

February 14, 2006

ALL AGREEMENT STATES, MINNESOTA, PENNSYLVANIA, VIRGINIA

RESPONSE REQUESTED: AGREEMENT STATE IMPLEMENTATION OF THE EMPLOYEE PROTECTION RULE (STP-06-015)

Purpose: To request a response by March 15, 2006 to questions regarding State employee protection laws and regulations.

In a letter dated July 2, 1998 (SP-98-057), we requested information on your State's employee protection provisions for nuclear workers and requested comments on the appropriate compatibility category designation for the U.S. Nuclear Regulatory Commission (NRC) employee protection rules (10 CFR 19.20, 30.7, 40.7, 61.9, and 70.7). By All Agreement States letter dated March 24, 1999 (SP-99-017), we informed you that the Commission reviewed the employee protection regulations and determined that they should remain compatibility Category D, not required for purposes of compatibility. We also notified you that your licensees should be reminded of the U.S. Department of Labor (DOL) requirement for informing employees of their rights and protection against discrimination for raising safety concerns, including the Occupational Safety and Health Administration (OSHA) form "Your Rights Under the Energy Reorganization Act" posting requirements.

In the April 26, 2002, Discrimination Task Group Report, "Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues," the Report Discrimination Task Group advised the Commission that the employee protection rule compatibility designation of Category D should be revisited. In addition, the December 23, 2005, *Staff Requirements-SECY-05-0212 -Proposed Rule: Clarification of NRC Civil Penalty Authority Over Contractors and Subcontractors who Discriminate Against Employees for Engaging in Protected Activities*, directed staff to solicit comments from stakeholders regarding the Category D designation for the employee protection rules. Please see All Agreement State letter STP-06-011 for more information regarding this proposed rule.

It is the view of the NRC that the enforcement of employee protection regulatory requirements and the investigation of retaliation for engaging in protected activities (e.g., as defined in 10 CFR 30.7) is necessary to ensure adequate protection of public health and safety. If a licensee retaliates against an employee for engaging in a protected activity, then safety concerns may go unmentioned, overlooked and unresolved because employees may become afraid to raise them.

The NRC does not involve itself in licensee labor or employment issues. Under the Atomic Energy Act, the NRC has authority to take enforcement action against Commission applicants and licensees and their contractors and subcontractors who violate Commission requirements.

The NRC routinely investigates complaints of retaliation, if a *prima facie* case is articulated. If the investigation reveals that retaliation has occurred, then enforcement action against the licensee is considered. For more information regarding NRC's implementation of employee protection requirements see "*Sanctions for Discrimination Against Employees Who Raise Safety Concerns*" at: <http://www.nrc.gov/what-we-do/regulatory/enforcement.html>.

Under Section 211 of the Energy Reorganization Act of 1974, as amended, most individuals employed by an NRC licensee can file a complaint with the DOL if they feel they have suffered an adverse action due to engaging in protected activities (which are defined in Section 211). The DOL then investigates the complaint, and has the authority to provide a personal remedy to the individual if retaliation (also referred to as discrimination) occurred. However, if the individual is an employee of a State agency, the DOL cannot award the individual a personal remedy under Section 211, because Federal claims for damages against a State government by a private individual are barred by the doctrine of sovereign immunity, unless a State specifically waives its immunity.

The Commission recognizes that some States provide a remedy to whistleblowers under State law, thus offsetting the lack of a Federal remedy. The Commission is conducting this survey (see Enclosure) to better understand the various State laws and implementation of those laws in this area. We would appreciate your response to this survey by March 15, 2006.*

Thank you for your attention to this matter. If you have any questions regarding this correspondence, please contact me at (301) 415-2325 or the individual named below.

POINT OF CONTACT: Cardelia H. Maupin
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/RA/

Janet R. Schlueter, Director
Office of State and Tribal Programs

Enclosure:
As stated

cc: State Liaison Officers

* This information request has been approved by OMB 3150-0029, expiration 06/30/07. The estimated burden per response to comply with this voluntary collection is approximately 8 hours. Send comments regarding the burden estimate to the Records and FOIA/Privacy Services Branch (T-5F52), U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, or by Internet e-mail to infocollects@nrc.gov, and to the Desk Officer, Office of Information and Regulatory Affairs, NEOB-10202 (3150-0029), Office of Management and Budget, Washington, DC 20503. If a means used to impose an information collection does not display a currently valid OMB control number, the NRC may not conduct or sponsor, and a person is not required to respond to, the information collection.

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EMPLOYEE PROTECTION SURVEY QUESTIONS

1. Does your State have employee protection (sometimes referred to as whistleblower protection) regulations for nuclear workers, including State employees, equivalent to those in NRC rules 10 CFR 19.20, 30.7, 40.7, 61.9, or 70.7? State employees are those individuals who are employed by a State organization reasonably defined as the State government for purposes of sovereign immunity, e.g. State universities, State hospitals, etc. If yes, please indicate where these regulations can be located on your website or provide a copy as apart of your response to this question.
2. Does your State investigate complaints of alleged discrimination (retaliation) for engaging in protected activities?
 - a. If so, does the radiation control program conduct these investigations or another State agency?
 - b. If so, would your State investigate the complaint even if there was no direct radiological safety issue?
 - c. If not, please provide a brief description of the circumstances of those complaint cases that have occurred over the last five years,
3. Do you consider complaints of retaliation against nuclear workers for engaging in protected activities as a public health and safety issue or a labor issue? Why or why not?
4. What constitutes an adverse action (retaliation) against the employee?
5. What constitutes engaging in a protected activity, e.g., see definition in 10 CFR 30.7?
6. The Commission has the authority to take enforcement action against applicants and licensees, and their contractors and subcontractors, who violate the Commission requirements that prohibit retaliation against employees based on their engaging in protected activities.
 - a. Does your Agreement State Program have the authority to take enforcement against the licensee who retaliates against a nuclear worker for engaging in protected activities? Why or why not?
 - b. Should Agreement State programs have independent authority to take appropriate enforcement action against Agreement State licensees and applicants, or their contractors and subcontractors, who discriminate against employees for engaging in protected activities? Why or why not?
7. By All Agreement State letter dated March 24, 1999 (SP-99-017), we informed you that your licensees should be reminded of the U. S. Department of Labor requirement for informing their employees of employee rights and protection and the Occupational Safety and Health Administration (OSHA) form "Your Rights Under the Energy Reorganization Act" posting requirements.
 - a. Have you reminded your licensees of this requirement?
 - b. Do you believe nuclear workers within your State are adequately informed of their employee protection rights? Why or why not?
8. Does your State's equivalent of NRC's Form 3, Notice to Employees, include information which advises Agreement State licensee employees of their employee protection rights? Please provide a copy of your State's equivalent of NRC's Form 3, Notice to Employees.