

SAFETY, HEALTH AND ENVIRONMENTAL ISSUES IN THE WORKPLACE

MINNESOTA OCCUPATIONAL SAFETY AND HEALTH ACT

The Occupational Safety and Health Division of the Minnesota Department of Labor and Industry administers the Minnesota Occupational Safety and Health Act of 1973. The express purpose of this Act is “to assure so far as possible every worker in the State of Minnesota safe and healthful working conditions and to preserve our human resources...”³⁹² The Minnesota Occupational Safety and Health Codes adopt, by reference, the federal Occupational Safety and Health Standards. In addition, Minnesota has adopted some “localized” standards that apply to hazards not covered by the federal OSHA standards.³⁹³ OSHA standards apply to all places of employment in the state with the exception of those under the exclusive jurisdiction of the federal government.³⁹⁴

EMPLOYER RIGHTS AND RESPONSIBILITIES

An employer’s rights and responsibilities under the Act include, but are not limited to, the following:

- An employer must furnish to employees conditions of employment that are free from recognized hazards that are causing or are likely to cause death or serious injury.³⁹⁵
- Employers are entitled to participate in the development, revision or revocation of OSHA standards by commenting on proposed standards, participating in hearings concerning standards, or by requesting the development of a new standard.³⁹⁶
- An employer may request a variance from the requirements of a particular OSHA standard if the employer is unable to meet the mandates of that standard and wishes to use alternative means of compliance.³⁹⁷
- Employers are entitled to protection of trade secrets or other legally privileged communications.³⁹⁸
- Employers must post the Occupational Safety and Health Protection on the Job poster in their places of employment.³⁹⁹ Posters may be obtained by contacting

the Minnesota Department of Labor and Industry, 443 Lafayette Road North, St. Paul, MN 55155, (651) 284-5042 (or at www.dli.mn.gov).

- Employers must provide to their employees free of charge all necessary protective equipment required by OSHA standards.⁴⁰⁰

RECORDKEEPING

Employers must maintain a log of injuries and illnesses prescribed in the Minnesota OSHA Codes and must post an annual summary of those injuries. The OSHA 300 Form (rev. January 1, 2004), which is used for this purpose, includes information and instructions for completing the form and is available by contacting the Minnesota Department of Labor and Industry at (651) 284-5042 or visiting www.dli.mn.gov/recordkeeping.html. This injury and illness information must also be made available to an OSHA investigator should an inspection be conducted at the place of employment.⁴⁰¹

PENALTIES

Under Minnesota law, an employer who receives a citation for a serious violation of its duties under the Minnesota OSHA standards may be assessed a fine of up to \$7,000. If a serious violation of the Minnesota OSHA standards occurs which causes or contributes to the death of an employee, the employer may be assessed a fine of up to \$25,000.⁴⁰² Minnesota OSHA regulations contain an exception for small employers with fewer than 50 employees: if a violation is not willful or repeated, small employers may be assessed an initial fine of \$5,000, and \$5,000 for each of the following four years. Minnesota OSHA regulations also provide for criminal penalties of up to \$70,000 or imprisonment for not more than six months or both for a first violation, and \$100,000 or imprisonment for not more than one year or both for a subsequent violation.

ERGONOMICS

To date, Minnesota has not promulgated rules with respect to ergonomics; however, employers have an obligation to correct recognized ergonomics hazards causing or likely to cause injury to employees. However, Minnesota OSHA Workplace Safety Consultation (WSC) is working to showcase ergonomics best-practices of employers throughout the state to recommend approaches to reduce work-related musculoskeletal disorders in Minnesota. Examples of ways that employers and employees are working to reduce the risks of musculoskeletal injuries in the workplace can be reviewed at www.dli.mn.gov/WSC/BestPractices.asp.

