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# OSHA Observer

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A review and analysis of emerging developments in occupational safety and health law

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December, 1999

## OSHA PUBLISHES CONTROVERSIAL PROPOSED ERGONOMICS STANDARD

Late last month, the Occupational Safety and Health Administration ("OSHA") published in the Federal Register its long-delayed Proposed Ergonomics Standard (the "Proposed Standard"). 64 Fed. Reg. 65768 (Nov. 23, 1999). Although not in effect at this time – the standard is in the rulemaking stage with comments due by February 1, 2000 – and public hearings scheduled to begin on February 22, 2000 the impact of the standard, if and when it is promulgated, is expected to be significant and far-reaching. Employers must, therefore, become familiar with its basic provisions as early as possible in order to appreciate the impact of compliance and to determine whether they should file formal comments with OSHA on the Proposed Standard before it is finalized.

### Who Is Covered by the Proposed Standard?

The Proposed Standard's coverage is extremely broad. Although OSHA predicts that 75% of general industry employers will not need to take any action once the standard is finalized, most interested parties consider this estimate to be unrealistically low. The Proposed Standard applies to all general industry employers with workers involved in manual handling or manufacturing production jobs and any other general industry employer with one or more workers who experience a covered work-related musculoskeletal disorder ("MSD").

For an MSD to be considered "covered" for purposes of triggering employer obligations under the Proposed Standard, the injury or illness must meet three criteria. First, it must (i) be diagnosed by a health care

professional, (ii) result in a positive physical finding or (iii) be serious enough to require medical treatment, days away from work or assignment to light duty work (*i.e.*, it must be an "OSHA-recordable" injury or illness). Second, the MSD must be directly related to the employee's job. Third, it must be specifically connected to activities that form the core or a significant part of the worker's job. Under the Proposed Standard, even one covered MSD will bring an employer within the standard's compliance obligations.

### **What Is Required by the Proposed Standard?**

The Proposed Standard imposes differing obligations on each employer, depending on the type of work its employees perform, the presence of any existing ergonomic programs the employer has in place and its MSD experience. One company-wide program covering all jobs will not comply. Employers must tailor a separate program for each job. Irrespective of whether there are any reported MSDs, employers with manual handling or manufacturing production jobs are required to establish "basic" ergonomics programs consisting of two elements:

1. management leadership and employee participation; and
2. hazard information and reporting.

The management leadership and employee participation element requires the employer to designate an individual to be responsible for ergonomics and supply resources and training for the program, ensure that the company's policies do not discourage employees from reporting problems and advise employees how they can become involved in the ergonomics program. The hazard information and reporting element requires employers to provide employees periodically with information relating to ergonomics, such as risk factors, signs and symptoms of MSDs and the importance of reporting, and to set up a formal system for employees to report signs and symptoms of MSDs and for employers to respond promptly to such reports.

If as few as one employee in a manufacturing, material handling or any other general industry job experiences a covered MSD, then the employer is required to implement a "full" ergonomics program, unless it can correct the

ergonomic hazard with a Quick Fix. Quick Fixes are responses to problem jobs that can be "fixed" right away without the need to set up a full program for that job. Under the Proposed Standard, a "Quick Fix" consists of four elements:

1. promptly care for an injured employee;
2. work with employees to eliminate the MSD hazard within 90 days;
3. verify that the fix "worked" within another 30 days; and
4. keep a record of Quick Fix controls.

For those jobs that cause a covered MSD to an employee despite implementation of a "basic" program or for which a Quick Fix fails, OSHA's Proposed Standard requires a "full" ergonomics program. In addition to the two elements of the basic program, a full program requires five additional elements:

1. job hazard analysis and control;
2. training;
3. MSD management for workers with covered injuries;
4. program evaluation; and
5. recordkeeping.

Unquestionably, the provisions of the full program are onerous. The job hazard analysis and control element requires the employer, among other things, to evaluate all "problem" jobs for ergonomic risk factors. In addition, the program evaluation element requires the employer to review its entire program at least every three years, consult with employees on effectiveness and correct any deficiencies.

