

Perspective— Bad Law and Bad Politics: OSHA's Ill-Fated Ergonomics Standard

Mark A. Spognardi and Staci L. Ketay

In this volume, the authors and the publisher were prepared to present our readers with a thorough discussion of OSHA's newly established ergonomics standard. However, on March 6 and 7, 2001, Congress acted with lightning speed to repeal the controversial opus. In rapid succession, first the Senate, and then the House, voted largely along partisan lines to hand a stinging defeat to organized labor and the defenders of the Clinton administration's pro-labor policies.

Congress used the Congressional Review Act of 1996 (CRA) to pass a resolution of disapproval, something it had never done before. The CRA was designed to be a speedy vehicle to allow Congress to rescind administrative regulations by limiting debate and barring amendments, so long as Congress acted within 60 days of the rules becoming law. The Senate voted 56 to 44, with six Democrats joining the efforts to junk the standard. Less than 24 hours later, the House voted 223 to 206, with 16 Democrats supporting, and 13 Republicans opposing, the repeal.

Democratic lawmakers voiced indignation at Republicans for moving to repeal the standard after only a few hours of debate, noting that the rules were a result of ten years of study and a year of hearings. Opponents of the standard claimed poetic justice, reminding anyone who would listen that former Secretary of Labor Alexis Herman announced publication of the rule on the very day Congress adjourned for the year. The standard was published in the *Federal Register* on November 14, 2000, with an effective date of January 16, 2001, shortly before the end of President Clinton's term.

Mark A. Spognardi is a partner in the Chicago law firm of McBride Baker & Coles, and is a member of the firm's Labor and Employment Relations Department. Staci L. Ketay is an associate in the Labor & Employment Relations Department. The Department provides client counseling and litigation services to employers in all areas of labor and employment law, including employment discrimination, equal employment opportunity and affirmative action; union-management relations; wage and hour law; employee benefits; and occupational safety and health.

In truth, the standard was a product of bad-faith politics and bad science. In rushing its final rule into publication, OSHA blatantly ignored Congress' and businesses' opposition to the standard. For at least five years, Republicans had blocked OSHA from establishing a standard, contending that there was insufficient scientific evidence that repetitive job motions cause musculoskeletal disorders ("MSDs"), such as carpal tunnel syndrome. However, legislation proposed in 1999, which would have again prohibited the use of federal funds to propose or enforce such a standard, was not completed by the time of adjournment, so this time OSHA came through the back door. Shortly afterward, the National Academy of Sciences (NAS) issued a study that reinforced the business view that there is a lack of scientific evidence on the causes of MSDs and that there may be numerous non-work factors that contribute to such injuries. It is speculated that OSHA rushed through the Standard to preempt the impact of the NAS study.¹

Applying to virtually all employers of any size, the standard, by OSHA's own estimates, was expected to cost employers approximately \$4.5 billion annually. However, most employer associations claimed that this estimate was too low, with compliance costs tagged at approximately \$120 billion a year.² The American Trucking Association argued that OSHA's ergonomics rule would cost the trucking industry, alone, \$6.5 billion.³ If this estimate was correct, the standard would have cost the trucking industry approximately \$2 billion dollars more than OSHA's entire estimate for the cost to all employers combined. While the true costs of compliance will never be known, it would seem a safe bet that the standard would cost employers significantly more than OSHA predicted. It is also a set bet that the standard would have hampered job growth, bankrupted some employers, and crippled others.

The standard was exceedingly lengthy and complex. Whatever happened to the Democratic mantra of "Reinventing Government." At over 600 pages, including charts and supporting material, one can only speculate at the amount of time and money wasted since November trying to comprehend and digest it, as well as lobby against it and try to enjoin it in the courts. The standard was also called a turkey. For example, the Food Marketing Institute complained about that part of the standard limiting the recommended weight of shopping bags to 15 pounds. "So how do we pack a 20 pound turkey into a 15 pound bag?" asked Tim Hammonds, the groups' president.⁴ His complaint is aptly reflected the battle cry of one anti-standard group – "Stop Ergo-nonsense."

The standard had two notably distinct, perhaps unique, characteristics. For one, while it *potentially* applied to any manufacturing, material handling or general industry worksite, the requirements of the standard for the most part became mandatory on a site-by-site basis only *after* a job-related MSD occurred. This was distinct requirement compared to other OSHA safety and hygiene standards, which hold employers responsible for identifying and correcting hazards even when no injury has occurred. The different approach adopted by OSHA seems to almost concede the very uncertainty of ergonomic “science” decried by Congressional and business critics of the standard.

The second unique feature of the standard — in fact, completely unprecedented — was its requirement that employers *fully compensate* employees who are required to take a lower-paying “light duty” position while recuperating from an ergonomics injury, or to supplement — up to 90 percent of the employee’s regular salary — the amount of any temporary total disability benefits paid to employees who are disabled due to a job-related MSD. Lawsuits filed to enjoin the standard alleged that this amounted to a virtual federalization of workers’ compensation laws. Prior to this, OSHA has never attempted to regulate the compensation of employees who are disabled due to an accident or illness caused by a violation of a safety or health standard, nor had any other federal law required businesses to pay employees for non-working time.

The proposed OSHA ergonomics standard imposed tremendous administrative and record-keeping obligations that could be triggered at the whim of a single employee who alleged a job-related genesis for muscle or skeletal discomfort. It overreached to the extreme by proposing to make employers the absolute guarantors of the income of employees who are fortunate enough to have suffered a job-related injury that can be classified as “ergonomic,” even if its origin was elsewhere.

