Ripe for a Challenge--Does OSHA's Lockout/Tagout Standard Really Require Equipment-Specific Energy Control Procedures

Section 1910.147(c)(4) of OSHA’s Lockout/Tagout Standard requires each covered employer to develop and document the measures to be used to control hazardous energy while performing maintenance and servicing activity on machines and equipment. An area of continuing controversy has been whether an employer must develop equipment-specific checklists to supplement a generic umbrella procedure, or whether it may rely on a detailed generic procedure to satisfy this requirement. A detailed generic procedure would list: 1) the practices or steps applicable to each type of energy isolating device, lockout device, and tagout device in use at the facility; and 2) the criteria for dealing with a machine or system having multiple energy sources and isolating devices.

OSHA appears to have taken the position that, at a minimum, employers must develop a separate step-by-step checklist for each category of “similar” equipment (including the identification of the covered equipment) and an equipment-specific step-by-step checklist for each unique piece of equipment. That position appears to be supported by the decisions of the Occupational Safety and Health Review Commission (OSHRC). Nevertheless, that position is completely contrary to the critical regulatory analysis documents underlying the initial rulemaking and appears to violate the conditions under which that requirement is currently approved by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (PRA).

What the Standard Says

Any effort to interpret an OSHA standard must begin with the language of the standard. An exhaustive review of the relevant provisions of the LOTO Standard is beyond the scope of this article but leads to the conclusion they are ambiguous. For example, the heading of Paragraph 1910.147(c)(4) is “energy control procedure” rather than “energy control procedures.” Two subparagraphs under 1910.147c)(4) refer to “procedures”, but Paragraph 1910.147(c)(6) refers to a periodic inspection of “the energy control procedure” rather than either “the energy control procedures” or “each energy control procedure.”

It appears OSHA cites and fines employers for failing to develop equipment-specific energy control procedures when OMB’s current approval was explicitly conditioned on OSHA’s representation it would not issue citations on that basis.

A review of the official regulatory analysis developed by OSHA during the initial rulemaking and the associated Paperwork Reduction Act request submitted to the Office of Management and Budget demonstrates that both documents were based on the premise that a generic site procedure would be adequate to satisfy the written energy control procedure requirements of the standard.

Initial Rulemaking-Regulatory Analysis During the initial LOTO rulemaking, OSHA used an outside contractor, Eastern Research Group (ERG), to develop and prepare the LOTO Profile Study (See “Industry Profile Study of a Standard for Control of Hazardous Energy Sources Including Lockout/Tagout Procedures, Final Report, Eastern Research Group, May 1985 (revised 7/31/85).) Throughout this study, which included a technical and economic...
feasibility analysis, ERG interpreted 1910.147(c)(4) to require only “plant-wide, general guidance procedures [emphasis added]” (page 7-68) and, therefore, did not include the costs of developing “machine-specific, detailed LOTO instructions” in its analysis (page 7-69, para. 2). OSHA adopted both ERG’s interpretation of 1910.147(c)(4) and ERG’s cost estimates for compliance with 1910.147(c)(4) in the Regulatory Impact Analysis for the LOTO Standard (See Regulatory Impact and Regulatory Flexibility Analysis of 29 CFR 1910.147 (The Control of Hazardous Energy Sources--Lockout/Tagout), pp. VI-32 and 33).

Office of Management and Budget Approval

Because the LOTO Standard requires a broad portion of the employer community to create, maintain, and report information, this “collection of information” requirement must be submitted to OMB for review and approval under the PRA. Absent a current OMB approval and a valid OMB control number, the requirement for a written procedure is not enforceable.

OSHA and the other Federal agencies submit these requests to OMB in the form of an Information Collection Request (ICR), which is generally approved for an initial period of three or four years and then subject to periodic renewal proceedings every three years. In general, each periodic request to extend the approval for existing paperwork requirements triggers a mini-rulemaking that is designed to address, among other things, the continuing legality and need for the paperwork requirements, the adequacy of OSHA’s burden estimates, whether the requirements are readily understandable, and whether the burden can be further reduced.

While relatively limited in scope and far too rare, the PRA is a true “look-back” statute “with teeth.” It actually requires an agency to review and demonstrate (to OMB) the continuing validity of a portion of its rules. OMB has both the authority and obligation to deny approval of ICRs that fail to satisfy the applicable requirements of the PRA and implementing rules.

