

## MANAGING ERGONOMIC CONCERNS UNDER OSHA'S NEW GUIDELINES

by

Jerome K. Bowman

On April 5, 2002, the Department of Labor's Occupational Safety & Health Administration ("OSHA") announced its new approach to ergonomics. As everyone will undoubtedly recall, during the final months of the Clinton Administration, OSHA rushed to issue its ergonomics standard. That standard was impractical, cumbersome, and overly burdensome. Congress and President Bush agreed, and the standard was revoked by an act of Congress early last year. Virtually ever since, OSHA has been promising to develop a new approach to ergonomics. Until recently, development and announcement of that approach has been continually delayed. OSHA's new approach has both good and bad points and should prompt employers to ask what is the proper response to this action.

OSHA's new approach to ergonomics is not standard-based. OSHA states that it will not issue a new standard to address the hazards associated with ergonomic hazards. Instead, it will issue voluntary guidelines to assist employers in addressing ergonomic hazards. OSHA will, however, continue to cite employers for ergonomic hazards under certain circumstances under the Occupational Safety & Health Act's "General Duty Clause." The General Duty Clause contains a requirement that all employers maintain a workplace free from recognized hazards. It is a sort of "catch all" which OSHA uses when there is no standard on point.

***The Positive.*** This new approach to ergonomics, of course, is in many ways a positive development. The best part of OSHA's new approach to ergonomics is simply that it is not OSHA's old approach to ergonomics. By many accounts, OSHA's defunct ergonomics standard was a disaster. In the view of many management officials, the standard was so bad that the very thought of OSHA working on a new standard was quite frightening.

This viewpoint is somewhat understandable. The old standard was quite unreasonable and it is hard to imagine OSHA being able to issue a new and reasonable standard any time in the near future. Indeed, even if OSHA were able to develop a new, reasonable standard, it would almost certainly be locked up in litigation for many years to come. Moreover, there is no consensus regarding what form a new standard should take. Developing a workable, standard-based approach to ergonomics would certainly be a very difficult undertaking.

***The Negative.*** On the negative side, paradoxically, OSHA's new approach to ergonomics fails to lock in a standard-based approach to ergonomic hazards for the future. But why would management want an ergonomics standard, given the problems with OSHA's last attempt to develop such a standard? The absence of a standard might be considered a negative because a future administration will find it far easier to institute a new rulemaking process for ergonomics in light of OSHA's just-announced voluntary

approach. If an ergonomics standard were already in place, it would be far more difficult to unravel the administrative record to support a new standard. There is more than a bit of the “better the devil you know” attitude here. If management were now able to work cooperatively with OSHA to develop a formal ergonomics standard which is both protective of health and safety and practical from a management standpoint, everyone would be a winner. The standard would be in place, it would be more difficult for a future administration to issue a stricter standard, and management should recognize gains in reduced workers’ compensation costs.

Thus, while a reasonable, although imperfect, ergonomics standard would undoubtedly present some problems for management, it would decrease the likelihood of bigger future problems in the form of a less reasonable and less workable ergonomics standard being issued by a future presidential administration.

***Possible Legislative and State Actions.*** OSHA’s recently announced approach has prompted a bipartisan group of Senators to introduce legislation requiring OSHA to develop and issue a new ergonomics standard within two years. It is unclear whether such legislation will pass Congress, much less be signed by the President. Many members of Congress, however, may well be tempted to vote for such legislation in order to provide political cover for an earlier vote overturning OSHA’s ergonomics standard. Legislation might even appear to be more palatable to many in Congress because it is somewhat general in nature. OSHA would then have to work out the details.

Federal action is not the only possible result of OSHA’s new approach. Approximately one-half of the states operate their own occupational safety and health programs. Some of those states have already issued ergonomics standards and some others may be pressured to do so in the future. Employers subject to state-run OSHA programs will need to monitor these situations carefully.

***Risks Faced By Employers.*** In light of OSHA’s recently-announced approach to ergonomics, what should employers do? To answer that question, employers need to understand the risks facing them under this new approach. OSHA stated that aggressive enforcement will still play an important role in its approach to ergonomic hazards. These enforcement efforts will have to take place under OSHA’s General Duty Clause because no specific standard is in place. While it is more difficult for OSHA to pursue a claim under the General Duty Clause as compared to a claim under a specific standard, OSHA has shown a willingness to use this approach for ergonomic hazards in the past. Although to many observers it has appeared that OSHA has been reluctant under the current administration to pursue many General Duty Clause prosecutions for ergonomic hazards, OSHA’s formal announcement of its new approach to ergonomics may make it more willing to do so in the future. According to the announcement, enforcement efforts under this new approach to ergonomics, will involve closely coordinated efforts among the local OSHA area office, national OSHA experts on ergonomics, and Department of Labor attorneys. The target of such an enforcement effort will probably find that OSHA will behave very aggressively during any such investigation.

The risk to employers of this approach lies not so much in any penalty OSHA may seek, but in the costs of abatement. As part of any settlement of claims, OSHA would require the cited employer to abate, or correct, the allegedly hazardous condition. While the ideal approach to an ergonomics program, as will be outlined below, is incremental, OSHA would likely require the cited employer to move more quickly and decisively (and expensively). Developing ergonomic abatement measures with the threat of an OSHA enforcement action is quite difficult to do and will almost certainly result in a more expensive and probably less workable program for addressing ergonomic hazards. Even if a program is developed at a reasonable cost, ergonomic solutions developed in this way are more likely to pose perhaps unforeseen production problems down the road. This is a real risk about which employers should be fully informed.

