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OSHA — WHAT’S NEW AT A “TWENTY-SOMETHING” AGENCY: WORKPLACE ENVIRONMENTAL HAZARDS

by JoAnne Levy

In recent years, predictions have been rampant regarding a resurgence of occupational safety and health issues and a strengthening of the Occupational Safety and Health Administration (OSHA). Since 1991, which represented the twentieth anniversary of the Occupational Safety and Health Act (OSH Act), these predictions have certainly proven to be accurate. OSH Act reform has been hotly contested in Congress; new regulations have been issued by OSHA; and older regulations have been further interpreted by OSHA and the courts.

Furthermore, the overlap between matters within the jurisdictions of OSHA and the Environmental Protection Agency (EPA) continues to grow. Occasionally, in areas such as indoor air pollution, the proper allocation of jurisdiction between OSHA and EPA has become part of the substantive debate in the area. This article is designed to provide an overview of some of today’s “hot topics” in the area of occupational safety and health law.

I. OSHA ADMINISTRATION

For some time now, OSHA has been without a head, with David Zeigler serving as the Acting OSHA Administrator. Effective April 1, 1993, however, the U.S. Department of Labor hired Joe Dear, the former director of the Washington Department of Labor and Industries, as a consultant to OSHA. On July 1, Dear was formally nominated for the position of administrator of OSHA. Dear’s managerial experience and working knowledge of OSHA requirements (Washington being one of only a few states with an approved state OSHA plan) supported his nomination. On November 10, Dear’s nomination was approved by the full Senate.

In the meantime, senior OSHA staff members have been preparing a briefing paper for Labor Secretary Robert Reich on OSHA operations. The briefing paper, which is still in draft form, is designed both to raise Reich’s awareness of the challenges facing OSHA and to offer suggestions for improvements.

II. OSH ACT REFORM

In August 1992, the Comprehensive OSH Reform Act was introduced simultaneously in the House and Senate. Inspired in part by the tragic fire in Hamlet, North Carolina, in September 1991, this legislation was introduced at a time designed to coincide with the twentieth anniversary of the original OSH Act. Described as organized labor’s “wish list,” the legislation faced vehement opposition from both the Bush administration and the business community. Eventually, in both the House and Senate, the legislation failed to reach the floor after committee approval.


On March 10, 1993, a new version of the Comprehensive OSH Reform Act was introduced by Rep. Ford (D-Mich.), the chair of the House Education and Labor Committee. In general, the legislation contains the following provisions:

- All employers would have to develop and implement workplace safety and health programs.
- Employers with eleven or more employees would have to establish joint labor-management safety and health committees.
- Minimum $1000 civil penalties would be established for serious safety and health violations.
- Criminal sanctions under the OSH Act would be stiffened.
- The scope of the OSH Act would be broadened to include approximately 7.3
millions of state and local government employees.¹⁸

- Specific provisions addressing safety and health issues in the construction industry are included.¹⁹

- The Supreme Court’s ruling in *Gade v. National Solid Waste Management Ass’n*,²⁰ on states’ safety and health licensing abilities would be reversed.²¹

- The Eleventh Circuit’s ruling in *AFL-CIO v. OSHA*,²² on air contaminant exposure limits would effectively be reversed.²³

- A revolving fund for consultation and technical assistance programs would be established with expectations that it would raise approximately $40 million for OSHA.²⁴

On August 6, House Republicans introduced alternative legislation, known as the Occupational Safety and Health Reform Act.²⁵ In contrast to the Democratic-sponsored bill, H.R. 2937 emphasizes OSHA’s role as a technical assistant to businesses rather than as an enforcement entity. Specifically, H.R. 2937 would, among other things:

- Expand OSHA’s consultation and training program for employers;²⁶

- Provide incentives and rewards (mostly in the form of exemptions from inspections) for reductions in workplace hazards;²⁷

- Provide for flexibility in OSHA’s decisions regarding health and safety standards;²⁸

- Extend coverage of the OSH Act to federal employees²⁹ and delay coverage of state and local employees pending a study of the costs associated with such coverage;³⁰

- Reduce maximum penalties under the OSH Act from $70,000 to $7000 but retain OSHA’s egregious case policy;³¹ and

