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SUMMARY OF OSHA'S PROPOSED RULE ON ERGONOMICS

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On November 22, 1999, the Occupational Safety and Health Administration (OSHA) released its controversial proposed rule on ergonomics applicable to general industry. The rule, which would only become final sometime next year, after the conclusion of a comment period, could affect nearly every employer in the country whose employees undertake manual handling, manufacturing, or repetitive-motion work.

The proposed rule will only apply to certain types of jobs rather than employers. Jobs covered by the rule include manufacturing, manual handling, and jobs in which a worker reports a single OSHA-recordable musculoskeletal disorder (MSD) related to that employee's work. OSHA has identified six components of an ergonomics program. For the first two categories of jobs, manufacturing and manual handling, employers need only implement an ergonomics program consisting of the first two components: (1) Management Leadership and Employee Participation and (2) Hazard Information and Reporting. For *any* job in which an employee reports a single OSHA-recordable MSD, or for manufacturing or manual handling jobs in which a known MSD hazard exists that has prompted the reporting of persistent MSD symptoms, the employer must complete a full six-part ergonomics program, consisting of the two above-mentioned components, along with (3) Job Hazard Analysis and Control; (4) Training; (5) "MSD Management;" and (6) Program Evaluation.

The six components would require employers to implement ergonomics programs monitored by management, in consultation with employees, that would question employees about their physical difficulties and respond to those problems with incremental efforts at abatement. Both supervisors and employees would have to be trained in the recognition and abatement of ergonomic and MSD hazards, and employers must respond to their employees' developing MSD hazards by fixing problematic workstations, and offering medical care and maintaining injured employees' pay and benefits. Employers supposedly may be able to avoid implementing a full ergonomics program if they utilize an effective "Quick Fix" alternative to address single cases, but this provision may be of little use because any Quick Fix must show effectiveness over a three-year period. Additionally, the proposed rule purports to "grandfather" existing ergonomics programs that satisfy the basic requirements of the proposed rule. However, it is unclear whether OSHA will accept under the grandfather clause programs that do not meet the standard's more onerous requirements, including a still undefined minimum level of effectiveness.

Nonetheless, OSHA has promised encouragement and support for companies' sincere efforts at implementing effective programs.

In spite of the proposed rule's supposed flexibility, employers are concerned about a number of serious problems. Notwithstanding OSHA's contentions to the contrary, many commentators, including medical experts, are not convinced of the scientific basis for the standard. More problematic, however, are the rule's requirements that employers respond to a single reported injury -- the "single incident trigger" -- and the financial burden imposed by the "work restriction protection," which would require employers to maintain 100% of pay and benefits for reassigned employees, and 90% of pay and 100% of benefits for employees who take time off work to recover from MSDs. Moreover, the language of the standard itself is inexplicably vague, and OSHA itself has yet to offer definitions of its key terms. Finally, but perhaps most significantly, the actual cost of ergonomics programs and remedies for MSDs may be far higher than the $4.2 billion per year estimated by OSHA -- as much as $28 billion per year by some industry association estimates.

A wide range of responses is expected to the proposal. Because the rule is only a proposal, the first response will take the form of comments and objections, which must be submitted by February 1, 2000. The OSHA Practice Team at the firm is already working with clients interested in submitting anonymous comments, under the firm's name, during the hearings. Additionally, attorneys from our OSHA Practice Team have already met with Assistant Secretary of Labor for OSHA Charles Jeffress to express their concerns with the proposal and to explore what types of programs might be acceptable under the rule's grandfather clause.

Clients interested in having the firm either file anonymous comments on their behalf or in pursuing a grandfathered ergonomics program should speak with a member of the Practice Team listed below.

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OSHA'S PROPOSED RULE ON ERGONOMICS

December 1999

On November 22, 1999, the Occupational Safety and Health Administration (OSHA) released its proposed rule on ergonomics which is designed to reduce the incidence of musculoskeletal disorders (MSDs) in general industry. Though the House of Representatives had voted to delay the proposal until the completion of a second National Academy of Sciences study on the science of ergonomics, the Senate did not pass a similar bill before its recess. The rules, to be codified at 29 C.F.R. § 1910.900 *et seq.*, apply only to general industry, and not agriculture, construction or maritime operations. They can be made final only after a period of public comment. Written comments must be submitted by February 1, 2000, and public hearings are scheduled begin on February 22, 2000, so employers interested in submitting comments must act quickly.

