

# OSHA'S FINAL ERGONOMICS PROGRAM STANDARD

November 2000

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In November 14, 2000, the Occupational Safety and Health Administration ("OSHA") published in the *Federal Register* the final ergonomics program standard, to be codified at 29 C.F.R. § 1910.900. The standard -- which applies to employers in general industry but not those engaged in railroad, agriculture, construction, or maritime operations, and which will go into effect on January 16, 2001 -- will require employers to implement ergonomics programs by October 14, 2001 to respond to employee complaints about the development of work-related musculoskeletal disorders ("MSDs"). Publication of the final standard followed public comment and hearings on last year's proposed rule, which industry representatives considered to be a vague, burdensome, and costly proposal. Notwithstanding those criticisms, OSHA published a final standard that should become even more controversial than the proposed rule.

During public comment on the proposed rule, Dennis J. Morikawa of Morgan Lewis made four recommendations that, if adopted, would have reduced the burden on employers and diminished the likelihood that they would be forced to respond to injuries that were not caused by work activities. First, Mr. Morikawa recommended revising the proposed rule to cover only repetitive stress injuries rather than the broader category of MSDs. Second, he recommended that OSHA reduce the costs associated with the work restriction protection ("WRP"), a guarantee of employee pay and benefits intended to encourage incident reports from employees who might be concerned about losing time from work. Third, he recommended that OSHA replace the "single-incident trigger" -- the rule requiring employer action after one MSD incident -- with a double-incident trigger. And fourth, he recommended that employers adopt the "safe harbor" provisions established in the Cal/OSHA ergonomics standard, which permits employers to continue to use a pre-existing program so long as that program has been effective in reducing ergonomic injuries and illnesses.

OSHA did not adopt these recommendations, opting instead to make two minor changes that appear in the final standard. First, OSHA included a statement of purpose that clarifies the scope of the standard's coverage by declaring that the standard "does not address injuries caused by slips, trips, falls, vehicle accidents, or similar accidents." Second, OSHA reduced the maximum duration of the WRP, but not its amount.

In several other respects OSHA blatantly disregarded the concerns of employers and industry groups. For example, OSHA did not change the basic structure of an ergonomics program, which comprises consultation with employees and their unions on workplace hazards and requires employers to respond to subjective employee assessments of MSD symptoms. Further, although OSHA replaced the single-incident trigger with an "Action Trigger" and a "Basic Screening Tool" -- a chart of guidelines to determine whether an MSD incident is work-related -- the change is meaningless; the

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Action Trigger still depends on only one reported incident, and the standard's "Quick Fix," the purpose of which was to allow employers to avoid implementing a full ergonomics program in response to a single MSD incident, is not available to employers who have experienced more than two MSD incidents in the preceding 18 months. Moreover, the final standard's instruction on determining whether MSDs are in fact work-related relies on scientific papers called "tools" that are not published in the rule. The complexity of these tools suggests that, contrary to OSHA's claims, many employers will have to hire professional ergonomics consultants to comply with the standard. Additionally, the final standard's "grandfather clause" does not cover any program implemented after November 14, 2000, and does not allow employers to use pre-existing programs unless they include several specific elements required by the standard, including WRP, irrespective of the effectiveness of the program in encouraging MSD incident reports.

The most remarkable addition to the final ergonomics program standard, however, is one that is not immediately obvious. Scattered throughout the text of the final standard is language referring to employers' obligations to speak about, among other things, job hazard analyses and hazard controls, not only with employees, but also their "representatives." These references present not only practical problems but significant legal problems as well. Because OSHA conceivably could cite employers for violations of the standard if they fail to discuss their ergonomics programs with labor unions, the final standard essentially creates a substantive bargaining right for organized labor. Bargaining rights, however, are governed by federal labor law, not safety and health law, and the NLRB has never recognized ergonomics programs as a mandatory subject of bargaining. The resulting conflict of law inevitably will become the subject of litigation between employer groups and OSHA.