- Require OSHA to promulgate employee drug and alcohol testing standards.³²

Supporters of the OSH Act reform legislation describe it as based upon the concepts of employee empowerment and a workplace approach to safety and health.³³ Organized labor, in particular, has strongly supported the bills, especially the joint safety and health committees, which is interesting because labor groups historically have insisted on the necessity for worker-only committees.³⁴ Management groups generally oppose the legislation, especially the mandatory joint committees, arguing that employers need more flexibility in handling safety and health issues in the workplace.³⁵

The Clinton administration has not specifically endorsed the OSH Reform Act legislation. Labor Secretary Reich, whose appointment was generally favored by organized labor, has announced the administration’s general support of legislative efforts to improve worker safety and health. Reich also announced the administration’s plans to establish a task force to review the proposed legislation and to develop recommendations.³⁶

Reaction has been guarded from former OSHA officials. Three former OSHA heads — Thorne Auchter, John Pendergrass and Gerard Scannell — have urged that OSH Act reform be dealt with at an administrative, rather than legislative, level.³⁷ Nonetheless, they predict that OSH Act reform legislation likely will pass, but probably not until 1994.

### III. REGULATORY ACTIVITIES

#### A) Bloodborne Pathogens

On December 6, 1991, OSHA promulgated its long-awaited regulation on bloodborne pathogens.³⁸ The standard is intended to protect employees who have

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²² 955 F.2d 962 (11th Cir. 1992).


²⁴ § 701.

²⁵ H.R. 2937, 103d Cong., 1st Sess. (1993), the bill is sponsored by Rep. Goodling (R-Pa.) and Rep. Fawell (R-Ill.) and is pending before the House Education and Labor Committee. In the Senate, Sen. Kennedy (D-Mass.), who chairs the Labor and Human Resources Committee, and Sen. Metzenbaum (D-Ohio), who chairs the Labor and Human Resources Committee’s Subcommittee on Labor, introduced the Senate version of H.R. 1280, known as S. 575, 103d Cong., 1st Sess. (1993) on March 11, 1993. Most of the provisions in H.R. 1280 are included in Senate Bill 575, which is currently pending before the Senate Labor and Human Resources Committee.


²⁷ § 7.

²⁸ §§ 3(a)(E).

²⁹ § 28(a).

³⁰ § 11(a).

³¹ § 12(e).

³² § 15.


³⁶ A position paper on OSHA reform is due from the task force to Reich this fall. Labor Department Panel to Send Report on OSH Act Reform to Reich in September, 158 D.L.R. (BNA) D-11 (Aug. 18, 1993).


The standard, which became effective July 6, 1992, effects approximately 5.6 million workers and has generated concern from both employees and employers as to which workers are covered and what employers need to do to comply with the rule.

All employees who are exposed to blood and potentially infectious materials (such as saliva, amniotic fluid, human tissues, etc.) are covered by the standard. Employers with covered employees had to establish Exposure Control Plans by May 5, 1992. These Exposure Control Plans must include an exposure determination, an explanation of how compliance with the OSHA regulation will be achieved, and procedures for investigating exposures.

The regulation also requires use of "universal precautions" (treatment of all blood and other potentially infectious materials as contaminated). Engineering and work practice controls must also be used to eliminate or at least to minimize occupational exposures. If the occupational exposure cannot be eliminated, then personal protective equipment (gloves and masks, etc.) must be provided at no cost to the employee. As of July 6, 1992, a hepatitis B vaccination must also be made available at no cost to, covered employees.

General hygiene and labeling and disposal procedures are also required in the bloodborne pathogens rule. Employee information and training was required as of June 4, 1992, and at least annually thereafter. Also, beginning this past June, training and medical records must be maintained. Training records must be kept for three years from the date of training while medical records must be kept, in a confidential manner, for 30 years after the employee's term of employment ends.

In March 1992, OSHA issued an instruction on uniform inspection procedures for the bloodborne pathogens rule. Some observers have predicted that the rule and its 71-page instruction will result in much enforcement, especially in the health care industry. Currently, OSHA conducts about 350 inspections yearly at sites where employees are exposed to infectious materials.

Since issuance of the final bloodborne pathogens rule, various groups have challenged its implementation. The American Dental Association (ADA) and the Home Health Services and Staffing Association, Inc. (HHSSA), for example, sought a stay of the rule. The ADA argued that the rule is invalid because in determining the feasibility of the standard, OSHA did not take into account the effect on sufficient and affordable dental care to the public. HHSSA argued that the rule was vague as to workplaces where the health care employer does not control the site, such as with in-home services. On January 28, 1993, the Seventh Circuit Court of Appeals generally upheld the rule but acknowledged that the rule is not necessarily a good standard. In particular, the Seventh Circuit vacated the rule as it applies to sites not controlled by the employer.

