

OSHA Observer

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

May 2002

OSHA'S "NEW" ERGONOMICS INITIATIVE?

On November 14, 2000, amid a storm of controversy, the Occupational Safety and Health Administration ("OSHA") issued its Ergonomics Program Standard. The Standard was short-lived. On March 7-8, 2001, pursuant to the Congressional Review Act, the Senate and House, respectively, voted to overturn the rule and on March 20, 2001, President Bush signed S.J. Resolution 6 formally repealing the rule.

Since its repeal, the future of OSHA's ergonomics initiative has remained uncertain. Although Secretary of Labor Elaine Chao committed to developing a comprehensive approach to ergonomics, and OSHA continued to study the issue intensely, nothing formal emerged from OSHA to address ergonomic hazards. Until now.

On April 4, 2002 OSHA unveiled what it describes as a four-pronged "comprehensive" approach to reducing musculoskeletal disorders ("MSDs") in the workplace. Its plan consists of: (1) guidelines; (2) enforcement; (3) outreach and assistance; and (4) research.

Guidelines

OSHA plans to develop industry or task-specific guidelines for a number of industries based on current incidence rates and available information about effective and feasible solutions for reducing the occurrence of MSDs. OSHA will also encourage other industries

to develop their own ergonomic guidelines to meet their specific needs.

OSHA declined to undertake another effort at formal rule-making, opting instead to issue and encourage guidelines, for two reasons. First, OSHA believes rule making is prohibitively difficult because:

- there are a variety of different hazards and combinations of different hazards to be addressed;
- exposure to the hazards is not readily measured in some cases;
- the exposure-response relationship is not well understood;
- cost and feasibility of abatement measures may be uncertain and may be very high in some cases; and
- it is difficult, except in the most general terms, to prescribe remedies for abating such hazards in a single rule.

Second, OSHA believes that industry and task-specific guidelines are more flexible than standards. According to OSHA, guidelines can be developed more quickly than formal standards and can be changed easily as new information becomes available from research and scientific advances. OSHA now claims that guidelines make it easier for employers to adopt innovative programs to suit their workplaces. By

contrast, standards tend to be inflexible “one-size-fits-all” solutions that may not be appropriate in a certain industry or facility.

Despite its espousal of guidelines as an important tool to assist employers in recognizing and controlling ergonomic hazards, OSHA has not yet issued any such guidelines, except for guidelines it issued over a decade ago for the meatpacking and certain other industries. Although OSHA announced on April 18, 2002 plans to draft guidelines for the nursing home industry, and those guidelines are expected to be available for public comment later this year, employers in other industries appear to be on their own for the time being.

Enforcement

Despite having no formal guidelines to assist employers in recognizing and controlling ergonomic hazards, OSHA nevertheless intends to embark on an aggressive “enforcement” campaign. What OSHA intends to enforce, however, remains a mystery. OSHA has stated that it does not intend to use an employer’s failure to follow

OSHA-promulgated guidelines (whenever they become available) as the basis for citing an employer for ergonomic hazards. It emphasizes that the guidelines are tools intended to assist employers in recognizing and controlling hazards and are “voluntary.”

Instead, OSHA plans to base its citation activity on the Occupational Safety and Health Act’s General Duty Clause (29 U.S.C. § 654(a)(1)), a nebulous provision of the OSH Act which requires employers to furnish each of its employees “employment and a place of employment which are free from *recognized hazards* that are causing or are likely to cause death or serious physical harm” (emphasis added).

OSHA’s plan to cite employers under the General Duty Clause is problematic, at least until guidelines

are readily available to employers. OSHA will be hard-pressed to establish that a particular workplace condition constitutes a *recognized hazard* under the General Duty Clause when the recognition tools – the guidelines – are not yet available. Even then, case law under the OSH Act has held that OSHA produced guidelines may not be used by OSHA to satisfy its burden under the General Duty Clause to prove that a hazard is recognized in an employer’s particular industry. Nevertheless, OSHA emphasizes that employers in industries with no current guidelines may be subject to citations and penalties for ergonomic hazards and that employers should avail themselves of information currently available from OSHA, the National Institute for Occupational Safety and Health (“NIOSH”) and various industry and labor organizations on how to establish effective ergonomics programs.