I. THE REQUIREMENTS OF THE STANDARD

The proposed ergonomics rule will apply to certain jobs rather than types of employers. The categories of jobs covered by the standard are manufacturing, manual handling and jobs in which a worker reports a single OSHA-recordable MSD. The latter category acknowledges only those injuries which an employer has determined to be work-related; that is, where the physical activities of the job are reasonably likely to contribute to the type of MSD reported, and where those activities are a core element of the job or make up a significant amount of the employee's work time.

For the first two categories of jobs, employers must implement an ergonomics program consisting of "Management Leadership and Employee Participation," and "Hazard Information and Reporting." For *any* job in which an employee reports an OSHA-recordable MSD, or manufacturing or manual handling jobs in which a known MSD hazard exists that has prompted the reporting of persistent MSD symptoms, the employer must complete a full six-part ergonomics program, consisting of the two above-mentioned elements, along with Job Hazard Analysis and Control, Training, "MSD Management," and Program Evaluation.

Employers with existing ergonomics programs may continue their programs, provided that the continuing program satisfies the six basic elements listed above, the employer implemented and evaluated the program before the effective date of the new OSHA standard, and the evaluation indicates that the program is functioning properly and successfully accomplishing the objectives set forth in 29 C.F.R. § 1910.921, which concern the removal or reduction of ergonomic hazards. Employers may also avoid implementing a full six-part program if they can eliminate MSD hazards using a "Quick Fix," which requires consultation with employees and the control of a hazard such that no further OSHA recordable MSD is reported for three years.

Management Leadership and Employee Participation

Under the proposed standard, employers are required to demonstrate management leadership of an ergonomics program. Specifically, management must provide employees with ways to (1) report MSD signs and symptoms; (2) get responses to reports; and (3) participate in developing, implementing, and evaluating each element of the ergonomics program. Management must also (1) designate supervisors who have the authority, resources, and training necessary to fulfill responsibilities to oversee programs; (2) examine their existing policies and practices to ensure that they encourage rather than discourage reporting and participation in the ergonomics program; and (3) communicate periodically with employees about the program and their concerns about MSDs. Employees must be able to (1) report MSD signs and symptoms; (2) receive prompt responses to their reports; (3) access information about ergonomics programs; and (4) participate in the development and implementation of those programs.

Hazard Information and Reporting

The second element of an ergonomics program requires employers to (1) set up reporting procedures for MSD signs and symptoms; (2) evaluate such reports; and (3) provide information to employees that explains how to identify and report MSD signs and symptoms. Specifically, employers must provide information on common MSD hazards, the reporting of MSD signs and symptoms, and a summary of the requirements of the ergonomics standard. A reporting system must identify at least one person to receive and promptly respond to employee reports in accordance with the standard.

Job Hazard Analysis and Control

Under the standard, employers are obligated to analyze a problem job and identify "ergonomic risk factors" that result in MSD hazards, and thereafter reduce those hazards to the extent feasible.

To analyze a problem job, employers must (1) include all the employees in that job, or those who represent the range of physical capabilities in the job; (2) ask the employees which physical difficulties they associate with the job; (3) observe the employees performing the job to identify which work conditions and ergonomic risk factors may be present; and (4) evaluate the ergonomic risk factors in a job to determine the MSD hazards present and employee exposure thereto. A list of possible conditions and risk factors is included in the text of the standard, at 29 C.F.R. § 1910.918(c).

In controlling hazards, employers must (1) ask employees for recommendations about hazard reduction; (2) identify, assess, and implement controls to reduce hazards; (3) track their progress in reducing hazards, in part by consulting with employees; and

(4) evaluate hazards when employers change equipment used in the problem jobs. Employers may use any combination of "engineering," "administrative," or "work practice controls" to reduce hazards, or may instead provide personal protective equipment (PPE) at no cost to their employees. These efforts must either "materially reduce MSD hazards" (effect a significant reduction in the likelihood that a covered MSD will occur), reduce MSD hazards to the extent feasible, or eliminate hazards. The reduction of hazards may take place through an incremental abatement process, by which an employer would gradually exhaust all feasible controls in seeking abatement.

Training

Employers must train employees who work in problem jobs, their supervisors, and any person involved in the ergonomics program (except outside consultants). Required training is listed in a table at 29 C.F.R. § 1910.925, and should cover (1) the recognition of MSD hazards; (2) how to report them; (3) how to protect oneself from MSD hazards; (4) any job-specific controls implemented in response to a hazard; and (5) the company's ergonomics program; for supervisors, additionally, (6) management of the program; (7) how to identify, analyze, and reduce hazards; and (8) how to evaluate the effectiveness of the program. All training must be provided in language that employees can understand (including foreign languages if necessary).