In late July 1992, the House Appropriations Committee directed OSHA to reexamine the rule to determine whether changes are necessary in the provisions affecting dentistry. OSHA is still in the process of that reexamination.

On a related note, organized labor has indicated an intent to focus on the issue of tuberculosis (TB) among health care workers. The Service Employees International Union (SEIU) petitioned OSHA to issue a standard on ventilation systems, isolation rooms, screening procedures for TB patients, and surveillance programs for health care workers at risk for exposure.

In August, the Labor Coalition to Fight TB in the Workplace, representing over nine million workers, petitioned Labor Secretary Robert Reich to issue an emergency temporary standard (ETS) on TB, to initiate rulemaking, and to publish enforcement guidelines. On October 8, Reich indicated that no ETS would be issued, but an enforcement memorandum has been issued to OSHA regional offices and a TB task force established. The enforcement memorandum...
details use of both the OSH Act's general duty clause and OSHA regulations on respiratory protection to cite employers in five settings: health care, correctional institutions, homeless shelters, long-term elderly care facilities, and drug treatment centers.61

On October 12, the Center for Disease Control published draft guidelines on the protection of health care workers from TB.62 Comments are due December 13. The guidelines describe administrative measures, engineering controls, and personal respiratory protective equipment.63

In Congress on May 12, 1993, Rep. Schumer (D-N.Y.) introduced the Tuberculosis Prevention and Control Amendments of 1993.64 This legislation would authorize $380 million for TB programs under the Centers for Disease Control. An additional $250 million would be authorized to improve hospitals and health care centers. The legislation is currently pending before the House Energy and Commerce Committee.

B) Cumulative Trauma Disorders

Business and industry are currently seeing a growth of cumulative trauma disorders (CTDs) — injuries caused by repetitive motion.65 According to the Bureau of Labor Statistics, CTDs accounted for 52% of all occupational illnesses in 1989.66 The Bureau of Labor Statistics reports that since 1984, the number of CTDs have more than tripled.67 Of these disorders, carpal tunnel syndrome has attracted the most attention, although back injuries are still the most frequent of the CTDs.68

In an attempt to reduce CTDs in the workplace, OSHA sent a draft notice to ergonomics experts in June 1991, seeking their input before OSHA issued an advance notice of proposed rulemaking for a standard to prevent such disorders in general industry. The advance notice was issued in August 1992.70 The advance notice will allow OSHA to gather information from industry on what is the state of the art in ergonomics,71 before it develops a proposed rule on CTDs.

In April 1993, OSHA also began a nationwide survey of employers regarding their ergonomic programs. As of July, approximately 1500 companies had responded to the survey.72 A report on the survey results is due out by year-end.

Based on ergonomic guidelines issued by OSHA for the red meat industry in August 1990, a good ergonomic program will likely include four components: work site analysis, hazard prevention through engineering and administrative controls, medical monitoring, and training and education.73

On July 1, 1991, an industry consulting group sent a document to OSHA which outlined a recommended standard for controlling CTDs.74 The recommended standard calls for identifying, evaluating and managing CTDs. Under the recommendations, employers should examine their illness and injury records, workers' compensation records and employee complaints to determine if their employees are suffering from a higher rate of CTDs than other populations.75 If so, the employer should develop a written program, which includes management's commitment and employee involvement in assessing job hazards, training and informing employees, and instituting and implementing a medical management plan.76

Other comments received by OSHA focused on the interplay of a CTD standard with the Americans with Disabilities Act and workers' compensation laws. In the meantime, voluntary guidelines are also being developed by ergonomics groups formed by other industries, such as food distribution, nursing homes and postal workers, in cooperation with OSHA.77 The American National Standards Institute (ANSI) is also developing a voluntary standard on reducing CTDs in the workplace.78

On April 20, 1992, then-Labor Secretary Lynn Martin denied a petition from 31 unions led by the United Food and Commercial Workers calling for OSHA to issue an emergency temporary standard (ETS) on ergonomic hazards.79 Martin cited insufficient definitive data indicating a grave enough danger to warrant an ETS.80 Nevertheless, preventing CTDs likely will remain an OSHA priority for some time.