OSHA’s enforcement plan appears to be somewhat limited at this time. It has signaled that it will not focus its enforcement efforts on employers who have implemented effective ergonomic programs or who are making good-faith efforts to reduce ergonomic hazards.

Thus, OSHA’s primary targets at this time appear to be those employers with high injury or illness rates that have made little or no effort of their own to address the problem.

Outreach and Assistance

As part of its four-pronged approach, OSHA has also promised to provide assistance to businesses, particularly small businesses. Among other things, OSHA intends to direct some of its fiscal year 2002 training grants to the development of ergonomic training materials and the direct training of employers and employees. This training will include courses at 12 non-profit Education Centers and the development of complete and comprehensive compliance assistance

“Despite having no formal guidelines to assist employers in recognizing and controlling ergonomic hazards, OSHA nevertheless intends to embark on an aggressive ‘enforcement’ campaign. What OSHA intends to enforce, however, remains a mystery.”

tools, including Internet-based training and information. OSHA also intends to use Voluntary Protection Program (VPP) sites to help model effective ergonomic solutions and, as part of the Department of Labor's cross-agency commitment to protecting immigrant workers, OSHA's plan includes a specialized focus on helping Hispanic and other immigrant workers.

Research

The final element of OSHA's four-pronged plan is more research, particularly to address deficiencies identified by the National Academy of Science (NAS) in response to last year's failed Ergonomics Program Standard. Among other things, OSHA intends to charter an advisory committee to identify gaps in research relating to the application of ergonomics and ergonomic principles to the workplace, with the committee reporting its findings to Assistant Secretary Henshaw and NIOSH. OSHA then intends to work closely with NIOSH to encourage research in needed areas.

OSHA's ergonomics plan has already received sharp criticism from several senators and organized labor. One criticism is that OSHA's plan is not new. To the contrary, OSHA has issued guidelines to

specific industries and used the General Duty Clause to cite employers for ergonomics violations for over a decade. Thus, OSHA's current approach is nothing more than "a plan for a plan." The AFL-CIO has also dubbed the approach meaningless, commenting that OSHA has failed to identify which industries are being targeted for enforcement or come up with a definition of "work-relatedness" for purposes of recordkeeping and the issuance of citations.

Without question, OSHA's plan provides little in the way of concrete guidance for employers attempting to grapple with workplace ergonomic hazards. At most, OSHA's four-pronged approach represents the first step in what appears to be an ongoing effort to address the myriad workplace injuries and illnesses collectively referred to as MSDs. Nevertheless, OSHA's stated intention to use the General Duty Clause to cite employers for ergonomics hazards means that, even in the absence of specific guidance from OSHA, employers may once again soon find themselves facing ergonomics inspections and contesting ergonomics citations.

If you have questions about OSHA's new approach to ergonomics, or if you would like further information on how to develop your own ergonomics program, please contact Nina G. Stillman (312/609-7560), James E. Bayles, Jr. (312/609-7785) or any other Vedder Price attorney with whom you have worked.

"OSHA's current approach is nothing more than 'a plan for a plan.'"

VEDDER, PRICE, KAUFMAN & KAMMHOLZ

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 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 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.

About Vedder Price

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

Chicago

Vedder, Price, Kaufman & Kammholz

A Partnership Including Vedder, Price, Kaufman & Kammholz, P.C.

222 North LaSalle Street

Chicago, Illinois 60601

312/609-7500

Fax: 312/609-5005

Contact: Robert J. Stucker

New York

Vedder, Price, Kaufman & Kammholz

805 Third Avenue

New York, New York 10022

212/407-7700

Fax: 212/407-7799

Contact: Alan M. Koral

New Jersey

Vedder, Price, Kaufman & Kammholz

354 Eisenhower Parkway, Plaza II

Livingston, New Jersey 07039

973/597-1100

Fax: 973/597-9607

Contact: Barry J. Bendes