***How Employers Should React.*** In OSHA’s announcement regarding its new approach to

ergonomics, it stated that the agency will not focus its enforcement efforts on employers who have made good faith efforts to reduce ergonomic hazards or who have already implemented effective ergonomic programs. Thus, employers should take this opportunity to voluntarily address ergonomics hazards in the workplace. Not only would these efforts presumably reduce workers' compensation costs and improve health and safety, these efforts will also go a long way towards minimizing the risk of an OSHA enforcement action under the General Duty Clause.

Developing a reasonable and workable ergonomics program should be broken down into several steps. An employer should first try to identify "problem jobs" requiring action. Each facility should review prior OSHA logs of injuries and illnesses to look for trends and indications of ergonomic problems in specific jobs. If problem jobs are identified, these are the jobs that should be addressed initially. Such efforts would help demonstrate a good faith attempt to address the most pressing ergonomic needs in a facility.

This of course begs the question as to what factors an employer should consider in order to determine whether a job should be classified as a problem job. A "trigger" should be developed by the employer. The trigger should involve two variables: (1) a minimum number of ergonomic-related injuries, and (2) a set time period within which the injuries occurred. Certainly, more than one injury within a set time period should be required before a job should be considered to be a problem. Otherwise, an employer may be forced to revise a job or task because of a single employee's idiosyncratic response to a particular job. Requiring multiple injuries as part of a trigger makes this less of a risk. In addition, in order for the injuries to count towards this trigger, they should relate to the same body part. For example, perhaps two wrist injuries in a single job over ninety days would suffice to label a job as a problem, but one wrist injury and one back injury should not be sufficient because the injuries are unlikely to be traceable to the same risk factor. Of course, the employer must also determine that the injuries are job-related before they would count towards the trigger.

The time period within which ergonomic injuries must occur in order to count towards this trigger may be set either in calendar days or in hours worked in a particular job. Obviously, hours worked in a particular job would be most accurate because it would not place undue emphasis on jobs held by many employees. Clearly, in some facilities, the hours worked measurement can be easily estimated based on the number of employees in the particular job.

Because there is no OSHA standard on ergonomics, employers have considerable flexibility in determining the exact contours of the trigger. In general, the more injuries that must occur to trigger a problem job classification, the greater the time period may be. Similarly, if only a small number of injuries will be required, the time period may reasonably be shorter. The exact trigger should only be determined after review of past injury and illness logs. As long as an employer's choices in this regard are reasonable, that employer will be in a very strong position should OSHA investigate ergonomic hazards at its facilities.

After a trigger is defined, the employer should then designate a supervisor or a team of personnel who would investigate each potential problem job. This person or team should spend time observing employees performing the particular job. The employer may wish to make use of videotape to facilitate this observation. This person or team should ask whether any obvious risk factors are observed and should also question employees regarding the job and any discomfort associated with particular tasks. Obviously, some level of training will be required to perform these tasks. However, it should not be necessary for this person or members of this team to be professional ergonomists. It may be more convenient for an employer to use outside consultants to assist in this process, but in most cases this should not be necessary.

Once a problem job is identified and investigated, the employer should then prioritize fixes for the job. Again, because there is no standard, employers have considerable flexibility. "Fixing" a problem job

should be done on an incremental basis. The initial focus should be on simple fixes (including job sharing, rotation, personal protective equipment). Then the employer needs to assess the selected fixes. If the ergonomic problems seem to be eliminated or greatly reduced, the process is over, except for maintaining the “fix”. If injuries or discomfort continue, however, the employer should proceed to the next potential solution. Even if the employer determines that a particular potential approach to a problem is cost-prohibitive, the employer should nevertheless proceed to take other positive steps to protect employees in that particular job.

It is absolutely essential that employers consider production issues in selecting approaches to remedying ergonomic hazards. Employers should ask whether the problem job could be modified *both* to improve production *and* ergonomics. Thus, production personnel should be involved in this process. If production is ignored, it is far more likely that the solution to the ergonomic problem will eventually be discarded.

Once the initial problem jobs are identified and addressed, future reports of injuries or discomfort need to be monitored. Again, the use of some sort of trigger mechanism should be developed and used to identify a new problem job. In addition, if an employee reports minor ergonomic-related discomfort, but is determined to still perform all job-related duties, the employer should consider whether work restrictions would prevent the development of an actual ergonomic injury. While work restrictions as the result of an injury would normally result in a recordable injury on the OSHA log of injuries and illnesses, OSHA has stated that, as part of a recent settlement of a lawsuit with the National Association of Manufacturers, such action would not be recordable. Employers should seek guidance from their attorneys regarding the details of the recording requirements.

***Prove It.*** Of course, an employer must be able to demonstrate and prove that it has taken the steps outlined above should OSHA institute an investigation. To do so, an employer should maintain records of each step in the process in order to be able to demonstrate efforts to address problem jobs. These records should include training records of supervisors and other persons involved in the process.

***Conclusion.*** OSHA’s recent decision not to issue a new ergonomics standard does pose a risk of future standard setting by OSHA. In the meantime, however, it frees employers from overly burdensome federal oversight. With or without a specific OSHA standard, it undoubtedly makes sense to develop and implement a reasonable ergonomics program. It is the absence of a specific OSHA standard, however, which allows employers to develop such a program with the greatest flexibility. A well-developed ergonomics program should increase productivity, save money and protect the safety and health of employees. The current status of ergonomics regulation presents great opportunity for employers to take reasonable and effective steps without the burden of excessive federal oversight.