Because the rulemaking process is so slow, OSHA had been using the OSH Act's "general duty" clause to reach employers who expose their workers to ergonomic
hazards. On March 26, 1993, however, an administrative law judge (ALJ) ruled that OSHA cannot use the general duty clause to force abatement of repetitive stress hazards. In June, OSHA announced that despite the decision, it would continue its policies and procedures with respect to ergonomic hazards (including citations under the general duty clause). In September, in response to Labor Secretary Reich's petition, the OSH Review Commission agreed to review the ALJ's decision.

In fact, OSHA recently announced several large settlements involving ergonomic hazards. Both Crane & Co., Inc. and ConAgra Poultry Co. agreed to corporate-wide settlements, each involving approximately $500,000. Crane, a paper manufacturer, has agreed to a five-year program to reduce or eliminate ergonomic hazards at eleven of its facilities nationwide, which will affect 1200 workers. In July 1990, Crane was charged with 52 willful OSHA Act violations and faced proposed fines totaling $156,400. In exchange for OSHA's dropping the "willful" characterization of the violations, Crane will pay a $125,120 fine and begin an ergonomics program.

ConAgra was cited in June 1989 with 250 safety and health violations, facing total proposed penalties of $1 million. The settlement requires ConAgra to pay a $425,000 penalty and initiate a four-year ergonomics program at 21 plants, involving about 16,000 employees.

Both companies will hire consultants to perform ergonomic analyses and to recommend hazard abatement methods. Training and medical management must be provided to employees, and strict recordkeeping and reporting requirements also apply.

At the state level, California's Division of Occupational Safety and Health is circulating a draft ergonomic standard which would require all California employers to provide training to employees on CTD risks. The standard would also require employers to implement administrative and engineering controls to eliminate or reduce risks in a timely fashion according to the severity of the hazard.

C) Video Display Terminals

Video display terminals (VDTs) pose two types of hazard concerns: health hazards and ergonomics hazards. Several studies regarding VDT use during pregnancy have culminated in inconclusive results. A recent study performed by the California Department of Health Services indicated no significant connection between VDT use during pregnancy and miscarriage, low birth weight or premature delivery. The study did reveal an elevated risk for intrauterine growth retardation for heavy (more than 20 hours per week) VDT use. A study published in August 1991 in the American Industrial Hygiene Association Journal, "[Hazard Assessment Study]" found no evidence of worker exposure to electric and magnetic fields significantly above ambient levels. This study examined 1,166 workers in clerical positions at a company in Canada. More study is necessary before OSHA will act upon the health risks allegedly posed by VDTs.

Many studies, including the Hazard Assessment Study, however, have shown a clear correlation between VDT use and CTDs or other ergonomic discomforts. The Hazard Assessment Study indicated VDT users had a "significantly higher incidence of excessive discomfort" than non-users for eye-strain, blurred vision and neck/shoulder aches. These discomforts were linked to the time spent looking at the VDT, to pressure to meet deadlines, and to repetitive work. As an ergonomic hazard, VDT use likely will be addressed by OSHA in its general industry ergonomic standards presently being developed.

On April 2, 1993, Rep. Byrne (D-Va.) introduced the Electromagnetic Labeling Act of 1993. The legislation would require manufacturers to provide information on the strength of electromagnetic fields emitted by products such as VDTs. Although the bill is described primarily as a consumer safety measure, it would also protect workers. The bill is currently pending before the House Energy and Commerce Committee.

Some states and municipalities have developed legislation on VDT use. The most controversial ordinance was San Francisco's VDT ordinance, which required work breaks...
and ergonomic equipment for VDT operators in San Francisco.\textsuperscript{100} The ordinance as it applied to private employers was struck down by a California state court in 1992, on the theory that it was preempted by the California OSH Act of 1973.\textsuperscript{101} The ruling was affirmed on appeal on August 5, 1993.\textsuperscript{102}

Proposed legislation in Washington state calls for the promulgation of health and safety standards on safeguards and practices to be followed by employers to protect employees using VDTs.\textsuperscript{103} Other governments, such as Contra Costa County in California, have issued voluntary guidelines for VDT use, which include ergonomically designed work stations, work breaks, annual vision inspections and operator training.\textsuperscript{104} On July 3, 1991, the California Assembly approved a VDT measure that requires existing equipment to be upgraded by 1995 and new equipment (purchased after July 1, 1993) to meet ergonomic standards adopted by ANSI.\textsuperscript{105}