Training should begin when either a problem job is identified, when employees are assigned to a problem job, or as needed, but at least once every three years. Supervisory employees involved in an ergonomics program must be trained at the time of their assignment and as needed thereafter, but at least once every three years.

MSD Management

MSD management, an employer's response to the development of MSD hazards, must be provided promptly after the occurrence of an MSD. Employers must respond to reports of MSDs by (1) determining whether work restrictions or other measures are necessary; (2) providing employees access to health care professionals (HCPs) when necessary; (3) providing information to HCPs, including job descriptions, available work restrictions, and a summary of the requirements of the standard; (4) providing HCPs the opportunity to walk through the workplace; and (5) obtaining written opinions from the HCPs. An HCP's written opinion must contain information about an employee's medical condition related to his MSD and the hazard and any recommended temporary work restrictions. The opinion must also include statements that the HCP informed the employee about the results of his evaluation and any activities that may aggravate the employee's condition, but it *cannot* contain confidential diagnoses of or findings about conditions unrelated to the workplace hazard.

If any temporary work restrictions are needed, an employer must follow the HCP's written opinion and ensure that "appropriate follow-up" is provided during the recovery period. Significantly, the standard also requires employers to maintain an employee's work restriction protection (WRP), which includes 100% of pay and benefits for employees assigned to light duty, and 90% of pay and 100% of benefits for employees who have been removed from the workplace. The WRP must be maintained for up to six months, until the employee can return to his job or the MSD hazard has been materially reduced to the extent that the job no longer poses a risk of harm to the employee during his recovery period. The WRP may be offset by workers' compensation payments, compensation from a job taken with another employer, or other compensation provided by an insurance policy funded publicly or by the company.

Program Evaluation

Employers must evaluate their ergonomics program at least once every three years to ensure its compliance with the standard. Evaluation must include consultation with employees in problem jobs and assessments of the efficacy of program elements and the measures taken to reduce hazards. If an evaluation reveals deficiencies in a program, the employer must move to correct those deficiencies promptly to ensure compliance.

Recordkeeping

Employers with more than 10 employees (including part-time and temporary employees) employed on any one day during the preceding calendar year must keep the records required by the standard, which are listed in a table that can be found at 29 C.F.R. § 1910.940. The records include (1) employee reports and responses, which must be preserved for at least three years; (2) job hazard analyses, control records, and program evaluations, which must be preserved for up to three years; and (3) MSD management records, which must be preserved for the duration of an injured employee's employment *plus* three years.

Deadlines

The ergonomics standard will become effective 60 days after the publication of the final rule. Employers must thereafter initiate MSD management promptly after an MSD is reported; management leadership and employee participation, and hazard information and reporting, one year after the effective date of the standard; job hazard analysis, interim controls, and training two years after the effective date; and permanent controls and program evaluation three years after the effective date. If these compliance deadlines have passed before an employer reports a covered MSD, the standard allows additional time for compliance: five days for MSD management; 30 days for management leadership and employee participation and hazard information and reporting; 60

days for job hazard analysis; 90 days for interim controls and training; and one year for permanent controls and program evaluation.

If an employer has materially reduced an MSD hazard in a manufacturing or manual handling job, and no covered MSD is reported for three years, the employer needs to continue only management leadership and employee participation, hazard information and reporting, and maintenance of implemented controls and related training. If the employer has reduced an MSD hazard in a non-manufacturing or manual handling job, and no covered MSD has been reported for three years, the employer needs to continue only maintenance of controls and related training.

II. CONSEQUENCES OF THE RULE'S APPLICATION TO EMPLOYERS

Several lawmakers and trade associations have voiced opposition to drafts of OSHA's ergonomics rule during the past year. Nearly all parties opposed to the proposed rule have objected to the vagueness of the standard and its requirements, and the potential costs associated with implementing ergonomics programs as prescribed by the rule. Several employer groups, including the United States Chamber of Commerce, are also unhappy with the brief comment period, which the agency has announced will end February 1, 2000. "Employer Groups: Ergo Comment Period Too Short, Extension Needed," 6 *Inside OSHA* 24 (November 29, 1999), p. 8. The following summarizes these objections, the problems many employers will likely face should the proposed rule become final, and several probable legal challenges to the ergonomics rule.