Not surprisingly, several employer groups already have stated their opposition to the final standard, and at least one coalition, led by the National Association of Manufacturers, will challenge the rule in the United States Court of Appeals for the District of Columbia. It is also expected that a number of trade associations, including the Chamber of Commerce and American Trucking Association, will challenge the final standard. Several possible results could come out of these groups' challenges. The court could stay enforcement of the entire rule before its effective date, in which case employers would not have to take action until the resolution of the litigation. But the duration of any such stay is unknown. Alternatively, the court could stay enforcement of a portion of the final standard, such as the WRP or employee participation requirements, but leave in place the remaining requirements. Employers thus would have to prepare ergonomics programs, and meet the initial action requirements discussed below, before October 14, 2001. Attorneys at Morgan Lewis, including Mr. Morikawa and members of the OSHA practice group working under his direction, are available to assist employers developing ergonomics programs with seminars or consultation. At all events, because the court challenges are not certain to succeed, all general industry employers should become familiar with the standard's requirements, which are discussed and analyzed below.

## **I. Initial Action**

The final standard differs from the proposed rule in that it requires immediate action from all employers even before an employee reports an MSD. Unlike the proposed rule, which imposed initial "Hazard Information and Reporting" requirements only with respect to manufacturing and manual handling jobs, the final standard does not distinguish between types or classes of jobs within general industry. By October 14, 2001, general industry employers without existing ergonomic programs that meet the grandfather clause must provide each current and new employee with basic information about: (1) common MSDs and their signs and symptoms; (2) the importance of early reporting of MSDs and their signs and symptoms; (3) how to report MSDs; (4) the kinds of risk factors and work activities associated with MSD hazards; and (5) a summary of the requirements of the standard. 29 C.F.R. § 1910.900(d).

## **II. MSD Incidents and the Action Trigger**

One of industry's loudest complaints about the proposed rule concerned its "single-incident trigger," which required employer action after only one reported MSD. During the comment period, Dennis Morikawa recommended replacing the single-incident trigger with the double-incident trigger used by California's state plan, Cal/OSHA. OSHA's general response to complaints about the single-incident trigger referred to the "Quick Fix" option, which allowed employers to avoid implementing a full ergonomics program if they can take certain steps to control an MSD hazard and prevent its recurrence. Despite industry's dissatisfaction with this response, OSHA did not make any significant change to the single-incident trigger, and has, in fact, lessened the availability of the Quick Fix.

Under the final version of the standard, when an employee reports an MSD or MSD signs or symptoms, the employer must determine whether the substance of the report qualifies as an MSD incident. An MSD incident is either an OSHA-recordable MSD or an MSD with signs or symptoms that are work-related and last for seven consecutive days after the report. 29 C.F.R. § 1910.900(e).

If an employee reports an MSD incident, the employer must determine whether that incident meets the Action Trigger. An incident meets the Action Trigger if the reporting employee's job routinely involves, on at least one day a week, exposure to at least one of the relevant risk factors at the levels described in the "Basic Screening Tool" published in a table referenced in the standard. The Basic Screening Tool is a chart that connects general risk factors such as repetition, force, awkward postures, contact stress, and vibration with certain actions and body parts that could be affected by such actions. If an employee develops MSD signs and symptoms in a body part associated on the chart with work activities performed by the employee, the MSD incident meets the Action Trigger, and the employer must implement either a Quick Fix or a complete ergonomics program to address the problem.

Employers may resort to the Quick Fix, however, only if there have been fewer than two MSD incidents in the particular job to be fixed. Moreover, and perhaps more

importantly, employers may not implement any Quick Fix if there have been three or more MSD incidents in the entire establishment in the past 18 months. In such situations the employer must develop and implement a full ergonomics program.

### **III. Required Elements of the Ergonomics Program**

The standard requires that an ergonomics program consist of (1) management leadership; (2) employee participation; (3) MSD management; (4) job hazard analysis, and hazard reduction and control; (5) training; and (6) program evaluation.

#### **A. Management Leadership**

Under the proposed standard, employers are required to demonstrate management leadership of an ergonomics program. Specifically, management must:

- \* assign and communicate responsibilities for setting up and managing the ergonomics program;
- \* provide designated persons with the authority, resources, and information necessary to fulfill responsibilities;
- \* ensure that existing policies and practices encourage rather than discourage reporting and participation in the ergonomics program; and
- \* communicate periodically with employees about the program and their concerns about MSDs.

#### **B. Employee Participation**

Employers must ensure that employees and their representatives:

- \* have ways to promptly report MSD signs and symptoms, and MSD hazards;
- \* receive prompt responses to their reports;
- \* are provided with a summary of the requirements of the standard and have access to a copy of the standard and to information about MSDs, MSD signs and symptoms, MSD hazards, and the employer's ergonomics program; and
- \* have ways to be involved in the development, implementation, and evaluation of the ergonomics program.