The MSD management element requires the employer to provide a prompt response to an injured employee and access to a health care professional, if needed, for evaluation, management and follow-up at no cost to the

employee. As part of this process, interaction between the employer and the health care professional is required. The employer is required to provide information to the health care professional about the job, the MSD hazards encountered and the ergonomics standard. The employer is also required to obtain from the health care professional a written opinion on how to manage the employee's recovery. The MSD management element also requires the employer to provide necessary work restrictions to injured employees and work restriction protection ("WRP") during the recovery period. WRP is 100% pay and benefits for employees put on light duty and 90% pay and 100% benefits for employees who must be removed from work. The employer is required to maintain WRP benefits for 6 months or until the employee can return to work, whichever occurs first. WRP benefits, however, can be offset by workers' compensation or similar benefits.

Unfortunately, OSHA's Proposed Standard provides little guidance to employers on how to measure their compliance. The standard states only vaguely that an employer has met the standard's requirements when the controls eliminate or "materially" reduce MSD hazards. No practical guidance on what constitutes "material" reduction is provided in the standard, however, and, given that even one MSD triggers an employer's obligations to implement a full program or a Quick Fix, it is difficult to envision any scenario in which a typical employer with a large workforce could ever avoid implementation of a full ergonomics program.

The Proposed Standard allows employers to opt for an incremental process when attempting to correct jobs causing MSDs – trying one control and adding others if an injured employee does not improve or another MSD occurs in that job. However, OSHA has not provided any safe harbors in the standard for employers whose workplaces are inspected during one of these incremental processes.

Finally, the Proposed Standard contains provisions regarding when an employer may discontinue its ergonomics programs, but these provisions, like the provisions purportedly measuring compliance, are, to say the least, vague. The current version of the standard provides that an employer may discontinue certain portions of its ergonomics program if MSD hazards are eliminated or "materially" reduced and no covered MSD is

reported for three years. For manufacturing and material handling jobs, the employer may discontinue all elements of its program except for management leadership and employee participation and hazard information and reporting.

For all other jobs, the employer may discontinue the program entirely. However, any implemented controls and training related to those controls must be maintained by the employer for all jobs, including manufacturing and material handling jobs.

### **When Is the Standard Effective?**

The Proposed Standard will become effective 60 days after publication of the Final Standard and individual provisions will be phased in over a three-year period thereafter. MSD management is to be implemented "promptly." Quick Fixes are to be implemented within 90 days. The elements of the basic program are to be in place within one year after the effective date, and the remaining elements of a full program are to be in place within two years. In addition, within two years, the employer is to have in place any necessary interim controls. Within three years, permanent controls are to be in place, and employers are required to have evaluated their programs at least once.

### **What if There Is Already an Ergonomics Program in Place?**

The Proposed Standard contains a grandfather clause for employers that have already implemented ergonomics programs provided the programs:

1. meet the basic obligations and recordkeeping requirements of the standard;
2. were implemented and evaluated before the standard became effective; and
3. are eliminating or "materially" reducing MSD hazards.

OSHA's use of the term "material," however, makes evaluating employer eligibility for the grandfather clause difficult, if not impossible. Given that even one covered MSD would otherwise trigger an employer's obligations

under the standard, it is difficult to envision any circumstance where any injury rate short of complete elimination would constitute a material reduction.

### What Will This Cost?

OSHA estimates that the standard will prevent approximately 300,000 MSDs, save employers about \$9 billion and cost about \$4.2 billion, annually. According to OSHA, employer costs are expected to average about \$150 per year per workstation fixed. Recent studies performed in specific industries, however, indicate that costs to employers could be substantially greater than OSHA's estimates. For example, the food distribution industry estimates the costs of compliance with the Proposed Standard to be between \$14 and \$26 billion for that industry alone.

### Why Is It Necessary to Make a Record of Concerns About the Proposed Standard?

Due to the constraints of this publication, a full critique of the Proposed Standard is not possible here. However, there are certain elements of OSHA's proposal that are extremely troublesome. For example, an employer's obligation to initiate an ergonomics program in non-manufacturing or non-material handling jobs or to implement a full-blown ergonomics program for manufacturing or material handling jobs can be triggered merely by the report of one MSD that meets the very low recordable threshold. While OSHA would have us believe that an "OSHA-recordable MSD" must meet certain "screening criteria," in reality, these will hardly filter out the overwhelming majority of such claims. Moreover, because it has historically been OSHA's position with regard to recordkeeping that employers should record an employee claim for a work-related injury or illness even when the employer challenges the work-relatedness in a workers' compensation contest and line out the entry if and when the employer succeeds in its challenge, under that procedure an employer would have to proceed with implementation of an ergonomics program that could ultimately prove unnecessary. If OSHA persists in using a recordable MSD as a trigger for implementation of an ergonomics program, employers will have to seriously reevaluate their recording procedures with respect to the recording of questionable cases.

