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OSHA Observer

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

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OSHA Adopts Final Ergonomics Standard

On November 14, 2000, the Occupational Safety and Health Administration ("OSHA") finalized its long-awaited Ergonomics Program Standard (the "Standard"). 29 C.F.R. § 1910.900, *published in* 65 Fed. Reg. 68261 (Nov. 14, 2000). The Standard, occupying more than 600 pages of the Federal Register, including its preamble, is among OSHA's most ambitious, confusing, and controversial rulemaking to date with widespread impact on nearly every employer covered by OSHA's General Industry Standards. Its stated goal is to reduce the number and severity of musculoskeletal disorders ("MSDs") caused by exposure to risk factors in the workplace. The tools used to measure success and compliance, however, are complicated and provide little guidance to employers untrained in sophisticated ergonomic principles.

The Standard, barring congressional, administrative or judicial action, becomes effective January 16, 2001. Even though a stay of the Standard may well issue from the Court of Appeals, employers should, nonetheless, become familiar with its basic provisions despite substantial uncertainty as to the Standard's meaning and ultimate enforceability in light of pending litigation. However, before employers begin major efforts at compliance with the Standard as currently published, they should consult with their OSHA attorneys as to what, if any, compliance activities should be initiated at this time.

Who Is Covered By The Standard?

The Standard's coverage is extremely broad and coextensive with coverage under OSHA's General Industry Standards found at 29 C.F.R. § 1910. Thus, all general industry employers, including the U.S. Postal Service, are covered by the Standard approximately 102 million workers at 6.1 million worksites, according to OSHA estimates. The Standard does not apply to employment covered by OSHA's construction, maritime or agricultural standards or to

railroad operations.

Does The Standard Have A "Grandfather Clause?"

The Standard contains a "grandfather clause" for employers that have implemented their own ergonomics programs, provided those programs meet stringent guidelines outlined in the Standard. To qualify initially for an exemption under the "grandfather clause," an employer's ergonomics program must have been written and implemented prior to November 14, 2000. Thus, employers no longer have the flexibility to implement their own programs now that the Standard is in place. That written program must also contain the following elements:

- ⚡ *Management leadership*, as demonstrated by an effective MSD reporting and response procedure, clear delegation of responsibilities, and regular communication with employees;
- ⚡ *Employee participation*, including the early reporting of MSDs and active employee involvement in the implementation, evaluation, and future development of the program;
- ⚡ *Job hazard analysis and control*, including processes that identify, analyze, and reduce exposure to MSD hazards to levels set forth in Appendix D to the Standard, or to the extent feasible;
- ⚡ *Training* of managers, supervisors and employees in (i) the provisions of the program, (ii) recognition of MSD signs and symptoms and the importance of early reporting, and (iii) identification of MSD hazards and methods to control them; and
- ⚡ *Periodic program evaluation*, including at least one complete review of the elements and effectiveness of the program by January 16, 2001.

Assuming an employer's written program meets the basic requirements for inclusion under the Standard's grandfather clause, one of the Standard's most financially onerous provisions, MSD management (discussed below), must be included in the written program by January 16, 2002. Moreover, any employer that has policies or procedures in place that discourage employee participation in the employer's ergonomics program or early reporting of MSD signs, symptoms or hazards is automatically ineligible for grandfather treatment.

What Must Employers Do Initially To Comply?

As set forth above, the Standard becomes effective on January 16, 2001. However, all that employers covered by the Standard must do prior to October 15, 2001 is provide basic information to employees about MSDs, including (1) their signs, symptoms and causes, (2) to whom to report them, and (3) a summary of the basic provisions of the Standard. To assist employers in compliance, OSHA has published, as Appendices A and B to the Standard, information sheets which employers may simply copy and distribute to employees. Although Appendices A and B are not mandatory, information sheets prepared for distribution to employees must contain the same information.

Note: Employers whose programs may qualify for "grandfather" treatment must complete a comprehensive program evaluation by January 16, 2001, if they have not already done so.

What Must Be Done When An Employee Reports An MSD?

Employers that do not have existing ergonomics programs in place which qualify under the Standard's grandfather clause are required to receive and respond to employee reports of MSD signs and symptoms beginning October 15, 2001. Upon receipt of an employee report, the employer is required initially to determine whether the report constitutes an "MSD incident." An employee report is considered an "MSD incident" if the MSD at issue is work-related and (1) it requires days away from work, restricted work, or medical treatment beyond first aid; or (2) the MSD signs and symptoms persist for seven consecutive days after initial report. An employer may make this initial determination on its own or with the assistance of a health care professional ("HCP").

