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Recent OSHA Enforcement Regarding the Retail Facility Exemption of the Process Safety Management Standard: Does the Fifty (50) Percent Standard Still Apply?

Section 1910.119(a)(2)(i) of the Process Safety Management (PSM) standard states that it does not apply to “retail facilities.” The PSM standard does not apply to retail facilities, but there is no specific definition of what constitutes a retail facility. But in an Interpretation Letter dated June 19, 1992, OSHA provided a definition: “An employer is a retail facility if more than fifty (50) percent of its income is derived from the direct sale of the covered process to end users.” This remained for more than two decades and is otherwise known as the “50 percent standard” within the regulated community.

In a Memorandum dated July 22, 2015, OSHA changed course and revised the definition of a retail facility. Specifically, OSHA stated that only employers in sections 44 and 45 of the North American Industry Classification System (NAICS) manual constitute a retail facility for purposes of the PSM standard.

A lawsuit filed in the DC Circuit Court of Appeals challenged OSHA’s ability to revise the definition of what constitutes a retail facility without notice and comment rulemaking as required by the Occupational Safety and Health Act of 1970. In *Agricultural Retailers Ass’n v. U.S. Dep’t of Labor*, 837 F.3d 60 (D.C. Cir. 2016), the DC Circuit Court of Appeals vacated the Memorandum dated July 22, 2015, finding that

the Memorandum was an occupational safety and health “standard” under of the OSH Act. The DC Circuit concluded that because the Memorandum dated July 22, 2015 was an occupational safety and health “standard,” OSHA was required to engage in notice-and-comment rulemaking pursuant to the mandates of the OSH Act.

Rather than engage in notice-and-comment rulemaking, however, in a Memorandum dated April 30, 2018, OSHA stated it would not issue PSM citations to employers in the following North American Industry Classification System (NAICS): (1) 424510 Grain and Field Bean Merchant Wholesalers, (2) 424590 Other Farm Product Raw Material Merchant Wholesalers, or (3) 424910 Farm Supplies Merchant Wholesalers. OSHA also stated that compliance officers should exercise enforcement discretion in accordance with the following explanation from the preamble to the PSM standard:

With respect to the exclusion of retail facilities ... OSHA believed that such facilities did not present the same degree of hazard to employees as other workplaces covered by the proposal. Therefore, OSHA should not require a comprehensive process safety management system in addition to other applicable OSHA standards addressing flammable and combustible liquids, compressed gases, hazard communication, etc., for retail facilities...

Certainly highly hazardous chemicals may be present in [retail] ... operations. However, OSHA believes that chemicals in retail facilities are in small volume packages, containers and allotments, making a large release unlikely. OSHA received few comments disagreeing with the exemption of retail facilities (e.g., gasoline stations). OSHA has retained the exemption in the final rule.

In early 2021, OSHA issued several PSM citation items and a large penalty to a nationwide employer with a facility located in Houston, Texas. In defense of the PSM citation items, the employer asserted that it was not required to comply with the PSM standard, because the facility is a retail facility according to the 50 percent standard. OSHA disagreed, stating that it had revoked the 50 percent standard in its Memorandum dated July 22, 2015. OSHA asserted that its “interpretation” of what qualifies as a retail facility under the PSM standard is in its Memorandum dated April 30, 2018. OSHA argued that according to the Memorandum dated April 30, 2018, the employer needed to prove that “a large release was unlikely” to qualify for the retail facility exemption. The employer met that burden of proof, with the help of a PSM consulting expert, and therefore the citation items and penalty were withdrawn, saving the nationwide employer millions of dollars in compliance costs.

Notwithstanding the withdrawal of the citation items and penalty, an elephant in the room remains: Must OSHA go through notice-and-comment rulemaking when it wants to withdraw a standard like the 50 percent standard? Or can OSHA withdraw the standard in an interpretation letter or memorandum, which is what OSHA claimed it could do during a recent enforcement action? Stay tuned.

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