There are no federal OSHA ergonomic rules in final form. However, the federal OSHA has issued, and will continue to issue, industry-specific guidelines to reduce injuries and illnesses related to musculoskeletal disorders. These guidelines are tools an employer can use to recognize and control hazards. The guidelines are voluntary and, accordingly, employers who

fail to implement guidelines that OSHA develops are not in violation of OSHA. Currently, guidelines are available for the shipyards, poultry processing, nursing home and retail grocery store industries. These guidelines can be found at www.osha.gov/SLTC/ergonomics/outreach.html#etools. Employers in other industries for which guidelines have not been developed may find useful information in these guidelines for developing their own ergonomic programs.

EMPLOYEE RIGHTS AND RESPONSIBILITIES

Although the sole responsibility for compliance with the law rests with the employer, employees are obliged to comply with OSHA standards and regulations which are applicable to their own actions and conduct. Employees cannot be cited or fined for noncompliance; employers must set up their own disciplinary procedures for employees who violate standards or regulations. Employee rights include, but are not limited to, the following:

- Employees have the right to request an OSHA inspection by filing a written complaint with the Minnesota Occupational Safety and Health Division describing the hazardous conditions that exist at the work facility.⁴⁰³ The complaint must be filed by a current employee and must be signed. A complainant's name is not revealed nor is it part of any inspection record made available for review.
- Employees may participate in standards development activities.⁴⁰⁴
- Employees must be notified of a variance request filed by their employer; employees may petition for a hearing on the variance request.⁴⁰⁵
- Employees may participate in the opening and/or closing conference held prior to or during an OSHA inspection; employees who exercise this right must be paid their usual wage.⁴⁰⁶
- Employees may not be discriminated against because they exercised any right afforded them under the Minnesota OSHA Act.⁴⁰⁷

OSHA INSPECTIONS

OSHA authorizes the Minnesota Department of Labor and Industry to conduct inspections and to issue citations and proposed penalties for alleged violations of OSHA. Inspections are generally prompted by fatalities or accidents which may have occurred at the facility, conditions which represent a continuing imminent danger to employees or an employee complaint. Other inspections may occur during routine programmed inspections for high-hazard industries or occupations. Industries targeted for program inspections are selected based

on their death, injury and illness incident rates as well as such factors as employee exposure to toxic substances.

The investigator has the authority to take environmental samples and to take photographs related to the purpose of the inspection.⁴⁰⁸ The inspector may also privately question the owner or operator of the facility and its employees.⁴⁰⁹ The inspector must comply with all employer safety and health rules and practices at the facility being inspected, and the inspections should be conducted to avoid unreasonable disruption of the operations at the facility.

A representative of the employer and a representative authorized by its employees must be given an opportunity to accompany the inspector during the inspection of the workplace.⁴¹⁰ The inspector may consult with employees concerning matters related to OSHA during the inspection.⁴¹¹ The authorized representative of the employees must also be given an opportunity to participate in any conference or discussion held prior to or during the inspection.⁴¹² The investigator will hold a private conference with either the employee representative or the employer at either party's request.⁴¹³ Under OSHA rules, an employee taking part in the inspection is entitled to his regular pay for the time spent in the inspection.⁴¹⁴

When the inspector arrives at the facility, management should be immediately notified. As part of employee training, employees should be advised as to the proper procedure to notify management in the event an inspector arrives at the facility. If an OSHA inspector does not have a search warrant, the inspector can be denied access to the facility.⁴¹⁵ However, if the inspector is denied access, the inspector may return with a warrant and may be more likely to take a closer look at the facility because of the concern that the employer was trying to hide something or had the opportunity to correct a violation during the period of time it took the inspector to get the warrant.

At the beginning of an inspection, the inspector should present his or her credentials, explain the nature and purpose of the inspection and indicate generally the scope of the inspection and the records he or she wishes to review, if any.⁴¹⁶ Inspections are generally conducted during regular working hours.⁴¹⁷ If the inspection was prompted by a complaint, the employer should request a copy of the complaint from the inspector. The employer should also ask for an opening conference prior to the commencement of the inspection.⁴¹⁸ During that time, a manager familiar with OSHA's standards and the facility should meet with the inspector and collect information regarding why the inspection is occurring and what areas the inspector would like to inspect and the types of information he or she will be collecting. At that time, the employer can decide whether or not the employer wants to take duplicate photos and duplicate environmental samples.

