part of the Bipartisan Budget Act of 2015, P.L. 114-74, §701, 129 Stat. 599 (2015), which amended the Federal Civil Penalties Adjustment Act of 1990 ("FCPAA"), and made the FCPAA applicable to the Occupational Safety and Health Administration (OSHA). The FCPAA requires OSHA to increase its penalties by the cost-of-living adjustment (according to the CPI-U) since the penalty levels were last increased in 1990.

The Bipartisan Budget Act's amendment to the FCPAA directed the Department of Labor (DOL) to increase its penalty levels in an interim final rule, P.L. 114-74, §701(b)(1)(A), 129 Stat. 599 (2015). As directed, DOL has published an Interim Final Rule (IFR) in the Federal Register, effective August 1, 2016, implementing a "catch-up adjustment" to its maximum penalty levels (81 FR 43430, July 1, 2016). The FCPAA also directs DOL to increase penalty levels by the cost-of-living adjustment for every subsequent year by January 15th.

There were four State Plan-related comments submitted in response to the IFR. One was from the Occupational Safety and Health State Plan Association (OSHSPA) and three from individual State Plans (North Carolina, Kentucky and New Mexico). OSHA is responding to these four comments in this letter.

Section 18(c)(2) of the OSH Act requires that a State Plan "provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 6 which relate to the same issues . . . ." Prior to the July 1, 2016 publication of the IFR, the State Plan Indices of Effectiveness for initial approval stated that State Plans must "[p]rovide[] effective sanctions against employers who violate State standards and orders, such as those prescribed in the Act." 29 CFR 1902.4(c)(2)(xi) (2015). In the factors for determination of final approval status, the regulations require that, "[t]he State proposes penalties in a manner at least as effective as under the Federal program, including the proposing of penalties for first instance violations and the consideration of factors comparable to those required to be considered under the Federal program." 29 CFR 1902.37(b)(12).

Thus, OSHA-approved State Plans must have maximum and minimum[1] penalty levels that are at least as effective as federal OSHA's per Section 18 (c)(2) of the OSH Act; 29 C.F.R. 1902.4(c)(2)(xi); 1902.37(b)(12). It is OSHA's long-standing position that "at least as effective," in this context, means that State Plans must have maximum penalty levels that are at least as high as OSHA's maximum penalty levels. Therefore, all State Plans must increase their maximum penalty levels to be at least as high as OSHA's initial catch-up maximum and minimum penalty levels in 29 CFR 1903.15(d), and must thereafter increase these maximums and minimums based on inflation.

With the publication of the IFR, the location of OSHA's maximum and minimum penalties was moved from Section 17 of the OSH Act to 29 CFR 1903.15(d). To make it clear where the OSHA penalty levels are located, OSHA amended 29 CFR 1902.4(c)(2)(xi) to now read that State Plans must "[p]rovide[] effective sanctions against employers who violated State standards and orders, such as those prescribed in the Act *and 29 CFR 1903.15(d)"*(emphasis added). This change was simply to add a reference to the new location of OSHA penalty levels, in 29 CFR 1903.15(d).

OSHSPA submitted a letter (DOL-2016-0005-0010) requesting that OSHA make clear that the amendment to 29 CFR 1902.4(c)(2)(xi) is not intended to require State Plans to have an identical penalty structure for assessed penalties. As explained above, State Plans have long been required to have effective sanctions as prescribed in the OSH Act. The penalty levels in the OSH Act (Section 17) have historically been OSHA's maximum and minimum penalties, while OSHA's structure or practice for assessing penalties has been developed through policy and is currently contained in OSHA's Field Operations Manual. OSHA confirms that the amendment to §1902.4(c)(2)(xi) refers only to the location of the new maximum penalty levels in 29 CFR 1903.15(d). The change to §1902.4(c)(2)(xi) does not expand OSHA's scope of authority or control over State Plans penalties, nor does it alter OSHA's obligation to analyze both State Plan maximum penalties *and* State Plan penalty assessment structures under the "at least as effective" lens.

The North Carolina Department of Labor submitted a comment (DOL-2016-0005-0005) that took issue with OSHA's amendment of 29 CFR 1902.4(c)(2)(xi), and was joined by Kentucky Labor Cabinet (DOL-2016-0005-0007) and the New Mexico Environment Department (DOL-2016-0005-0009). The North Carolina State Plan contended that OSHA's amendment to 29 CFR 1902.4(c)(2)(xi) was: in excess of the authority granted by the Bipartisan Budget Act of 2015's amendment to the FCPAA; not in conformance with the Administrative Procedures Act (APA), 5 USC 553; and arbitrary, capricious, and an abuse of discretion.

