

Workplace Injuries & *2010 NJAJ Meadowlands Seminar Guide*

Ergonomics: The Politics of Arm-Twisting

By Wayne D'Angelo

When the U.S. Occupational Safety and Health Administration ("OSHA") regulates, such actions are often limited to discrete industry sectors, and engagement on the proposal is most often limited to those industries directly impacted by the regulation. Opposition can blaze brightly in one job sector without an industry-wide conflagration. The battle over the ergonomics standard was not one of those discrete blazes. Soon after the first credible move toward an ergonomics standard in the early '90s, it became readily apparent that the issue of musculoskeletal disorders ("MSDs") would result in a blistering inferno of division and debate.

Disparate industries have near universal concern over the ergonomics standard because industries fear that such standard will be universally applied across all job sectors. Additionally, industry is concerned about the compliance costs of such a regulation and argues against saddling a wide swath of struggling business with such costs in a poor economic climate, in the face of intense international competition,

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and with what industry considers "uncertain science" or "unclear benefits." With respect to the breadth of any MSD regulation, industry opposes a one-size-fits-all approach that regulates, for instance, a sales clerk at Banana Republic, the same way it regulates a welder in a steel fabricating facility.

Unions, on the other hand, have made an ergonomic standard a top agenda item and a touchstone of their public relations and recruitment campaigns. Unions are not just crying foul on an ergonomics standard because it makes good press — MSD injuries are the most prevalent type of injury in U.S. workplaces. In 2000, the last year that OSHA mandated that employers report repeated trauma injuries, such injuries accounted for 67 percent of all workplace injuries. Unions also fight the perception that MSDs are trivial and easily subject to fraud. Indeed, while workers' compensation fraud will always remain a concern, many MSDs are both extremely debilitating and easily documented.

Ergonomics: A History of Controversy

It is a massive understatement to say that the ergonomics issue is a divisive issue fueled by extremely hot rhetoric. The polarizing nature of ergonomics was last seen in a series of epic battles during the Clinton

administration. The Clinton administration made the promulgation of an ergonomics standard a regulatory priority in 1993. Soon after Republicans seated majorities in the House and the Senate, the Republican majority began moving legislation to block OSHA from issuing an ergonomics standard. President Clinton vetoed the initial rescission bill. A similar bill later came into effect which prohibited OSHA from issuing, but not developing or drafting, an ergonomics standard. Several subsequent efforts to prevent OSHA from developing or even working on an ergonomics standard were loudly and publicly debated on the House floor, including one in which Rep. Nancy Pelosi (D-Calif.) led a successful effort to strip the prohibitive language from an appropriations bill.

The four-year prohibition on issuing an ergonomics standard was lifted in a provision added to the massive FY1999 Omnibus spending bill. OSHA immediately released a draft of its ergonomics standard for analysis under the Small Business Regulatory and Enforcement Fairness Act ("SBREFA"), and despite several hotly contested efforts to prohibit further OSHA action, proposed a standard on Nov. 22, 1999.

OSHA's proposed ergonomics were met with several high-profile legislative battles to prohibit finalization, more than a

thousand witnesses at OSHA's public meetings, and hundreds of thousands of public comments from stakeholders and supporters of both sides of the issue. OSHA published its final standard on Nov. 14, 2000, days after the election of George W. Bush. As one of its last acts, the outgoing Clinton administration rushed to make the ergonomics standard take effect on Jan. 16, 2001 — again days before the executive branch was ceded to the Republicans.

The ergonomics standard lasted about a month before both the House and Senate invoked the Congressional Review Act to disapprove the ergonomic standard, and was officially killed by President Bush's execution of the resolution of disapproval on March 20, 2001.

President Bush's Slow Roll

President Bush signed the resolution of disapproval in order to "pursue a comprehensive approach on ergonomics." By all accounts, President Bush did not seek such an approach. Indeed, in his two terms in office, the Bush OSHA pursued only nonbinding guidelines governing the poultry processing industry, retail grocery workers, nursing homes and the shipbuilding industry. To his credit, President Bush lived up to campaign promises to provide businesses tools for compliance instead of relying on heavy-handed enforcement. These industry-specific guidelines do, in fact, give employers tools to protect their workers. Similarly, these industries were appropriately targeted because of their high incidences of MSDs. Still, it is a stretch to view these efforts as "comprehensive."