At the beginning of an inspection, the employer may identify areas in the facility which might reveal trade secrets.⁴¹⁹ Information obtained in such areas during the inspections shall be labeled "Confidential Trade Secret" and may not be disclosed by OSHA.⁴²⁰

During the inspection, employers should always have a representative accompanying the inspector.⁴²¹ If at all possible, it is beneficial to have two people accompany the inspector, one showing the inspector the areas of the facility and the other taking notes on the inspection. If the employer decides to take photos, they should be taken from the same vantage point as the OSHA inspector or the employer can request that the OSHA inspector provide copies of the photos to the employer. If samples are taken, the employer can request duplicate samples which would be retained by the employer. It is important to record the sample location and the collection methods.

In the event the inspector decides to review company documents, generally only those documents which are required to be maintained under the law, such as the log and summary of occupational injuries and illnesses and the annual summary, need to be disclosed. In the event the OSHA inspector requests facility accident reports, legal counsel should review such reports before they are released.

At the conclusion of the inspection, the inspector must confer with the employer or the employer's representative and then formally advise the employer of any alleged violations discovered during the inspection.⁴²²

If there is evidence suggesting a violation of OSHA, the inspector will issue the employer either a citation or a notice of violation.⁴²³ A copy of the citation and a proposed assessment of penalty is also provided to the employee representative.⁴²⁴ The citation should describe the nature of the alleged violation and refer to the provisions of the Act which have been violated and it will fix a reasonable time or times for the abatement of the alleged violation.⁴²⁵

The amount of the penalty will generally be related to its potential to cause harm, the company's history of compliance, the size of the company and the degree of control the employer had over the potential for the violation. The employer may be able to negotiate the amount of the penalty with the inspector by providing mitigating information to the inspector related to the factors which go into the assessment of the penalty amount.⁴²⁶ The imposition of a penalty and the date by which the violation must be corrected can be appealed through OSHA's administrative procedures.⁴²⁷ The employer or employee may also contest the determination of a citation and both have a right to a hearing before an administrative law judge.⁴²⁸

DISCRIMINATION

No employee may be discharged or in any way discriminated against because of filing a complaint with OSHA or exercising any of his or her rights under OSHA.⁴²⁹ This protection extends to participation in an inspection or providing information to the OSHA inspector during an employee interview.⁴³⁰

In addition, an employee may refuse to work if he or she has a reason to believe that imminent danger of death or harm may result from an alleged violation of OSHA.⁴³¹ In this circumstance,

the employee may have to accept alternative work until the existence of the alleged violation can be verified.⁴³²

The remedies for discrimination against an employee include back pay, compensatory damages, reinstatement and attorneys' fees.⁴³³ There is also a private right of action available to the employee against the employer.⁴³⁴

EMPLOYEE RIGHT-TO-KNOW ACT

The 1983 Minnesota Legislature passed the "Employee Right-to-Know" Act as part of the Minnesota statutes governing occupational safety and health. The Act is intended to ensure that employees are aware of the dangers associated with hazardous substances, harmful physical agents, or infectious agents (which apply only to hospitals and clinics) that they may be exposed to in their workplaces.⁴³⁵ The Act requires employers to evaluate their workplaces for the presence of hazardous substances, harmful physical agents, and infectious agents and to provide training to employees concerning those substances or agents to which employees may be exposed.⁴³⁶ Written information on hazardous substances, harmful physical agents or infectious agents must be readily accessible to employees or their representatives.⁴³⁷ Labeling requirements for containers of hazardous substances and equipment or work areas that generate harmful physical agents are also included.⁴³⁸

The Employee Right-to-Know Act generally applies to all Minnesota employers regardless of size.⁴³⁹ Special provisions apply to certain technically qualified individuals who meet the criteria defined in the standard; waste service employers are regulated by the federal Resource Conservation and Recovery Act.⁴⁴⁰

Employers should conduct an inventory of their workplaces to determine what hazardous substances or harmful physical agents are present and which employees are at risk of exposure. Once the survey is completed, the employer must obtain, and have accessible to employees, written information on those substances or agents. This written information is usually in the form of a material safety data sheet (MSDS) which can be obtained from the manufacturer of the substance. Material safety data sheets will provide the basic information that must be presented in the oral training program.

