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## In Case You Haven't Heard: OSHA Proposes New Interpretation of Workplace Noise Standard

On October 19, 2010, the Occupational Safety and Health Administration (OSHA) announced its intention to interpret its workplace noise standards in a new way, labeling the policy it has followed for the past quarter century to be "contrary to the plain meaning of" its standards and as thwarting the safety and health purposes of the Occupational Safety and Health Act (Act). While perhaps superficially innocuous, the proposed new interpretation raises thorny new issues, which may expose employers to costly citations and/or abatement requirements.

Adopted during the first two years after the passage of the Act, OSHA's noise (or Hearing Conservation) standard requires employers to protect employees exposed to high levels of sound. More precisely, the standard requires employers to utilize "feasible administrative or engineering control[s]" when employees are subjected to sound levels exceeding those specified in the OSHA standard. "If such controls fail to reduce sound levels [to levels below those set out in the standard,] personal protective equipment shall be provided to use and reduce sound levels [to compliant levels]." Engineering controls involve modifications to facilities, equipment and processes, such as using quieter machines or processes reducing the sound intensity at the source. Administrative controls include steps taken to reduce an employee's cumulative exposure to high levels of noise, such as rotating employees so that they work in noisy areas for a shorter time. Finally, personal protective equipment (PPE) involves using protectors such as earplugs and earmuffs fitted to individual employees.

Engineering and administrative controls are preferred because they do not rely on the employee to protect herself or himself. PPE is effective only if the employee uses it and uses it correctly. Nevertheless, since at least the early 1980's, OSHA has allowed employers to rely on the use of PPE such as earplugs and earmuffs instead of engineering and administrative controls if the PPE was effective in reducing noise exposures to acceptable levels and was less costly than administrative and engineering controls.

OSHA's proposed interpretation would stop this practice and would require that employers use "feasible" engineering and administrative controls before relying on PPE. The complication arises from OSHA's interpretation of what is feasible. OSHA proposes to interpret the term feasible as "capable of being done," or "achievable." Consistent with its statutory authority for promulgating standards having to do with toxic and hazardous substances, OSHA proposes that administrative and engineering controls will be considered feasible economically so long as the cost will not threaten the employer's ability to stay in business (and provided that the threat to financial viability does not result from the employer's having failed to keep up with industry safety and health developments). More specifically, OSHA announced its intention to issue citations to require the use of administrative or engineering controls when such controls are "capable of being done."

Although OSHA posits that its new approach does nothing more than to apply the plain language of the standard and end an enforcement policy that "thwarts" safety, the proposal offers no empirical data to support its need. The concept of preferring engineering and administrative controls over PPE within the hands of potentially less reliable workers is sensical. OSHA has not, however, proffered any safety-based statistics that would justify the need for such a policy change. Indeed, although OSHA castigates its historic approach as a "least-cost" approach rather than a "benefit-cost" approach, it makes no effort in its proposal to quantify any anticipated benefits of its new approach. The absence of such data suggesting that OSHA's historic policy is not effective speaks loudly. In other words, OSHA does not appear to be contending that workers are actually suffering any hearing loss as a result of its long-standing policy, even though it insists a change is needed so as not to "thwart" safety.

This is not a theoretical point. For example, the standard requires that employees be protected from noise levels that exceed an eight-hour time-weighted average of 90 decibels. Imagine a workplace in which one employee was exposed to sound levels of 91 or 92 decibels. Although PPE, used correctly, could reduce the employee's exposure to noise to less than 90 decibels, under OSHA's proposal, the employer would be required to implement feasible administrative or engineering controls (although, in this example, administrative controls would likely lead to exposing two employees to the noise instead of one). If the employee's time in the noisy area cannot be reduced, the employer would potentially be required to spend as much money as it could afford to reduce that noise level at least two decibels.

While not suggesting that safety is or should be subject to a strict cost-benefit analysis, in the absence of data

that OSHA's current policy is ineffective at protecting workers, one may question whether its new policy will lead to improved safety or simply a misallocation of resources. There are other possible criticisms: Large employers can be expected to be required to spend more than smaller employers with fewer resources. Will this lead to different levels of - or less effective - protection? The goal is, and should be, to ensure that workers do not suffer adverse health effects. OSHA's proposal potentially imposes a ritualistic application of a hierarchical rule that loses sight of this goal.

Moreover, because these considerations will, at first blush, be made by compliance officers who may not have extensive training in financial matters, employers can expect that they may be issued citations and forced to litigate the issue of feasibility – even if no employee has suffered any adverse effects from the noise because his or her exposure is otherwise effectively attenuated through an effective hearing conservation program that uses personal protective equipment. The bottom line is that employers should be prepared for new and potentially noisome citations.

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