FEBRUARY 14, 2024 | PROCESS SAFETY MANAGEMENT (PSM)

OSHA Releases a New Process Safety Management "Enforcement Manual"

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Things have been busy the last couple of months on the RMP/PSM front with these developments:

1. Without announcement, on January 26, 2024, Fed OSHA posted a new PSM "enforcement manual," replacing its long-standing 1994 compliance directive.
2. Members of the House Energy and Commerce Committee sent EPA a letter on January 18, 2024, urging EPA to withdraw and re-propose its upcoming RMP rule update, charging that the proposed version conflicts with OSHA and other agencies' responsibilities, goes beyond Congress' explicit mandates, and raises security concerns, among other things.
3. On December 27, 2023, Washington state's Division of Occupational Safety and Health amended its PSM standard, effective December 2024, adding a new part specifically addressing process safety at petroleum refineries.
4. The United Steelworkers ("USW") filed a petition on January 15, 2024 with Cal/OSHA's Standards Board asking Cal/OSHA to develop an emergency temporary standard ("ETS") that would subject renewable fuel refineries to the same rules the state applies to petroleum refineries.

For a relatively quiet 2023, 2024 is starting off with a bang. While we are keeping our eyes and ears open on these and any other relevant developments, we wanted to provide a summary of the key highlights from Fed OSHA's new PSM enforcement manual, especially in light of the fact that the now-cancelled instruction had essentially been in place for the lifetime of the PSM standard. Here are some of our main takeaways:

Why Did OSHA Issue This New Enforcement Manual?

OSHA states that it "completed a look-back review of its PSM standard" under the Regulatory Flexibility Act and Executive Order 12866, both of which direct agencies to periodically review their rules and identify needed changes, and that, in response to the look-back review's suggestions, the prior instruction "has been cancelled and superseded by this instruction." OSHA has not separately published the look-back review or its conclusions.

What Are The Significant Changes?

The manual sets forth two significant changes. First, in addition to cancelling and replacing the prior instruction,

the manual removes an appendix that set out a checklist for auditing a workplace's compliance with the PSM standard. This was called the program-quality-verification ("PQV") audit checklist. Although there does not appear to be a direct replacement for the checklist, the manual notes that OSHA's January 17, 2017 National Emphasis Program ("NEP") for the PSM standard sets out procedures "for inspecting facilities with highly hazardous chemicals (HHCs) in amounts at or greater than the threshold quantities listed in [the PSM Standard]."

Interestingly, the NEP states that "[i]nspections conducted using the PQV approach were broad and open-ended, while inspections using this instruction rely on specific investigative questions. The investigative questions are designed to gather facts related to requirements of the PSM standard, and include guidance for reviewing documents, interviewing workers, and verifying full implementation." OSHA explains in the NEP that PQV inspections were "resource intensive and, therefore, OSHA would perform only a limited number each year. Consequently, very few PQV inspections have been conducted . . . ."

Second, the manual incorporates "existing OSHA PSM enforcement policies" in a question-and-response ("Q&R") format, largely taken from agency letters interpreting the standard ("letters of interpretation," or LOIs). Those Q&Rs make up the vast majority of the 100+ page manual. They cover a wide range of topics in PSM implementation, from when the standard applies, to its definition of "process" and training requirements, to more case-specific issues like how facilities should prepare for specific equipment-failure scenarios. The Q&Rs also range in date, citing responses dating as far back as 1992 – just months after the PSM standard was first adopted – and as recent as a 2022 letter on training requirements. There is also a four-page appendix of additional, non-mandatory information in the form of supplemental definitions and Q&Rs, and a six-page appendix containing a list of citations to the original LOIs.

Does The Manual Affect State OSH Plans?

Yes. Per OSHA, State OSH Plans have the option of adopting identical or at least as effective enforcement policies as those contained in the manual. Within 60 days of the effective date of the manual (i.e., by March 26, 2024), State OSH Plans must submit a notice of intent indicating if the State Plan will adopt or already has in place policies and procedures that are identical to or different from Fed OSHA's program. State adoption, either identical or different, should be accomplished within six months (i.e., by July 26, 2024). If adopting identical policies, the State OSH Plans must provide the date of adoption to OSHA within 60 days of adoption. If the State Plan adopts or maintains policies that differ from those in the manual, the policies must be available for review. Within 60 days of adoption, the State OSH Plan must provide an electronic copy of the policy or a link to where their policies are posted on the State OSH Plan's website. The State OSH Plan must also provide the date of adoption and identify differences, if any, between their policy and Fed OSHA's.

Are There Any Updates on OSHA's PSM Rulemaking?

Not really. There have not been any major updates since OSHA's stakeholder meeting on October 12, 2022. OSHA accepted public comments through November 14, 2022, and per the current Regulatory Agenda, OSHA continues to analyze comments. No other future deadline is provided in the current Regulatory Agenda.

Employer Takeaways

Given this development, employers would be well-advised to further review their PSM programs to ensure that

they meet the enforcement expectations set forth in the manual.