The Employee Right-to-Know standard is being enforced as part of the Minnesota Occupational Safety and Health program. The standard provides guidelines concerning the type of information that must be included in the training program, how often training must be provided, requirements for documentation and maintenance of training records, and labeling of hazardous substance containers and equipment that generates a harmful physical agent.⁴⁴¹ The standard also includes lists of hazardous substances and harmful physical agents to assist employers in evaluating their workplaces.⁴⁴²

A copy of the Employee Right-to-Know Standard, which is included in the Minnesota Department of Labor and Industry Occupational Safety and Health Rules, may be obtained by

contacting the Minnesota Bookstore, 660 Olive Street, St. Paul, MN 55155, at (651) 297-3000. An employer's guide to developing an Employee Right-to-Know program is available at www.dli.mn.gov/OSHA/PDF/ertk_gi.pdf. Questions concerning the Employee Right-to-Know Act may be directed to one of the Occupational Safety and Health Division offices listed under OSHA Area Offices.

SMOKING

In response to the increasing awareness of the health risks posed by second hand smoke, many states, including Minnesota, have passed legislation restricting smoking in public places.⁴⁴³ The Minnesota Clean Indoor Air Act was passed to protect human health and the environment by prohibiting smoking in certain areas and limiting it in other areas. The Act prohibits smoking in public places, in health care facilities, including hospitals, clinics and doctors' offices, and in public schools.⁴⁴⁴

The Minnesota's Clean Indoor Air Act also prohibits smoking in virtually all places of employment.⁴⁴⁵ The Act is discussed in detail in the Workplace Issues section entitled "Smoking."

Where employers have failed to limit smoking in the workplace, nonsmoking employees have brought civil suits to force their employers to provide clean-air work environments. An increasing number of employees exposed to smoke in the workplace and afflicted with smoke-associated medical disorders are also suing for unemployment benefits, disability payments, and workers' compensation benefits.

SICK BUILDING SYNDROME

In recent years there has been increasing public awareness of dangers resulting from indoor air pollution. Sources of indoor air pollution include formaldehyde in particle board, plywood, furniture and carpet, benzene in synthetic fibers, plastics and cleaning supplies, mercury and lead in paint, asbestos, dust, pollen and mold. Indoor air pollution problems arise when these materials are present in a building with an inadequate or defective ventilation system.

AIDS

In 1986 OSHA first began considering the problem of assuring a safe workplace for employees whose jobs routinely involve exposure to blood or other body fluids and, thus, potential exposure to HIV. While documented transmission of HIV in the workplace has been relatively rare, OSHA has concluded that the risk of injury is real and has promulgated workplace safety rules. The current OSHA rules require employers to establish an infection control program which conforms with OSHA standards for any employees whose job responsibilities give rise to "reasonably anticipated skin, eye, mucous membrane, or parenteral contact with blood or other potentially infectious materials."⁴⁴⁶ Such exposures that are neither reasonable nor routinely expected in the normal course of employment are not covered by the OSHA rules.

OSHA standards do not require patients or other recipients of services provided by an employee to disclose their HIV infection. Pursuant to the OSHA rules, where an employee has suffered a needle stick or cut or a splash to eye, nose or mouth of body fluids, the source person must be informed of the incident and tested for HIV infection, after consent is obtained. If the source person refuses testing or tests positive, the employee must be evaluated clinically as soon as possible. If the employee refuses testing after the incident, no adverse action may be taken against the employee.