To do this, OSHA imposed what it called the MSD “management” function, including the obligation to furnish “Work Restriction Protection” (“WRP”) to employees who, because of an ergonomic injury, were reassigned to another position or become absent from work altogether. This was the bureaucratic term *du jour* used to denote the wage payments and workers compensation supplements discussed above. Specifically, it required employers to assure that such employees receive 100 percent of their normal earnings even while employed in a lower paid job due to a work restriction, or 90 percent of their earnings if they were incapable of working at all. In the latter

case, employers could offset any workers compensation benefits concurrently paid to the injured employee. In both cases, employers were required to maintain 100% of the value of any non-wage benefits, such as insurance programs and pension contributions.

Once triggered by an alleged work-related MSD, the standard imposed several general obligations on the employer, each consisting of more specific, subsidiary requirements. At workplaces where one employee reported an MSD incident, the employer could implement a "quick fix" program tailored to the job specific MSD problem. However, the ability to use the quick fix was extremely limited. It could only be used if there had been no more than one MSD incident in the job and there had been no more than two MSD incidents in the workplace for the preceding 18 months. Where such incidents occurred, a full ergonomics program had to be implemented.

A full ergonomics program required the implementation of six major components, and their corresponding subcomponents. Under the concepts of "Management Leadership" and "Employee Participation", employers were required to designate personnel to manage the ergonomics program, establish procedures to report MSD events and symptoms, provide methods for communicating with employees "periodically," involve employees in undefined ways in the implementation of the program, and provide the employee with the WRP income and benefit guarantees.

A surprising element of the standard was the obligations placed upon employers to "manage" the MSD's of their employees. This involved significant interaction with employee "health care providers" to identify the nature and extent of a claimed ergonomic injury, the restrictions it imposed upon the employee's work, and the adaptations to the job functions needed to redress the source of the injury. This process of interacting with the employee's doctor was similar to, but more specific than, that required under the Department of Labor's regulations implementing the Family and Medical Leave Act of 1993 (FMLA), as well as to the "interactive process" contemplated by the Equal Employment Opportunity Commission as part of the employer's duty of accommodation under the Americans With Disabilities Act of 1990 (ADA). Apparently OSHA believes that employers do not interact enough in their employees' problems, so they gave them more to do.

The standard also imposed strict obligations regarding the communication and reporting of hazard information. Employers were required to disseminate information about ergonomic hazards and symptoms and how to report them, as well as the requirements of

the standard itself, and to establish formal procedures for reporting MSD events. Employers were obligated to solicit employee information about work procedures in identified "problem jobs," assess the feasibility of means to minimize the hazards associated with them and establish a procedure for monitoring the effectiveness of the measures adopted to address them. Employers were required to adopt engineering and administrative controls to eliminate the hazard to the extent feasible, and then, as necessary, furnish personal protective equipment to employees without charge. However, OSHA forgot to define "feasible." And unlike other OSHA standards, the rule contemplated the incremental implementation of abatement measures as a continuing duty, forcing employers to continually assess and reassess the effectiveness of each ameliorative action, any time an alleged MSD incident occurred. But the process had no end to it.

The standard imposed an extensive training regimen for employers to give their employees initially upon employment or the first application of the Standard, and thereafter at intervals of no less than every three years. Similar training was to be given to individuals who are assigned responsibilities for creating and administering the ergonomics program. An employer was under a continuing duty to re-evaluate its program if it had reason to believe that it was not functioning properly, and at least every three years.

The resolution of disapproval has been sent to President Bush for his signature, and he has indicated that he will sign it. While Secretary of Labor Elaine Chao has stated she is interested in a comprehensive approach to ergonomics, do not expect to see any major effort to address the subject soon. The Congressional Review Act forbids federal agencies from issuing rules that are substantially the same as those repealed under the Act, unless Congress first approves them. Representative Andrews (D-NJ) stated that the repeal was the death sentence for ergonomics rules.⁵

He probably is right. While Labor Secretary Chao has stated she wants to move forward on the issue, her spokesperson has indicated that it would be premature to set a timetable for action.⁶ You do not have to be a skeptic to interpret this statement as meaning that it is not going to happen. This whole escapade can be viewed as just another mess left over from the Clinton administration, with only themselves to blame. Clinton could have proposed these rules before he lost a Democratic Congress, or could have tried to find common ground with Republicans after his reelection. Instead, his agency tried to slip this bad law in through the back door at night. Fortunately, Congress wasn't sleeping.

Notes

1. See "Coalition of Employers and Business Groups Questions Study on Ergonomics," National Coalition on Ergonomics, www.ncergo.org/nas.htm, Jan. 17, 2001.
2. Klein, Sarah A., "Workplace Rules Make Biz Cry, 'Ouch!'," *Crain's Chicago Business*, Feb. 5 2001.
3. Wislocki, John, "OSHA Urges Truckers To Focus on Prevention of Ergonomic Injuries," *Transport Topics*, Feb. 5, 2001.
4. Zuckman, Jill, "Senate Overturns New Rules on Safety," *Chicago Tribune*, Mar. 7, 2001.
5. Greenhouse, Steven, "House Joins Senate in Repealing Regulations Issued by Clinton on Workplace Injuries," *The New York Times*, Mar. 8, 2001.
6. Anderson, Nick, "Ergonomics May Face Repetitive Resistance," *Los Angeles Times*, Mar. 10, 2001.