**D) Formaldehyde Exposure Limits**

Formaldehyde once again has become an important issue for OSHA. On May 27, 1992, the agency finally published\textsuperscript{106} revisions to the previous formaldehyde rule published in December 1987.\textsuperscript{107} OSHA had been sued by the Auto Workers, which argued that OSHA had insufficiently explained its finding that formaldehyde presented no significant risk at a 1 ppm permissible exposure limit (PEL) and that OSHA had failed to include medical removal protection.\textsuperscript{108} In response to a remand order issued by the court, OSHA, on July 15, 1991, issued a draft proposal to lower the PEL from 1 ppm to 0.75 ppm,\textsuperscript{109} implement medical removal protection for workers\textsuperscript{110} and alter the rule’s hazard communication requirements by expanding a one-time worker training requirement to an annual training requirement.\textsuperscript{111} The Office of Management and Budget on June 11, 1991, reversed its earlier rejection of the draft proposal.\textsuperscript{112}

The American Conference of Government Industrial Hygienists recommended the adoption of a stricter exposure limit, eliminating the PEL and short term exposure limits and replacing them with a threshold limit value (TLV) that no exposure should exceed 0.3 ppm.\textsuperscript{113} Although TLV is a recommended limit and does not have the weight of a regulatory standard, TLVs have often formed the basis for regulatory standards.

With a few exceptions, the latest revisions to the OSHA formaldehyde standard are generally unchanged from the July 26, 1991, draft proposal. The revised standard took effect June 26, 1992, although all of the new requirements carried compliance dates at least three months later than that.\textsuperscript{114} For example, employers were required to offer respiratory protection to workers to meet the new exposure limit as soon as possible but no later than September 24, 1992.\textsuperscript{115} Employers were required to have engineering and work practice controls in place by June 26, 1993.\textsuperscript{116}

Besides reducing the exposure limit to 0.75 ppm, OSHA’s revisions will accomplish the following:

- Require employers to implement medical removal programs for employees who suffer adverse health effects from formaldehyde.\textsuperscript{117} This provision must have been in place by December 28, 1992;\textsuperscript{118}

- Enact specific labeling requirements for all forms of formaldehyde composed of 0.1 percent formaldehyde or greater and for materials capable of releasing formaldehyde in excess of 0.1 ppm.\textsuperscript{119} Until the December 28, 1992, deadline for these new labeling requirements, OSHA’s general hazard communication standard was applicable;\textsuperscript{120}

- Establish additional labeling requirements for situations in which formaldehyde levels may exceed 0.5 ppm.\textsuperscript{121} The December 28 deadline also applied to these requirements;\textsuperscript{122} and

- Implement annual training for all workers exposed to formaldehyde concentrations of 0.1 ppm or greater.\textsuperscript{123} This periodic training must have begun no later than August 25, 1992.\textsuperscript{124}
E) Process Safety

Chemical process safety has been on OSHA’s agenda for some time. Several major petrochemical accidents focused public attention on the issue in early 1991 and, in May 1991 at a hearing on a Louisiana chemical plant accident, Rep. Tom Lantos (D-Cal.) publicly criticized OSHA for not preventing such accidents.125

In fact, in July 1990, OSHA had issued an Advance Notice of Proposed Rulemaking on process safety management procedures to protect employees from accidents involving highly hazardous chemicals.126 Pursuant to the 1990 amendments to the Clean Air Act, the rule was to be published by November 15, 1991. But, in September 1991, OSHA reopened the public record on the rule to allow comments on an 18-month John Gray Institute study on contractor safety in the petrochemical industry.127 The study had been requested by OSHA following several petrochemical explosions, including an October 1989 fire in Pasadena, Texas, which killed 23 workers and injured over 100.128 The study recommended increased training of contractors and employees.129

On February 24, 1992, OSHA issued its final process safety rule.130 OSHA expects the rule, parts of which took effect May 25, 1992, will prevent 264 deaths and 1534 injuries annually.131

The rule primarily affects petrochemical and chemical companies, natural gas manufacturers, and industries that transport or mix chemicals. A list of about 130 chemicals and their threshold levels is included in the rule; flammable liquids and gases in amounts equal to or greater than 10,000 pounds are also covered.132 Covered facilities that are over the threshold level of a listed chemical must comply with the rule.133 The rule requires those facilities to perform process hazard analyses (with deadlines phased in over five years, and a first deadline of May 1994)134 and to take actions to prevent chemical releases or explosions.135 Written operating and safety procedures must be prepared.136