If the employer concludes that the employee has not experienced an MSD incident, the employer need not take further action. However, if the employee report does constitute an "MSD incident," the employer must determine if the employee's job meets the Standard's "Action Trigger." A job meets the Action Trigger if it involves exposure to one or more of five risk factors – (1) repetition; (2) force; (3) awkward postures; (4) contact stress; or (5) vibration – at levels set forth in Table W-1 of the Standard (a/k/a the "Basic Screening Tool").

If the employer, after application of the Basic Screening Tool, determines that the job meets the Action Trigger, it has two options. It can either: (1) develop a complete ergonomics program

for that job; or (2) implement a "Quick Fix," if the employer otherwise qualifies.

The Standard requires employers to apply the Basic Screening Tool and determine whether the job meets the Action Trigger within seven days of an employee's report of an MSD incident.

What Are The Elements Of A Complete Ergonomics Program?

A complete ergonomics program consists of six primary elements:

- ✧ Management Leadership;
- ✧ Employee Participation;
- ✧ MSD Management;
- ✧ Hazard Reduction and Control Measures;
- ✧ Training; and
- ✧ Periodic Program Review.

Note: Although the Standard is drafted in reference to an employer's response to the ergonomic hazards in a specific job in which an employee reports an MSD incident, the Standard defines "job" broadly as the specific job at issue *and* all other jobs that are "the same" (*i.e.*, that involve the same physical work activities or tasks, even if the jobs have different titles or classifications). This definition magnifies substantially the employer's hazard abatement obligations because it requires the employer to extend the program to all other jobs in the workplace that are functional equivalents to the one in which an MSD incident is reported.

The following are brief descriptions of each of the six primary elements of a full ergonomics program prescribed by the Standard:

Management Leadership. The management leadership provision requires employers to assign responsibilities for setting up and managing the ergonomics program, to allocate adequate resources to meet those responsibilities, and to ensure that policies and practices encourage employee participation in the program as well as the early reporting of MSD signs, symptoms and hazards. The management leadership provision also requires employers to

communicate periodically with employees about the program and their concerns about MSDs. Management leadership must be initiated within 30 days after the employer determines that a job meets the Action Trigger.

Employee Participation. The employee participation provision of the program requires the employer to ensure that basic information set forth in the Standard is transmitted to employees and that the program contains procedures for receipt of employee reports and management responses, and employee involvement in development, implementation and evaluation of the program. Employee participation must be initiated at the same time as management leadership – within 30 days after the employer determines that a job meets the Action Trigger.

Job Hazard Analysis. Within 60 days after the employer determines that a job meets the Action Trigger, it is required to perform a job hazard analysis. To perform a job hazard analysis, employers must talk with all, or a representative sample of, employees in the "job" as broadly defined, observe the job to identify risk factors, and evaluate the risk factors to determine whether they pose a hazard to employees in that job, generally. Appendix D of the Standard lists nine hazard identification and analysis tools that employers can use to "guarantee" that they are in compliance with the Standard's job hazard analysis and control requirements:

- ✍ Job strain index
- ✍ Revised NIOSH Lifting Equation
- ✍ Snook Push/Pull Hazard Tables
- ✍ Rapid Upper Limb Assessment
- ✍ Rapid Entire Body Assessment
- ✍ ACGIH Hand/Arm (Segmental) Vibration Threshold Limit Value
- ✍ UAW-GM Risk Factor Checklist
- ✍ Appendix to the Washington State Ergonomics Standard
- ✍ OSHA's checklist for analyzing MSD hazards in jobs involving computer use.

Any of the tools that are appropriate to the risk factors present may be used. Those tools are also the yardstick by which OSHA will determine whether hazards have been controlled to the levels required by the Standard.

The tools may appear unfamiliar and daunting to the average employer. This is not surprising. They were designed primarily by, and for, professional ergonomists and will undoubtedly be difficult for employers to use without competent, professional assistance.