One legal argument against the proposed standard was that its management leadership and employee participation requirements violated federal labor law prohibiting

employer-led employee groups. OSHA not only dismissed those arguments, but added to the final standard language specifically requiring employers to speak with employee *representatives* about MSD signs, symptoms, and hazards, and provide employees *and their representatives* with prompt responses to questions. As discussed above, not only do these changes fail to resolve employer concerns about dealing with unrepresented employees, they effectively create a new bargaining right for organized labor.

### **C. Job Hazard Analysis and Control**

If an MSD incident meets the Action Trigger, employers must conduct a job hazard analysis to see if the job poses an MSD hazard to employees. The job hazard analysis must include at least a sample of employees in the job who have the greatest exposure to the relevant risk factors, and during the analysis employers must (1) talk with employees and their representatives about the tasks the employees perform that may cause MSDs and (2) observe employees performing the job to identify risk factors and the degree and nature of employee exposure to those risk factors. In conducting the analysis, employers must use one or more "tools" (i.e.) analysis methods set forth different journals or publications listed in an appendix to the standard), employ a trained professional in ergonomics, or use "any other reasonable method that is appropriate to the job and relevant to the risk factors being addressed." If the employer determines that a job contains an MSD hazard, that job is a "problem job." For any problem job employers must take steps to either eliminate MSD hazards or reduce them in accordance with the levels set forth in the tools; if such steps fail, then the employer must reduce the hazards to the extent feasible, and assess the problem job at least once every three years to determine if additional feasible steps to reduce hazards would be effective. Hazard reduction controls can take the form of engineering, work practice, administrative controls, or any combination thereof. Personal protective equipment ("PPE") may be used, but if other controls are feasible, PPE must be used along with those other controls.

Additionally, employers reducing MSD hazards must:

- \* ask employees in the problem job and their representatives to recommend measures to reduce MSD hazards;
- \* identify and implement "initial controls" -- controls that "substantially reduce exposures even if they do not reach the levels" specified above -- within 90 days after determining that the job meets the Action Trigger;
- \* identify and implement permanent controls within two years after determining that the job meets the Action Trigger; and
- \* track the progress of controls, in part by consulting with employees and their representatives, and ensure that the controls are working as intended and have not created new MSD hazards.

### **D. MSD Management**

If an employee experiences an MSD incident that meets the Action Trigger, employers must provide to that employee at no cost (1) access to a health care professional ("HCP"); (2) any necessary work restrictions, including time off to recover; (3) work restriction protection ("WRP"); and (4) evaluation and follow-up of the MSD incident. MSD management and access to an HCP does not include medical treatment, emergency, or post-treatment procedures. The employer must provide to the HCP a description of the employee's job and associated MSD hazards and risk factors, a copy of the standard, and a list of information that the HCP's opinion must contain.

An HCP's written opinion must contain the HCP's assessment of the employee's medical condition as related to the activities, risk factors, and MSD hazards in the employee's job. The opinion must also contain the HCP's recommended temporary work restrictions, including time off to recover or needed follow-up, as well as a statement that the HCP has informed the employee about (1) the results of his evaluation; (2) the process the employee must follow to effect recovery; (3) medical conditions associated with exposure to the activities, risk factors, and MSD hazards in the employee's job; and (4) any activities that may impede recovery.

If the employee needs temporary work restrictions, an employer must follow the HCP's written opinion and provide the employee with temporary work restrictions or time off work. Significantly, the final standard also requires employers to provide employees with 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. For up to 90 days, the employer must maintain the employee's WRP, until that employee can resume his work activities or the HCP determines that the employee can never resume his work activities. Employers may condition WRP on employee participation in MSD management, and the employer's obligation to provide WRP is reduced to the extent that the employee receives payments from any publicly funded or employer-funded insurance or compensation program, including workers' compensation, or other employment made possible by virtue of the employee's work restriction. The final standard is not clear, however, on whether employers may deduct from WRP payments an amount equivalent to workers' compensation payments for which an employee is eligible but does not receive. Indeed, one of the problems with the final standard's MSD management provision is that it appears that an employee could choose to accept WRP in lieu of workers' compensation or disability insurance. Moreover, unlike workers' compensation, the WRP requirement does not have any waiting period; the final standard requires employers to begin WRP payments as soon as work restrictions begin.