Extensive employee training is required on health and safety hazards, emergency operations, and safe work practices.137 Initial training and refresher training, at least every three years, must be provided.138 Contractors must train their workers to insure the safety of their workers and the site owner’s workers.139 Recordkeeping of all training and injuries and illnesses is required.140

Four provisions of the rule were delayed until August 26, 1992, in response to industry requests for additional time to comply.141 On August 25, OSHA lifted its stay.142 The stayed provisions included those on operating procedures, contractor training, mechanical equipment integrity, and management of process change.143 OSHA determined, however, that no stay was warranted for the provisions pertaining to employee participation, pre-startup safety review, and emergency planning and response.144

Various groups, including the Chemical Manufacturers Association, the American Petroleum Institute, and the United Steelworkers, filed court petitions challenging the rule in general and the effective date of the standard in particular.145

In September 1992 (after the effective date of the rule, which caused some concern among the regulated community), OSHA issued a compliance directive on enforcement of the process safety rule.146 In addition to the compliance directive, further clarification of the rule arose from a settlement reached between the United Steelworkers and OSHA in April 1993.147

Under the terms of the settlement, the rule will be applied to all contractor activities involving process safety. Both the primary employer and the general contractor will be responsible for informing subcontractors of hazards and for ensuring compliance with this rule.148 A primary employer must consult not only with its own employees, but also with its contract employees, with respect to the process safety hazard analyses required by the rule.149 The clarifications contained in

128 Id.
129 Id.
131 Steelworkers’ Court Challenge Faults Effectiveness of Newly Issued OSHA Rule, 44 D.L.R. (BNA) A-5 (March 5, 1992).
133 § 1910.119(a)(1)(i).
134 § 1910.119(c).
135 § 1910.119(c)(iv).
137 § 1910.119(f).
138 § 1910.119(g).
139 § 1910.119(h)(2).
141 § 1910.119(g)(3) and § 1910.119(h)(2)(vi).
144 Id.
147 OSHA Instruction CPL 2-2.45A (1992). The directive was issued by an internal task force set up by OSHA specifically to address process safety. Since May 1992, OSHA has conducted 72 process safety management inspections, resulting in over 220 proposed citations. See Most Inspections Triggered by Complaints, Referrals, and Fatalities, OSHA Official Says, 23 O.S.H. Rep. (BNA) 518 (Oct. 13, 1993).
148 United Steelworkers v. OSHA, No. 92-3106 (3d Cir. filed March 2, 1993).
150 Id.
the settlement will be incorporated into a revised OSHA Instruction CPL 2-2.45A, which should be issued soon.151

EPA recently issued a proposed chemical safety standard.152 The proposed standard is similar, but not identical, to OSHA's rule. EPA's rule would affect companies that produce, process, handle or store any listed substance above certain threshold levels, but the substances listed by EPA differ from those listed by OSHA.153 EPA's rule would be promulgated pursuant to congressional directions to both EPA and OSHA, with EPA to focus on releases to air and OSHA to focus on workplace issues. The two agencies have been working together to coordinate their respective rules.

F) Workplace Smoking and Indoor Air Pollution

Another issue attracting a lot of attention is workplace smoking. In 1992, the Office of Disease Prevention and Health Promotion, an agency of the Department of Health and Human Services, conducted a study of 1507 work sites with 50 or more employees.154 About 59% of the employers had a formal smoking policy (up from 27% in 1985).155 Approximately 34% of the sites had a total smoking ban while 25% of the sites allowed smoking in a separately ventilated area.156 Companies cited health concerns and employee complaints as the driving forces behind smoking policies.157 Also, several recent surveys reveal that one to four percent of companies refuse to hire smokers.158 Typical discipline policies for violations of smoking restrictions include oral warnings, written warnings, suspension, enrollment in stop-smoking programs, and, after repeated violations, termination.159

According to State Legislated Actions on Tobacco Smoke, a report issued in May 1993 by the Coalition on Smoking and Health, 45 states and the District of Columbia place restrictions on smoking in public places, as of the end of 1992.160 Of those governments, 41 states and D.C. include public workplaces among public places and 19 states and D.C. place restrictions on private workplaces.161