The Scientific Basis for Ergonomics

Many complaints regarding OSHA's draft ergonomics rule concern the agency's alleged reliance on faulty or unsubstantiated science and anecdotal evidence. For example, during hearings conducted in April 1999 by the House Education and Workforce Committee's Workforce Protections Subcommittee, two orthopedic doctors disputed the need for an ergonomics standard. Dr. Stanley Bigos of the University of Washington, a specialist in back injuries, exhorted Congress to discount retrospective "searching" studies in favor of prospective "testing" studies, which require that researchers explain all, and not just favorable, data. Further, Dr. Bigos encouraged Congress to demand evidence of musculoskeletal injury predictability before allowing OSHA to label "aches and pains" as injuries. Dr. Michael Vender, a hand surgeon, criticized the National Institute for Occupational Safety and Health's standards for selecting studies included in its 1997 ergonomics review, the intrusion into "the professional standards of a physician's office" created by the rule's requirement that doctors not tell employers of non-work-related findings, the single-incident trigger, and

the rule's contribution to the "ever growing epidemic of somatization and medicalization." "Bone Specialists Dispute Need for Ergonomics Standard," 6 *Inside OSHA* 9 (May 3, 1999), pp. 4-5. Because of the controversy, the House of Representatives had voted before the recess to require OSHA to refrain from issuing a proposed rule until the completion of a comprehensive National Academy of Sciences study.

OSHA has responded by mustering a voluminous collection of scientific reports for inclusion in the Federal Register publication of the standard. 64 F.R. 65768 (November 23, 1999). Undoubtedly the science of ergonomics will be the subject of comments and complaints during the coming months.

The Single-Incident Trigger

Under the rule, employers must either develop an ergonomics program or a quick-fix for any job in which an employee reports an OSHA-recordable MSD. This has become known as the "single-incident trigger," under which the occurrence of a single incident would impose upon employers the rule's obligations. Several opponents of the rule have complained that this provision is unreasonable, and burdens employers with the rule's requirements where there may not be substantial proof that employees' tasks are the cause of an MSD. In a June 4, 1999 letter to OSHA administrator Charles Jeffress, the American Society of Safety Engineers (ASSE) recommended that OSHA include an incremental approach, under which the standard would take effect "if work-related musculoskeletal disorders (WMSDs) make up more than 10% of a site's recordable injuries/illnesses averaged over the last three years." "ASSE: Ergo Draft is Too Contentious to Survive Industry Assault," 6 *Inside OSHA* 12 (June 14, 1999), pp. 1-2. Executive Director P. J. Edington of the Center for Office Technology (COT), in an April 21, 1999 letter to Jeffress, likewise objected to the trigger, particularly because "vague terms govern the finding of a WMSD," and "uncertainty surround[s] both the diagnoses of these conditions and whether they are related to work." "COT Tells OSHA That Draft Ergonomics Standard Is Flawed," 6 *Inside OSHA* 9 (May 3, 1999), p. 9.

OSHA argues that its Quick Fix program, which was added to the revised proposal, should alleviate employer complaints about the single-incident trigger. The Quick Fix will allow employers to implement controls to fix problem jobs within 90 days, without embarking on a full ergonomics program. Nevertheless, employers must keep records relating to the Quick Fix controls, and if the hazard is not reduced, or another MSD occurs within three years, they must implement a full six-part ergonomics program. Thus, a single workplace MSD will still require an employer to take significant action and two MSDs will require a full program.

Moreover, in our view, there has not been sufficient attention paid to one of the most problematic elements of the single-incident trigger: its dependence upon the liberal standard incorporated into OSHA's definition of a recordable

injury. Upon its introduction, OSHA defended the broad scope of its definition of a recordable injury by stating that the concept would be used only for recordkeeping and not enforcement. Now, however, the same definition is the foundation of the single-incident trigger. OSHA is in the process of rewriting is Recordkeeping regulations. It is unclear whether those revisions will change the definition of a recordable MSD injury.