The final standard also provides for multiple HCP opinions. An employee may select a second HCP, at no cost to the employee, to review the findings of the first HCP selected by the employer. Alternatively, the employee may rely upon an opinion obtained from an HCP that the employee has visited previously, at his own expense. If the HCPs disagree, the employer must arrange for the two HCPs to discuss their disagreement. If the two HCPs still disagree, then the employer and employee, through their HCPs, must designate

a third HCP, whose opinion is binding on employer. Though this provision explains to employers how to resolve a dispute over the significance of an MSD, it also makes it possible that an employer will have to pay for three doctor visits per MSD incident.

#### **E. Training**

Employers must provide initial training, and follow-up training every three years, to employees who work in jobs that meet the Action Trigger, their supervisors, and any other employees involved in the ergonomics program. Training for employees in problem jobs, which must be provided within 45 days after the employer determines that the job meets the Action Trigger, must address:

- \* the requirements of the standard;
- \* the ergonomics program and employee roles in it;
- \* signs and symptoms of MSD hazards, and ways of reporting them;
- \* the risk factors or MSD hazards in the employee's job;
- \* the employer's plan to address the MSD hazards;
- \* controls used to address MSD hazards; and
- \* employees' roles in evaluating those controls.

Employees involved in setting up and managing the ergonomics program must be trained within 90 days of the employer's determination that the job meets the Action Trigger in the topics listed above, as well as how to set up, manage, and evaluate an ergonomics program, and how to identify and analyze MSD hazards and select measures to reduce those hazards. Employers must provide training in a language that employees understand and give employees an opportunity to ask questions about the program.

#### **F. Program Evaluation**

Employers must evaluate their ergonomics program at least once every three years to ensure its compliance with the standard, as well as at anytime the employer has reason to believe that the program is not functioning effectively. 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.

#### **IV. The Quick Fix**

The Quick Fix, which, as stated above, can only be used in an establishment with two or less MSD incident reports, requires employers to (1) provide MSD management; (2) talk

with employees and their representatives about tasks that may relate to the MSD incident; (3) observe employees performing their job to identify risk factors; (4) ask the employees and their representatives to recommend measures to reduce hazard exposure; (5) within 90 days after determining that the job meets the Action Trigger, implement controls that either eliminate hazards or reduce hazards below the levels identified in the tools, and train employees in those controls; and (6) within 30 after implementing the controls, review the job to determine if MSD hazards have been reduced accordingly. If the Quick Fix works, the employer need only maintain the controls and training related to those controls; if the employer is unable to reduce MSD hazards to the levels specified in the tools, then the employer must implement a full ergonomics program.

## **V. The Grandfather Clause**

Under the final standard employers may continue to use their existing ergonomics programs if those programs were implemented before November 14, 2000, are demonstrably effective, and contain the following program elements: (1) management leadership; (2) employee participation; (3) job hazard analysis and control; (4) training; and (5) program evaluation. Any program that discourages employee participation or MSD incident reports will not qualify under the grandfather clause.

The problem with the grandfather clause is that it is essentially illusory. In the proposed rule OSHA promulgated a grandfather clause that required pre-existing programs to contain all of the "basic elements" required by the standard. Mr. Morikawa suggested that in place of this vague requirement OSHA allow employers with pre-existing programs a period of time to prove the programs' effectiveness, before being required to comply with the standard's more formal requirements. OSHA rejected this suggestion; though the final standard does not specifically state that a grandfathered program has to use a single-incident trigger, within one year of the effective date of the standard even a grandfathered program must provide MSD management, including WRP, regardless of the efficacy of the program.

## **VI. 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 records of:

- \* employee reports and responses, which must be preserved for at least three years;
- \* job hazard analyses, hazard control measures, and program evaluations, which must be preserved for at least three years;
- \* work restrictions and time off work, which must be preserved for at least three years;
- \* Quick Fixes, which must be preserved for at least three years; and

- \* HCP opinions, which must be preserved for the duration of an injured employee's employment *plus* three years.

All records must be made available to OSHA at its request.

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The effective date of the standard is January 16, 2001. Before that time at least one industry group will seek a court order enjoining OSHA's enforcement of the standard's more onerous requirements, including the employee and employee representative participation requirements and the WRP. This paper provides only a summary of the final ergonomics program standard. The complete requirements should be ascertained through a close reading of the standard or conversation with counsel. Employers with questions about the status of the final ergonomics program standard, or in search of assistance in complying with the standard, are encouraged to speak with one of the attorneys listed below.

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