On June 25, 1990, the EPA issued a draft risk assessment report identifying secondhand smoke as a carcinogen.162 In May 1991, EPA issued another draft report that concluded secondhand smoke kills 53,000 non-smokers annually and is a leading contributor to indoor air pollution.163 A final report on this subject, entitled Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders, was released by EPA in January 1993 and classified secondhand smoke as a known carcinogen.164 In June 1993, the report was challenged by a group of tobacco growers and cigarette manufacturers who filed a federal lawsuit seeking to overturn the report.165

In a July 1991 bulletin, the National Institute of Occupational Safety and Health (NIOSH) stated that secondhand tobacco smoke causes cancer and heart disease in non-smokers and should be eliminated from the workplace whenever possible.166 If smoking is permitted, NIOSH suggested that it be limited to separate enclosed areas that are labeled and ventilated to the outside.167 Similarly, EPA's draft report, Environmental Tobacco Smoke: A Guide to Workplace Smoking Policies, issued in 1990, recommended that employers eliminate or reduce employee exposure to environmental tobacco smoke in workplaces.168 The final report is due to be issued this fall and the recommendation on employers' actions reportedly will not significantly change.

In September 1991, OSHA published a request for information on indoor air quality, including specific questions on tobacco smoke in the workplace.169 Of the approximately 1200 responses, totaling 17,000 pages, to the request for information received by OSHA, approximately 70% of the comments favored some form of regulation.170 OSHA is currently in the process of drafting an options paper on the potential health hazards posed by poor indoor air and environmental tobacco smoke.171 Two approaches are reportedly under consideration: (I) issuance of a broad rule dealing with

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155 Id.
156 Id.
158 See e.g., Id.
159 Id.
161 Id.
167 Id.
168 See Id.
169 56 Fed. Reg. 47,892 (1991). No dates have been established yet for issuance of proposed or final rules.
numerous air contaminants and ventilation standards, and (2) issuance of a narrow rule focused on environmental tobacco smoke.\textsuperscript{172}

In the meantime, OSHA will be conducting two studies to research the link between workplace tobacco smoke and increased lung cancer and heart disease.\textsuperscript{173} The studies are due to be completed by February 1994 and September 1994.

In court actions, a national anti-smoking public interest group, the Action on Smoking and Health (ASH), has sued the U.S. Department of Labor several times, attacking OSHA’s refusal to issue an emergency temporary standard to ban or limit workplace smoking.\textsuperscript{174} ASH has urged the court to encourage or force OSHA to ban smoke in the workplace.\textsuperscript{175} The courts so far have rejected ASH’s petitions to review OSHA’s decision not to issue an emergency temporary standard banning smoking in the workplace and have said that OSHA’s decision was reasonable because the risk associated with workplace smoke could not be quantified.\textsuperscript{176}

In December 1992, however, ASH renewed its petitions against OSHA, attempting to prompt OSHA to regulate environmental tobacco smoke and to ban workplace smoking.\textsuperscript{177} Two prior petitions filed by ASH were rejected by OSHA in light of the agency’s review of comments responding to the September 1991 Request for Information on indoor air quality.\textsuperscript{178} In response to ASH’s December 1992 petition, OSHA pointed to its on-going review of comments as well as its work on an options paper; nonetheless, the D.C. Court of Appeals on May 10 denied OSHA’s motion to dismiss ASH’s petition.\textsuperscript{179} ASH also filed a similar petition in July 1993, seeking an emergency temporary standard to protect workers from environmental tobacco smoke.\textsuperscript{180}

There continues to be increasing public pressure to take action regulating environmental tobacco smoke. In December 1992, a coalition of public health groups (including the American Heart Association, the American Lung Association, and the American Cancer Society) urged then-President-elect Clinton to place a high priority on anti-smoking policies.\textsuperscript{181} In February 1993, another public interest group, Public Citizen, urged OSHA to issue an emergency standard to protect workers from environmental tobacco smoke.\textsuperscript{182} In March, organized labor petitioned OSHA to issue an indoor air quality rule “promptly.”\textsuperscript{183} The petition stated that indoor air pollution affects 30 to 70 million building occupants and annually costs tens of billions of dollars in lost work time, medical expenses and decreased productivity.\textsuperscript{184} The unions’ petition argued for a “building systems” approach that would review ventilation systems and investigate specific contaminants.\textsuperscript{185}