The Standard offers employers what appear to be two alternatives to the use of the nine hazard analysis tools set forth in Appendix D: (1) having a trained ergonomist perform the job hazard analysis or (2) using any other "reasonable" method appropriate to the job and relevant to the risk factors present. Examples of the latter suggested by OSHA are having an "ergonomic team" conduct the job hazard analysis or performing a detailed job task breakdown. OSHA's so-called alternatives to the use of the professional ergonomic analytical tools listed in Appendix D, however, strongly suggest the need to use trained professionals, which effectively makes them not alternatives at all. Moreover, the nine hazard analysis tools listed in Appendix D are the only criteria mentioned in the Standard for gauging the success of an employer's ergonomics program. The Standard does not otherwise explain how an employer's success in hazard reduction will be measured for enforcement purposes, especially where the employer uses "reasonable" methods other than the Appendix D tools. This effectively forces the employer to use the very tools which the Standard suggests are options.

Hazard Reduction And Control. Once a job hazard analysis has been performed, the Standard requires employers either to (1) "control" MSD hazards or (2) reduce MSD hazards to levels at or below those established in the Appendix D job hazard analysis tools.

OSHA defines "control" vaguely as reducing MSD hazards "to the extent that they are no longer reasonably likely to cause MSDs that result in work-related medical treatment beyond first aid." Beyond this vague definition, OSHA provides no guidance as to what "control" means. Thus, employers are "safe" only if they reduce ergonomic hazards to levels specified in the Appendix D hazard identification tools, which, as suggested above, implies that employers will be required to use those tools to perform their job hazard analyses.

If employers cannot "control" hazards or reduce them to levels

identified in Appendix D, the Standard requires them to reduce hazards to the extent "feasible." Feasibility is not defined in the Standard.

In addition, the employer is required to re-evaluate the job at least every three years and determine whether there are additional feasible controls that would control or reduce the hazard. If such controls exist, the employer must implement them until exposure has either been "controlled" or reduced to levels identified in the Appendix D hazard identification tools.

Prior to implementing controlling measures, the employer is required to solicit recommendations from affected employees. The Standard, however, does not require employers to adopt them.

The employer is required to implement initial controls within 90 days after it determines that the job meets the Action Trigger. "Initial" controls are interim measures that "substantially reduce" hazard exposure even if they do not reduce them to levels identified in the Appendix D hazard identification tools. Permanent controls which do meet the Standard's reduction criteria must be in place within two years of the Action Trigger, or January 18, 2005, whichever is later.

Once appropriate controls are in place, employers have ongoing monitoring obligations to ensure that the controls work and do not create new MSD hazards.

The employer must use feasible engineering, work practice, or administrative controls, or a combination of the three, to control or reduce hazards. Engineering controls are OSHA's preferred method of hazard reduction, and personal protective equipment ("PPE") may be used to supplement other controls. However, PPE may be used alone to reduce hazards only if other controls are not feasible.

MSD Management. Within seven days after an employer determines that a job meets the Action Trigger (*i.e.*, not more than 14 days after an employee initially reports an MSD), the employer must provide the reporting employee with MSD management. MSD management consists primarily of two elements, which are to be provided to the employee at no cost:

- ⚡ Access to a health care professional ("HCP") for written evaluation of the employee's medical condition and recommendations for work restrictions, including time off, if necessary.

- ⚡ Work restriction protection ("WRP"), which guarantees the employee all benefits and (i) 100% of the employee's salary, during periods of restricted work activity, and (ii) 90% of salary, during time off for recovery.

The stringent MSD management requirements are subject to complex qualifications. Among other things, the Standard includes a process for challenging the findings and recommendations of an HCP by receiving a second and, if necessary, a third opinion, all at the employer's cost.

The employer's obligation to provide WRP is also qualified. The employer is required to maintain WRP only until the employee is able to resume work without restrictions, or for 90 days, whichever is earlier. In addition, although the minimum levels of protection must be guaranteed, the employer's financial obligations may be offset by other coverage. The obligation to provide WRP is reduced to the extent the employee receives workers' compensation benefits for earnings lost during work restriction periods. For employees requiring time off to recover, employers may also require those employees to exhaust sick or similar paid leave (*e.g.*, short-term disability), provided that such leaves maintain *all* employee benefits and at least 90% of the employee's earnings during his or her absence.

Training. The Standard prescribes extensive initial training, and follow-up training every three years, for: (1) each employee in a job that meets the Action Trigger; (2) each of their supervisors or team leaders; and (3) each employee involved in setting up and managing the ergonomics program. Training of employees involved in setting up and managing the program must be conducted within 45 days after the employer determines that a job meets the Action Trigger. Training of all other affected employees must be conducted within 90 days.

About Vedder Price

Vedder, Price, Kaufman & Kammholz is a national, full-service law firm with approximately 200 attorneys in Chicago, New York City and Livingston, New Jersey.