#### About Vedder Price

Vedder, Price, Kaufman & Kammholz is a national, full-service law firm with approximately 180 attorneys in Chicago, New York City and Livingston, New Jersey.

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Vedder, Price, Kaufman & Kammholz has one of the preeminent occupational safety and health law practices in the country. The practice is national in scope, with firm attorneys representing employers all over the United States and its territories with respect to federal and state plan matters under the Occupational Safety and Health Act ("OSH Act") and its state law equivalents as well as with respect to other wide-ranging workplace health and safety issues.

The firm's practice covers the broad spectrum of occupational safety and health law issues:

- ✦ OSHA standard-setting activities;
- ✦ defense of OSHA and state plan enforcement

Another significant flaw in the design of the Proposed Standard is that it lacks any reasonable means for measuring elimination or reduction of an MSD hazard. Under either the Proposed Standard's incremental abatement or Quick Fix approaches, the determination of whether another step is required is based on whether the ergonomic intervention method used eliminated or reduced "to the extent feasible" the purported ergonomic hazard. However, there is no bright line measure for that determination short of total automation. Although the Proposed Standard requires employers to "[t]rack [their] progress in eliminating or materially reducing the MSD hazards," it offers no real method for doing this. Indeed, many ergonomic interventions require long periods of time to evaluate their effectiveness.

- activities;
- ✍ representation in contest litigation;
- ✍ safety and health consulting and litigation avoidance;
- ✍ safety and health auditing;
- ✍ defense of workplace safety and health criminal liability matters; and
- ✍ safety and health training and lecturing.

The only suggestion of a measure appears to be "if the injured employee's condition improves and no additional covered MSD occurs in the job." However, this is hardly a reasonable or accurate measure. First, the employer has no control over what the employee may be doing outside of work that may impact on recovery – or causation for that matter. The employee may be an avid golf or tennis player or an amateur musician. Even if the employer were to implement state-of-the-art ergonomic initiatives, the employee's condition may show no improvement because of these non-occupational stressors over which the employer has no control and of which the employer may not even have knowledge.

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This problem is exacerbated by the fact that the Proposed Standard requires the employer to "instruct the [health care professional] that any findings, diagnoses or information not related to workplace exposure to MSD hazards must remain confidential and must not be put in the written opinion or communicated to" the employer. This provision effectively bars the employer from learning what other medical or non-occupational risk factors may impact on the employee's development of the MSD in the first instance, the severity of the disorder or the persistence of the condition. Thus, the employer may be required to develop an entire ergonomics program based on one highly and uniquely susceptible employee.

Another extremely troublesome provision of the Proposed Standard is its requirement that employees who are off work due to an MSD receive "work restriction protection" that exceeds most states' workers' compensation amounts.

This requirement goes far beyond OSHA's statutory mandate, creates a privileged class of workplace injuries and could be an administrative nightmare for employers.

Given the significant impact on employers of an ergonomics standard that in any way is similar to the proposal and the problems that the proposal presents, it is essential that employers actively challenge the Proposed Standard by submitting comments and making presentations at the hearings, if possible. Because a reviewing court will evaluate the final standard by whether it is supported by the record as a whole, employers must ensure that the record adequately challenges these and other deficiencies in the proposal. Failure to make a sufficient record contrary to OSHA's proposal could result in a final standard that is excessively onerous, confusing, expensive and disruptive for employers.

If you have any questions about OSHA's Proposed Ergonomics Standard or wish to prepare a comment for submission to OSHA and would like some assistance, please contact [Nina G. Stillman](#) (312/609-7560), [James E. Bayles, Jr.](#) (312/609-7785) or any other Vedder Price attorney with whom you work.

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