The same ERG estimates of burden hours and compliance costs that were explicitly premised on “plant-wide, general guidance procedures” rather than “machine-specific, detailed LOTO instructions,” were incorporated into the initial and all subsequent ICRs submitted by DOL/OSHA to OMB for approval of the Paragraph 1910.147(c)(4) requirements under the PRA through February 28, 2002. (OSHA recently announced that the proposed ICR under which it will be seeking an extension of the existing approval of the information-collection requirements of the LOTO Standard is available for public comment and that comments are due by February 26, 2002. 66 Fed. Reg. 67321-23, December 28, 2001.)

In the initial and subsequent ICRs covering the requirement for a written energy control procedure, OSHA estimated that the total paperwork burden (apparently on average) would be 2.5 hours for a facility that developed and documented its own procedure, and one-half hour for a facility that used the OSHA-developed procedure (in Appendix A of the OSHA standard) and tailored it to the facility’s needs.

On February 2, 1999, after considering the objections raised by at least one major trade association, OMB approved the renewal ICR for the LOTO Standard for a period of three years (See OMB Notice of Action in ICR Docket 1218-0150, dated February 2, 1999). The “Terms of Clearance” for this renewal included several conditions, including the following:
The burden hours for creating machine specific procedures are not included. This is based upon the DOL contention that firms will not be cited if they have generic site procedures rather than machine specific procedures.

It is difficult to reconcile OSHA's current enforcement policy with this condition (See November 3, 1999 letter from Director of Directorate of Compliance Programs, DOL/OSHA, Richard E. Fairfax, to Joseph P. De Vito of Greentree Consulting Inc. The existence of this November 3 letter on the OSHA Web site suggests three possibilities: 1) that the February 2, 1999 OMB Notice of Action was provided to DOL/OSHA but never forwarded to OSHA's Directorate of Compliance Programs;2) that OSHA somehow interprets the referenced Notice of Action to permit the November 3, 1999, interpretation; or 3) that OSHA feels free to ignore the referenced Notice of Action and will continue to do so unless successfully challenged in a future citation contest or ICR renewal.)

**Clearly, some fundamental changes are required in OSHA's rulemaking process.**

As a practical matter, it appears that OSHA's current enforcement position is to cite and fine employers for the failure to develop equipment-specific energy control procedures when OMB's current approval of the ICR for the LOTO Standard was explicitly conditioned on OSHA's representation that it would not issue citations on that basis.

**Enforcement Under 1910.147(c)(4)**

OSHA's enforcement policy, requiring equipment-specific rather than “plant-wide, general guidance procedures,” appears to have been largely upheld by the Occupational Safety and Health Review Commission (Drexel Chemical Co. 17 BNA OSHC 1908 (No. 94-1460, 1997). Additionally, in three cases decided by ALJs, citations involving a lack of machine-specific procedures have been upheld. Two of these cases, Turnbull Metal Products Inc. (No. 96-1463, 1998) and Akzo Nobel Chemicals, Inc. (No. 96-0062, 1998), were decided before the February 1999 OMB Notice of Action, and a third, S.K. Wellman Friction Company (No. 98-0648, 1999), was decided nine months after the February 1999 OMB Notice of Action).

**OSHRC Decisions** In its 1997 decision in Drexel Chemical, the Review Commission held that Drexel's "general procedures are not acceptable . . . [b]ecause the standard requires the lockout procedures for each type of machine to be specifically defined, and because there are different types of machines at the plant."

The Review Commission indicated it believed Drexel's procedure was derived from Appendix A to §1910.147, which is labeled "TYPICAL MINIMAL LOCKOUT PROCEDURE." However, the commission held that Drexel's failure to fill in any of the blanks in the Appendix A form with the plant-specific information, that "Appendix A clearly indicates … must be identified," rendered the procedure ineffective and inadequate.