President Bush's sole economy-wide ergonomics initiative was to revoke the requirement that regulated employers identifying MSDs on their 300 logs. OSHA 300 logs are the documents on which employers report to OSHA employees' work-related injuries or illnesses. Until June of 2003, OSHA 300 logs contained definitions of MSDs and a section wherein employers could report an injury as being such.

Round II?

Eight years of relative inactivity by the Bush administration has done little to erase the bitterness of the Clinton-era ergonomics battles. To the contrary, it may have fueled

it. For every ergonomics opponent that was enraged by President Clinton's rushed promulgation with one foot out the door, there are an equal number of ergonomics supporters angry that President Bush lost nearly a decade to inactivity and leniency.

Early in President Obama's administration, the stars seemed to be aligning for a new comprehensive ergonomics standard. The composition of Congress had shifted toward ergonomics proponents and many of the most vocal proponents, such as Speaker Pelosi, began to enjoy more political muscle. David Michaels, the head of OSHA, was expected to be an aggressive regulator, was an outspoken proponent of an ergonomics standard, and even wrote a book which, in part, strongly criticized, ergonomics opponents. Further, President Obama himself is closely tied to the labor unions that championed and financed the pro-ergonomic fight.

Still, an administration has to pick its battles, and President Obama picked an ambitious set for his first term. While the President can put health care reform in his "win" column, his victory was bruising and required the expenditure of a great deal of political capital. The President's efforts with respect to climate change also met stiff opposition and sapped additional political capital. His administration scored some victories moving climate regulation through EPA but saw its favored legislation stalled on Capitol Hill.

The question remains whether President Obama has the stomach or the stamina to pick a fight on ergonomics. His administration's initial efforts suggest that the President is intent on reversing Bush-era policy changes. Specifically, the Obama OSHA has proposed to reestablish a definition of MSDs and to again require 300 log recordkeeping and reporting of MSDs. A final rule is expected imminently.

Further, this spring, OSHA announced that it would begin enforcing ergonomic standards under the General Duty Clause of the Occupational Safety and Health Act ("OSH Act"). The General Duty Clause requires all employers to provide their employees workplaces that are free of recognized hazards. Traditionally, OSHA relies on the General Duty Clause as a catch-all when a potential dangerous condition at a workplace does not violate a specific provision of the OSH Act or OSHA regulations.

Still, it is difficult to tell whether

President Obama's reversal of Bush-era approaches on reporting and enforcement is the camel's nose under the tent for future regulation or whether such action is the most that can be mustered by an administration that is beleaguered by a floundering economy and other priorities. A lot has changed since the bullish early days of the Obama administration and a lot has remained the same. Unfortunately, the economic and employment situations have not improved in any readily appreciable way. Americans are worried about their jobs and angry about the returns on the stimulus money. Individual and generic polls suggest that voters will take their economic dissatisfaction out on the Democratic majorities in the House and Senate as well as the states. While smart people disagree about how many and which seats go Republican, almost nobody disagrees that the Republican Party will make significant gains.

While such gains do not directly impact the President's ability to regulate MSDs through OSHA (other than the potential for Clinton-era rescission efforts on Capitol Hill), the underlying economic and employment dissatisfaction may guide the hand of this extremely politically astute administration. An ergonomics standard will impose costs on domestic businesses. Whether such costs are excessive, unnecessary, or will lead to any job loss is almost immaterial. The mere public perception that this administration is seeking to saddle domestic industries with additional costs after facing similar criticisms with respect to climate change and health care may chill the Administration's appetite for an ergonomics standard. To be sure, ergonomics opponents are licking their chops for an opportunity to hammer the administration on ergonomics and job loss. The President's administration is staffed with the veterans of the Clinton-era ergonomics battle. They know an MSD standard will not squeak by like most OSHA standards. If there was a time in this administration to push for an ergonomics standard, that time has passed — at least for now. Given this administration's allocation of political capital on competing priorities and the continuing public concern over employment and any measure that could adversely affect employment, OSHA may find it most prudent to continue to use the General Duty Clause to enforce in egregious situations, to use the 300 log information to build a case for a future regulation and to live to fight another day. ■