The Grandfather Clause

In calling the proposed ergonomics rule the "most flexible standard that OSHA has ever proposed," Charles Jeffress has pointed in particular to the Quick Fix option and the grandfather clause, "both designed to limit what employers need to do while effectively protecting workers." "OSHA Issues Ergo Proposal, Says It Will Be Most Flexible Ever," 6 *Inside OSHA* 24 (November 29, 1999), p. 6. The proposed rule does indeed include a grandfather clause, but it is not clear which employers' current programs will meet its requirements. The clause, to be found at 29 C.F.R. § 1910.908, allows employers to continue existing ergonomic programs, even if they differ from what the standard requires, provided that the employer show (1) that the program satisfies the "basic obligation section of each program element in this standard;" (2) that he is in compliance with the recordkeeping requirements of the standard; (3) that the program and controls were implemented before the effective date; (4) that the evaluation indicates the program elements are functioning properly; and (5) that he is in compliance with the control requirements of the standard. What the clause does not make clear is whether an effective, existing program *without* a single-incident trigger would be acceptable. This issue should be the subject of discussion during the comment period and any negotiations with OSHA concerning the use of the grandfather clause.

Employee Participation

In a March 4, 1999 letter to Charles Jeffress objecting to the ergonomics draft, U.S. Representative Cass Ballenger argued that the proposal's requirement of employee participation violated the National Labor Relations Act (NLRA) under a December 1998 legal decision that prohibited certain employer-led groups or committees. In response, Jeffress noted that "nothing in the draft proposed rule requires employers to violate section 8(a)(2) of the National Labor Relations Act" because there was no requirement that employers meet the participation obligation by forming teams, groups, or committees. "Ballenger Pans OSHA's Answers to Questions about Ergonomics Rule," 6 *Inside OSHA* 7 (April 5, 1999), p. 17.

Irrespective of any potential problems brought on by the NLRA, the requirement of employee participation is an onerous one for many employers who may be willing to respond to employee injuries or complaints, but still wish to maintain control over their company's safety and health programs. Challenges to

the proposed rule's vague requirements regarding employee participation, and the possible conflict with the NLRA, are likely.

Vagueness

Several commentators, including Representative Ballenger, have objected generally to many of the vague and undefined terms used in the rule. Among some of the more unclear requirements of the rule are its application to certain manual handling jobs that involve "forceful" work; the proposal's mandate that employers undertake "prompt" responses and control ergonomic problems by implementing "feasible" controls; and the vague requirements of employee participation. All of these will be interpreted by compliance officers working in the field. To P. J. Edington of the COT, the rule's vagueness would require employers to prove compliance by producing a large amount of paperwork. 6 *Inside OSHA* 9 (May 3, 1999), p. 9.

Costs

For many employers the most objectionable element of the proposed ergonomics rule will be its cost. OSHA has recently revised its estimate of the rules' costs to employers. The initial estimate in February figured that employer costs would be $1.75 billion, and the current estimate is now approximately $4.2 billion. For some, however, the estimate is still low, perhaps by half; in particular, many feel that the agency has underestimated employers' potential need to hire outside consultants to assist in crafting MSD management. The Small Business Administration has said that costs could exceed $18 billion, while Food Distributors International has claimed that the costs to its industry alone could actually reach $26 billion. "Congress Likely to Conduct Oversight Hearings on OSHA's Ergo Plan," 6 *Inside OSHA* 24 (November 29, 1999), pp. 5-6.

The single requirement that will likely draw the most criticism is the WRP. The current proposal would require employers to pay 100% of a worker's salary and benefits if that worker is reassigned to light duty, and 90% of the worker's salary and 100% of benefits if the worker is required to take time off work. This could be an extraordinarily costly requirement if employers' worst fears concerning the abuse-potential of the standard and the expansive definition of injury are realized. Moreover, this requirement conflicts with workers' compensation law, which does not provide for equally large payments. Strategic Services on Unemployment & Workers' Compensation (UWC), in a February 19 "strategic update," articulated strong opposition to the 100% requirement. According to the UWC, the rule would increase workers' compensation costs rather than reduce them, not only because of the 100% requirement, but because the rule does not require workers to prove that their injuries arose out of employment, and it requires employer to tell certain workers that they may have something wrong with them. "Industry Group: Ergo Rule Will Cause Workers' Comp Costs to Soar," 6 *Inside OSHA* 5 (March 8, 1999), p. 5. The last complaint

refers to the rule's requirement that employers consult with employees with regard to potentially injurious work and possible corrective measures.

Employers should be advised that this paper provides only a summary of the proposed rule on ergonomics, and that the complete requirements should be ascertained through a close reading of the standard or conversation with counsel. Employers with questions regarding the proposed ergonomics rule, or in search of assistance in complying with the rule, are encouraged to speak with one of the attorneys listed below.

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