Rather than enacting a change to the OSH Act, Congress in the FCPAA directed OSHA to increase maximum and minimum penalties through an interim final rule issued without prior notice and comment. OSHA has the inherent authority to make technical amendments to its regulations to conform to Congress's direction to increase its penalty levels. With the change to the location of penalty levels to 29 CFR 1903.15(d), OSHA needed to update the reference in 29

[1] The penalties increased include the range of penalties for willful citations, which includes both a minimum and a maximum.

CFR 1902.4(c)(2)(xi) to point to both the Act and the new regulation. This change was merely the addition of a reference, or pointer, to increase clarity and transparency in the State Plan Indices of effectiveness.

The North Carolina, Kentucky and New Mexico State Plans argue that the change to 29 CFR 1902.4(c)(2)(xi) violated the APA because it was not issued through notice-and-comment rulemaking, and the good cause exception to notice-and-comment rulemaking is not applicable.

As noted by the North Carolina State Plan, the APA exception from notice and comment applies to regulations that make minor technical amendments and non-substantive corrections. *See* p. 3. That comports with the APA language that notice and comment are not required where they are "impractical, unnecessary, or contrary to the public interest." 5 USC 553(b)(3)(B). The amendment to 29 CFR 1902.4(c)(2)(xi) fits within that exception because it is a minor, technical amendment that updated the reference to the location of OSHA maximum and minimum penalty levels. It is the "at least as effective" standard in OSH Act § 18 that requires State Plans to increase their maximum penalty levels, and the amendment to 29 CFR 1902.4(c)(2)(xi) only made clear to State Plans and all other stakeholders that the maximum penalty levels that State Plans are required to be at least as effective as, are now listed under 29 CFR 1903.15(d), and are no longer in OSH Act § 17. There is no need for notice and comment on that type of "pointer" reference. *See, e.g.,* Corrections and Technical Amendments to 16 OSHA Standards, 76 FR 80735 (Dec. 27, 2011) (updating cross-reference from "Section 101(14)" of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) to "Section 103(14)" after Congress amended CERCLA). Also, DOL did accept comments on the IFR, and several State Plans took advantage of that opportunity to file comments.

Further, the State Plan comments argue that the change to 29 CFR 1902.4(c)(2)(xi) was arbitrary, capricious, and an abuse of discretion under the APA because it is not based on reasoned analysis. The North Carolina State Plan comment argues that OSHA should present current data to support the requirement that State Plans increase penalties to the level assessed by OSHA effective August 1, 2016, in order to be deemed "at least as effective." Further, the North Carolina State Plan comment emphasizes that the "at least as effective" standard does not require State Plans to have programs identical to OSHA's. New Mexico joined in arguing that assessed penalty levels and injury rates are not correlated and thus penalty levels should not be part of the "at least as effective" analysis.

In the FCPAA, Congress found that "(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations; (2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation." 28 USC 2461 note, § 2(a). This finding is as applicable to State Plan penalties as to Federal penalties.

The regulations that OSHA adopted (29 CFR 1903.15(d)) address only the maximum and minimum penalty levels – they do not address penalties finally assessed or the methodology involved in calculating assessed penalties. The latter are matters to be determined under the "at least as effective" analysis, on a case-by-case basis with each State Plan.

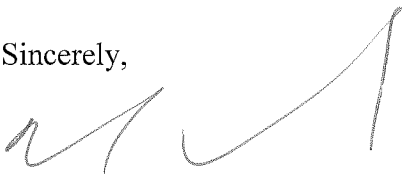
OSHA has an obligation to ensure that State Plans continue to maintain maximum and minimum penalty levels that are at least as effective as OSHA's. OSHA agrees that the "at least as effective" standard does not require State Plans to be identical to OSHA. However, as acknowledged by the OSHSPA comment, historically, State Plans have matched OSHA's maximum penalties identically. In 1990, when Congress last increased OSHA's maximum penalty levels, all State Plans adopted identical penalty levels, resulting in the $7,000/$70,000 penalty levels in effect for 25 years for both OSHA and the State Plans. OSHA recognizes that the August 1, 2016 increase in OSHA's maximum penalty levels is complicated by the requirement that the penalties levels increase annually, based on the cost-of-living adjustment, but that does not mean that State Plans do not have to increase their maximum penalty levels. OSHA will assist the State Plans in any way that we can to make these necessary changes occur. OSHA's position has been and continues to be that State Plans must have maximum and minimum penalties that are "at least as effective" as OSHA's.

OSHA expects State Plans to implement the changes as soon as their legislative sessions allow, although we recognize that a number of states have varied legislative calendars that may impact the adoption of this change.

If you intend to pursue something other than identical adoption of the new penalty structure, we would like to discuss existing legal or legislative barriers that may prevent you from adopting this structure, as well as your proposed alternatives/changes.

As always, we will assist you any way that we can to facilitate these necessary changes. We look forward to working with you on this very important issue.

Sincerely,



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