The Vedder Price OSHA Group

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

Periodic Program Evaluation. At least every three years, the employer is required to evaluate its ergonomics program in accordance with the Standard, or sooner if the employer has reason to believe that the program is not functioning properly. The Standard does not define what constitutes reasonable belief, but high occurrences of MSD incidents in jobs covered by an ergonomics program would probably trigger the employer's obligation to reevaluate. If reevaluation reveals deficiencies, the employer is required to correct those deficiencies promptly.

What Is A "Quick Fix" And How Does The Employer Qualify?

As an "alternative" to implementation of a full ergonomics program, an employer may respond to an MSD incident in a job identified by the "Basic Screening Tool" by implementing a "Quick Fix." A Quick Fix is an option for only those employers that have experienced no more than one MSD incident in the job at issue and for whom there have been no more than two reported MSD incidents in the establishment in the past 18 months.

To use a "Quick Fix," the employer must provide promptly to the reporting employee MSD management, talk to employees in the same job about the tasks they perform, observe them performing those tasks to identify risk factors, solicit employee suggestions to reduce those risk factors, and implement controls which reduce those hazards at least to levels specified in the nine applicable tools listed in Appendix D to the Standard. The Quick Fix option must be implemented within 90 days of the employee's report and the controls implemented must be reviewed not more than 30 days later to determine whether hazards have been reduced to the levels specified in the Appendix D tools. If hazards have been reduced to the requisite levels, the employer need only maintain the controls implemented, train employees in their use and keep a record of the process used to implement the Quick Fix for at least three years.

The term "Quick Fix" is a misnomer because the demands imposed on employers are nearly as great as the requirements of a full ergonomics program. Like a full ergonomics program, a Quick Fix must be implemented not only for the specific job in question, but all jobs that are the "same" (*i.e.*, that have the same physical work activities or tasks, even if the jobs have different titles or classifications). Accordingly, the employer might have to "fix" more jobs than the specific job at issue. Also, employers are required to provide the financially burdensome MSD management to a reporting employee. Finally, the requirement that employers reduce hazard levels in accordance with the applicable hazard analysis tools listed in Appendix D essentially forces employers to perform a complete hazard analysis in accordance with that Appendix. As a result, there is little practical difference between a "Quick Fix" and a complete, written ergonomics program for the job in question.

What Recordkeeping Obligation Does The Standard Impose?

Employers having eleven or more employees are required to maintain, in either written or electronic form, and provide to OSHA upon request, the following records:

other wide-ranging workplace health and safety issues.

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- ⌘ Employee reports of MSDs, MSD signs and symptoms, and hazards
- ⌘ Employer responses to such reports
- ⌘ Job hazard analyses
- ⌘ Hazard control measures
- ⌘ Quick Fix process
- ⌘ Ergonomics program evaluations
- ⌘ Work restrictions, time off of work, and HCP opinions.

The employer is required to keep all of the required records for three years, or until replaced by updated records, with the exception of HCP opinions, which must be kept for the duration of the employee's employment plus three years.

When May An Employer Discontinue An Ergonomics Program?

Under the Standard, an employer may discontinue an ergonomics program for a job, except for maintaining controls and training related to those controls, when job exposure to five risk factors (repetition, force, awkward postures, contact stress and vibration) are reduced to levels below that set forth in the Basic Screening Tool (Table W-1).

The foregoing is only a brief summary of the basic provisions of a cumbersome, vague and often contradictory Standard. At this time, substantial uncertainty exists as to how an employer is to comply and how OSHA intends to proceed with enforcement. Compounding the lack of precision with which the Standard is drafted is significant pending litigation filed by interested parties seeking to modify the Standard or block its enforcement entirely. Consequently, employers should promptly discuss with experienced counsel whether to begin implementing the Standard's requirements at this time in light of the uncertain legal environment resulting from the pending legal challenges to the Standard. In addition, employers who want to qualify their existing ergonomics programs for the Standard's grandfather clause must act promptly. If you have such a program and have not already done so, you are required to conduct a comprehensive review of its elements and effectiveness by January 16, 2001.

If you have any questions about OSHA's Ergonomics Program Standard or need assistance determining whether your current program qualifies for inclusion under the Standard's grandfather clause, 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.

- ✂ Return to: [OSHA Observer](#)
- ✂ Return to the Vedder Price: [Publications Page](#).
- ✂ Return to: [Top of Page](#).

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