Although the Appendix is offered as an example of minimal procedures, the final rule clearly states that the Appendix serves “as a non-mandatory guideline to assist employers and employees in complying with . . . this section” and that "[n]othing in the appendix adds to or detracts from any of the requirements of this section.” [emphasis added]. Based on the then-applicable OMB approval and the information that was apparently before it, the decision of the Review Commission in 1997 may have been appropriate. However, given the underlying regulatory analysis, the condition in the 1999 OMB approval, the fundamental breakdown in OSHA's rulemaking process, and the ambiguity in the final rule (including Appendix A) and the preamble to the final rule, the
The commission's reliance on Drexel's failure to comply with the non-mandatory appendix (i.e., to "fill in any of this information" that "Appendix A clearly indicates . . . must be identified") was misplaced.

The commission's interpretation of this requirement cannot be reconciled with the underlying premises of this requirement as stated by OSHA in the LOTO Profile Study and the LOTO RIA. It does not appear that the Review Commission had the benefit of the information contained in either of those documents in reaching its decision.

**OSHA Directive and Interpretation Letters**

In the LOTO Field Directive (STD 1-7.3--29 CFR 1910.147, the Control of Hazardous (Lockout/Tagout)--Inspection Procedures and Interpretive Guidance, 9/11/90), OSHA states:

Similar machines and/or equipment (such as those using the same type and magnitude of energy and the same or similar types of controls) can be covered with a single written procedure.

*Developing the enforcement approach properly would have reduced the potential for uneven enforcement--or the real possibility that some compliance officers will interpret "similar" to mean "identical."*

The ambiguity of this language creates tremendous uncertainty and invites varying and uneven enforcement. More recently, OSHA issued an interpretation letter advising that, as a general principle, "[t]he use of generic energy control procedures alone are unacceptable, since the generic procedures do not meet the provisions set forth in §1910.147(c)(4)(ii)." (November 3, 1999, letter from Director of Directorate of Compliance Programs, DOL/OSHA, Richard E. Fairfax, to Joseph P. De Vito of Greentree Consulting Inc.)

**Conclusion**

In recent years, it has been fairly standard for OSHA to adopt performance-based--and, therefore, inherently ambiguous--rules and then use the enforcement process to interpret them to require substantially more than was fairly contemplated by the regulated community. The provision under discussion presents one of those rare cases where the interpretation is so clearly at odds with the underlying regulatory analysis used to justify the rule that some appropriate remedial action should be required. Clearly, some fundamental changes are required in OSHA's rulemaking process.

Certainly, a persuasive argument can be made that the risk of exposure to unexpected energization should be significantly lower where a facility with a large number and variety of machines and equipment has developed equipment-specific procedures, or category-specific energy control procedures for similar types of equipment, rather than relying on a generic, plant-wide procedure. But that is a conclusion reached outside the regulatory process and apparently assumes the written procedures will be developed without any reallocation of resources away from efforts to control other hazards. The point is that the issue should have been thoroughly examined and clearly resolved during the rulemaking. Instead, we now have the (ANSI) ASC Z244 Committee developing a standard for the Control of Hazardous Energy--Lockout/Tagout and Alternative Methods that apparently adopts the OSHA enforcement position on this issue. (See Section 5.3.1.1 of Draft 14, dated 7/30/01.)
It has been estimated that the effort required to develop and maintain equipment-specific energy control procedures might take 3.5 million man-hours per year. The burden of developing task-specific procedures would be far greater. It has also been suggested that workers may develop an over-reliance on written procedures that interferes with the independent thought process necessary to deal with unanticipated events, outdated procedures, or outdated engineering drawings. Apparently because of these kinds of concerns, some employers have established a general policy of requiring workers to verify the continuing adequacy of the equipment-specific written procedure before implementing it.

Even if OSHA's current enforcement approach were determined to be the appropriate regulatory approach, it should have been developed through the rulemaking process in a way that would have given the regulated community an opportunity to clarify what is meant by the phrase “similar equipment.” This would have reduced the potential for uneven enforcement or the real possibility that some compliance officers will interpret “similar” to mean “identical.”

OSHA should not be permitted to satisfy the rulemaking criteria of Section 6(b) of the OSH Act based on a plant-wide, generic procedure approach and then "do a 180" through the enforcement process. Meanwhile, an employer who has a good generic energy control procedure but is expecting or has received citations for not having an adequate machine-specific procedure should carefully consider challenging OSHA’s basic interpretation of this provision.

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