

# OSHA MOVES TOWARD REGULATION OF ERGONOMICS

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## ABSTRACT

In February 1999, OSHA released a draft proposed ergonomics standard. It is broad in scope, and would impose significant burdens on employers to whom it might apply. The criteria for determining the covered industries are not clear. Industry has criticized the draft as unnecessary, vague, and not supported by scientific evidence. As of this writing, it was unclear how OSHA would respond to this criticism, and whether OSHA would formally propose an ergonomics standard. In the absence of a standard, employers may be cited under the OSHA General Duty clause for ergonomic hazards, although few such citations have been issued.

## BACKGROUND

For several years, OSHA has desired to publish a proposed standard to regulate ergonomic hazards. Prompted by fierce opposition from industry, Republicans in Congress had succeeded in stopping OSHA from developing such a proposal by including prohibitory provisions in the legislation that provides funding for OSHA.

The legislation for the current fiscal year, however, contains no such prohibition. The OSHA appropriations legislation does contain funding, however, for additional study of ergonomics hazards by the National Academy of Sciences.

Charles Jeffress, the Assistant Secretary of Labor for OSHA, has made clear that it is a personal priority for him to see that an ergonomics proposal is published. Thus, on February 19, 1999, OSHA released a draft proposed ergonomics standard. The draft was announced at a press conference by Mr. Jeffress accompanied by considerable media fanfare.

### Would the standard apply to waste-to-energy power generation operations?

As drafted, the standard would apply to "manufacturing" operations and "manual handling operations." Although not crystal clear on the point, the draft list "jobs in [a] power plant in [a] manufacturing facility" as an example of "jobs that are typically not manufacturing production jobs." This would appear to suggest that jobs in power plants are not "manufacturing," and thus are not covered.

This does not end the analysis, however. Even if such jobs are not considered "manufacturing" for purposes of the standard, the draft would also apply to a job "where a work-related musculoskeletal disorder (WMSD) is reported" after the standard's effective date. To meet the definition of a WMSD, the disorder must:

- (1) be recordable on the OSHA 200 logs;
- (2) occur "in a job where the WMSD hazards present are reasonable likely to cause or contribute to the type of WMSD reported;" and
- (3) result because a "significant part of the injured employee's regular job duties involves exposure to these WMSD hazards (*i.e.*, not incidental exposure)."

It thus remains possible that if a power plant employee reports an injury that would qualify as an WMSD, the standard would be triggered, at least for jobs similar to the reporting employee's job in that workplace. It is also evident that whether the standard would apply in particular circumstances is substantially unclear and unpredictable. Indeed, this is one of a large number of criticisms that industry is already articulating concerning the draft.

### If applicable, what would the draft require employers to do?

The draft is so broadly worded, and so imprecise, that it is virtually impossible to describe with certainty what an employer's obligations would be. The draft sets up a two-tiered system with differing requirements for manufacturing/manual handling operations and other

workplaces in which a WMSD has been reported or identified. Manufacturing and manual handling operations would be required to have programs with the following elements:

- “management leadership and employee participation”;
- “hazard identification and hazard awareness”;

Workplaces in which a WMSD is reported or identified would be required to have the elements listed above as well as:

- “job analysis and hazard control”;
- “training”;
- “medical management”; and
- “program evaluation.”

Manufacturing and manual handling operations would be required to maintain programs with all of the elements if a WMSD is reported or identified.

The draft also includes a grandfather clause. Employers who currently maintain ergonomics programs “may continue” their programs if:

- the program “satisfies the basic obligation of each of the six programs elements”;
- the program was “implemented and evaluated” before the effective date of the standard;
- the employer can demonstrate that any part of the program that differs from “the standard’s requirements” nevertheless “fulfills the intended purpose” of the draft; and
- the program “is eliminating or controlling WMSD hazards to the extent feasible.”

The draft contains a series of compliance deadlines. In the event the standard applies because manufacturing/manual operations are involved or an WMSD has been reported or identified, the employer must begin providing medical management “promptly” when an WMSD is reported or identified after the effective date of the standard. The “management leadership,” “employee

participation,” and “hazard identification and information” elements of the program must be implemented within one year of the standard’s effective date. The “job hazard analysis” required when WMSDs are reported or identified, “interim controls” to minimize or eliminate the hazard, and the training program must be implemented within two years of the standard’s effective date. “Feasible permanent controls,” “program evaluation,” and the “process to address problem jobs where WMSDs are still occurring even after controls are implemented” must be in place within three years of the effective date of the standard. Once the standard becomes effective, the lead times for compliance range from five days from the time an WMSD is reported or identified for medical management to one year to implement “feasible permanent controls.”

The draft is available on OSHA’s Internet site at <http://www.osha-slc.gov/ergonomics>.

## **INDUSTRY ATTACKS DRAFT ERGONOMICS STANDARD**

Industry sources immediately attacked the draft ergonomics standard as “everything we anticipated and worse” and said that OSHA failed to answer “critical issues” such as whether the standard would apply to multiple establishments within the same corporation. Industry commentators also pointed out that although OSHA has repeatedly stated that it does not have the scientific evidence to apply a standard to key-boarding, the terms of the draft apply to any “reported” or “identified” WMSD, including those allegedly caused by key-boarding. The National Coalition on Ergonomics (“NCE”), an industry association, questioned why OSHA would issue a draft without waiting for the completion of the National Academy of Sciences (“NAS”) study on ergonomics commissioned by Congress as part of the fiscal 1999 OSHA appropriations bill.

Congressional Republicans were also critical. Rep. Henry Bonilla (R-TX) commented that “despite OSHA’s [claim that the standard] would be tailored, it’s a broad overreaching rule [that] may not prevent one injury, but it will cost jobs.” Bonilla also chided OSHA for refusing to wait until completion of the NAS report to issue a draft.

## **GENERAL DUTY CLAUSE ENFORCEMENT**

In the absence of standard, OSHA has utilized Section 5(a)(1) of the Occupational Safety and Health Act, 29 U.S.C. §654(a)(1) (“the General Duty Clause”), as the basis for issuing citations addressing ergonomic hazards. As a practical matter, however, there have been only a relative handful of such citations issued.

The Occupational Safety and Health Review Commission ruled in *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993 (1997) that if the government adduced the necessary proof, ergonomic hazards could constitute a violation of the General Duty Clause. In that case, the Commission found that employees were being exposed to the hazard of lifting excessively heavy loads, which constituted a violation. The Commission found no violation, however, where employees engaged in repetitive motion placing cookies into packages. OSHA was unable to prove that there was a feasible alternative means of accomplishing the work. Proof of a feasible alternative is one of the required elements of proof to establish a General Duty violation.

*Pepperidge Farm* illustrates that, in the absence of a standard, it is difficult for OSHA to prove that ergonomic hazards violate the General Duty Clause. Litigation over such issues tends to become a protracted battle of expert witnesses. Indeed, in a recent decision, an Administrative Law Judge of the Review Commission vacated an ergonomics citation under the General Duty Clause issued against a tire manufacturer because he found the employer's experts more convincing than OSHA's. *Dayton Tire*, 1998 OSHARC LEXIS 23 (No. 93-3327, 1998). That case is pending on appeal before the Commission. As a practical matter, OSHA has undertaken such cases sparingly because of the drain such litigation places on OSHA's relatively scarce resources.