Employers may be liable for the discriminatory acts of their employees, such as when an employee refuses to provide services to a person infected with HIV or refuses to work with an HIV infected co-worker. Federal nondiscrimination standards, such as those contained in the Rehabilitation Act and the Americans with Disabilities Act, as well as state and local statutes, prohibit such discrimination. Under applicable OSHA regulations, an employee acting in good faith can refuse to perform his job because of a reasonable fear of death or serious injury, when no reasonable, less drastic alternative is available to the employee. The employer cannot discipline or terminate the employee for the refusal. However, OSHA regulations provide that the employee's apprehension of death or serious bodily injury must be of such a nature that a reasonable person, under similar circumstances, would conclude that there is a real danger of death or serious bodily injury and that there is insufficient time due to the urgency of the situation to eliminate the danger by resorting to regular statutory enforcement channels. Under this standard, an employee who is not afforded adequate protective equipment which meets OSHA standards may refuse to work. Such cases, however, would be limited to employment settings such as health care institutions, where employees routinely come in contact with patients' bodily fluids. In most workplaces, the employee's objection to working with a coworker or customer infected with HIV would not be based on a reasonable apprehension of an actual danger. Employer termination or discipline of an employee refusing to work under those circumstances does not violate OSHA standards.

WORKPLACE ACCIDENT AND INJURY REDUCTION PLANS

The Workplace Accident and Injury Reduction Act (AWAIR) requires employers in certain industries to develop and implement written workplace accident and injury reduction programs to promote safe and healthy working conditions. The Commissioner of Labor and Industry has compiled a list of standard industrial classifications (SICs) of employers who must develop these programs.⁴⁴⁷ Covered SICs are based on the industry's safety or workers' compensation record and are updated every two years. The list of covered SICs is published in the State Register. (Note that the State Register is available free online at www.admin.state.mn.us). The list of employers can be based upon either SIC codes or the North American Industry Classification System (NAICS).

A written plan must be developed within six months following the date the employer's SIC is placed on the list.⁴⁴⁸ The plan must have clearly stated goals and objectives; describe responsibility for its implementation and management participation; methods used to identify, analyze, and control new or existing hazards, conditions and operations; describe

communication to affected employees; and describe investigation of workplace accidents, corrective action, and enforcement of safe work practices.⁴⁴⁹ The employer must conduct and document a review of the workplace accident and injury reduction plan at least annually and document how procedures set forth in the plan are met.⁴⁵⁰

ON-SITE CONSULTATION SERVICES

Free assistance is available to help private sector employers in small, high-hazard industries improve their safety record, lower accident and workers' compensation costs, and understand OSHA obligations. This service is state and federally funded and is separate from the OSHA enforcement activity. A request for a consultation will not result in an OSHA inspection. Consultants will help employers recognize hazards, make recommendations for solving problems and suggest other sources of help that may be available. A visit to the workplace by a consultant is scheduled at the employer's request for a mutually agreeable time and is followed by a letter giving the consultant's recommendations. The employer's obligation is to correct any serious hazards noted. For information or assistance, contact: MN OSHA Workplace Safety Consultation, Department of Labor and Industry, 443 Lafayette Road North, St. Paul, MN 55155, (651) 284-5060.

OSHA AREA OFFICES

St. Paul

MNOSHA Compliance
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St. Paul, MN 55155-4307
Phone: (651) 284-5005
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Toll-free: (800) 342-5354
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Duluth

MNOSHA Compliance
525 Lake Ave. S., Suite 330
Duluth, MN 55802-2368
Phone: (218) 733-7830
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Mankato

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MNOSHA Workplace Safety Consultation

Minnesota Workplace Safety Consultation can be contacted at:

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³⁹² MINN. STAT. § 182.65, subd. 2 (2011).
³⁹³ See, e.g., MINN. R. Chap. 5206 (2011).
³⁹⁴ MINN. STAT. § 182.652, subd. 1-2.
³⁹⁵ MINN. STAT. § 182.653.
³⁹⁶ MINN. STAT. § 182.655, subd. 2.
³⁹⁷ MINN. STAT. § 182.655, subd. 5, 8.
³⁹⁸ MINN. STAT. § 182.668.
³⁹⁹ MINN. STAT. § 182.658, MINN. R. 5210.0420 subd. 1 (2011).
⁴⁰⁰ MINN. STAT. § 182.655, subd. 10a.
⁴⁰¹ MINN. STAT. § 182.663.
⁴⁰² MINN. STAT. § 182.666.
⁴⁰³ MINN. STAT. §§ 182.654, subd. 8; 182.659, subd. 4.
⁴⁰⁴ MINN. STAT. § 182.654, subd. 3.
⁴⁰⁵ MINN. STAT. § 182.654, subd. 4-6.
⁴⁰⁶ MINN. STAT. § 182.659, subd. 3.
⁴⁰⁷ MINN. STAT. § 182.654, subd. 9.
⁴⁰⁸ MINN. STAT. § 182.659, subd. 1; MINN. R. 5210.0470, subd. 2.
⁴⁰⁹ MINN. STAT. § 182.659, subd. 1.
⁴¹⁰ MINN. STAT. § 182.659, subd. 3.
⁴¹¹ MINN. STAT. § 182.659, subd. 3; MINN. R. 5210.0490.
⁴¹² *Id.*
⁴¹³ MINN. R. 5210.0490.
⁴¹⁴ MINN. STAT. § 182.659, subd. 3; MINN. R. 5210.0500.
⁴¹⁵ See MINN. STAT. § 182.659, subd. 6.
⁴¹⁶ See MINN. STAT. § 182.659, subd. 1; MINN. R. 5210.0470.
⁴¹⁷ MINN. STAT. § 182.659, subd. 1.
⁴¹⁸ MINN. R. 5210.0470.
⁴¹⁹ See MINN. STAT. § 182.668; MINN. R. 5210.0510.
⁴²⁰ See MINN. STAT. § 182.668.
⁴²¹ MINN. R. 5210.0480.
⁴²² MINN. R. 5210.0470, subd. 5.
⁴²³ MINN. STAT. § 182.66, subd. 1.
⁴²⁴ MINN. STAT. § 182.661, subd. 1.
⁴²⁵ MINN. STAT. § 182.66, subd. 1.
⁴²⁶ See MINN. R. 5210.0470, subd. 5.
⁴²⁷ MINN. STAT. § 182.661, subd. 1.
⁴²⁸ MINN. STAT. § 182.661, subd. 3.
⁴²⁹ MINN. STAT. § 182.654, subd. 9.
⁴³⁰ *Id.*
⁴³¹ MINN. STAT. § 182.654, subd. 11.
⁴³² *Id.*
⁴³³ MINN. STAT. § 182.669.
⁴³⁴ *Id.*
⁴³⁵ See MINN. STAT. § 182.653, 4a-4f.
⁴³⁶ MINN. R. 5206.0200.

⁴³⁷ MINN. STAT. § 182.653, subd. 4(j).

⁴³⁸ MINN. R. 5206.1000.

⁴³⁹ MINN. R. 5206.0300.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

⁴⁴² MINN. R. 5206.0400-.0600.

⁴⁴³ MINN. STAT. §§ 144.411-17 (2011).

⁴⁴⁴ MINN. STAT. § 144.414.

⁴⁴⁵ *Id.*

⁴⁴⁶ See 29 C.F.R. § 1910.1030(b) (2011).

⁴⁴⁷ MINN. STAT § 182.653, subd. 8-9; MINN. R. 5208.1500 (2011).

⁴⁴⁸ MINN. STAT § 182.653, subd. 9.

⁴⁴⁹ MINN. STAT. § 182.653, subd. 8.

⁴⁵⁰ *Id.*