The Indoor Air Act of 1993\textsuperscript{186} was introduced into the House on by Rep. Joseph Kennedy (D-Mass.).\textsuperscript{187} The House bill would direct EPA to develop a list of indoor air contaminants and also would require the Consumer Product Safety Commission to develop test methods for identifying respiratory irritants.\textsuperscript{188}

Senator Mitchell’s bill (which is more likely to pass the full Congress) requires OSHA to research on the health effects of indoor air contaminants and issue health bulletins/advisories, as appropriate; determine the effectiveness of existing ventilation standards and the costs and benefits of compliance with those standards; and assess the benefits of increasing air ventilation rates.\textsuperscript{189} The legislation would authorize total funding of $48.5 million annually.\textsuperscript{190}

G) Asbestos

For some time now, OSHA has been considering revisions to its current air contaminants standards on asbestos.\textsuperscript{191} One controversial area involves possible requirements for private building owners or other employers to inspect commercial buildings for asbestos and to evaluate potential worker exposure to asbestos.\textsuperscript{192}

The Service Employees International Union (SEIU) has been pushing EPA to promulgate such an inspection rule.\textsuperscript{193} A September 1991 report, Health Effects

\begin{itemize}
\item[175] Id.
\item[177] Action on Smoking and Health v. Dep’t of Labor, No. 92-1661 (D.C. Cir. filed Dec. 22, 1992).
\item[184] Id.
\item[185] Id.
\item[190] § 16.
\item[193] Id.
\end{itemize}
Institute - Asbestos Research focused the concern especially on building custodians and other maintenance personnel. 194

EPA and OSHA have agreed to work together on new asbestos rules, with OSHA to take the lead and EPA to follow. 195 In July 1990, OSHA proposed amendments to its asbestos regulations. 196 The amendments include lowering the permissible exposure limit; requiring communication of asbestos hazards to building owners, employers and employees; and defining the exemptions to the negative pressure enclosure requirement. 197

In November 1992, OSHA reopened the comment period on its worker protection rule to consider whether to require commercial buildings to be inspected for asbestos-containing materials (ACM). 198 Other options being evaluated include training maintenance workers on how to handle suspect ACM, requiring building owners to sample all suspect ACM, and developing building records on suspect ACM that would not require owners to sample all materials. 199

As part of the November 1992 notice, OSHA sought comments on an alternative to general building inspections. 200 The alternative would require that thermal insulation and any sprayed-on or troweled-on surfacing materials in buildings built between 1920 and 1980 be treated as asbestos-containing, unless proven otherwise. 201 This alternative has become known as the "presumed asbestos-containing materials" approach.

In response to the November notice, the AFL-CIO has urged Labor Secretary Reich to issue a final rule on asbestos quickly. 202 NIOSH has submitted comments to OSHA, seeking to broaden the scope of the final rule.203 Specifically, NIOSH has recommended that the presumed asbestos-containing materials approach cover vinyl asbestos floor tile and transite ceiling tile. 204 Several industry groups have endorsed the alternative, but also have urged expansion of the list of presumed asbestos-containing materials and deletion of the pre-1920 exemption. 205 Several labor organizations continue to urge OSHA to adopt a comprehensive building inspection requirement. 206

In light of the reopening of the comment period, OSHA plans to issue a final rule soon. EPA's rule is expected to follow, probably in mid-1994. 207

H) Exposure Limits

- Glycol Ethers

On March 23, 1993, OSHA published a proposed rule that would reduce by up to 99% the workplace exposure limits for four industrial solvents due to reproductive hazards: 208

<table>
<thead>
<tr>
<th>Solvent</th>
<th>Eight-hour limits</th>
</tr>
</thead>
<tbody>
<tr>
<td>2-Methoxyethanol</td>
<td>25 ppm to 0.1 ppm</td>
</tr>
<tr>
<td>2-Methoxyethanol acetate</td>
<td>25 ppm to 0.1 ppm</td>
</tr>
<tr>
<td>2-Ethoxyethanol</td>
<td>200 ppm to 0.5 ppm</td>
</tr>
<tr>
<td>2-Ethoxyethanol acetate</td>
<td>100 ppm to 0.5 ppm</td>
</tr>
</tbody>
</table>

The rule also includes provisions on monitoring, medical surveillance, training, personal protective equipment, recordkeeping, and emergency response. 209 The proposed rule would affect approximately 46,000 employees in 10,000 workplaces. The cost to employers would be $31 million initially and $7 million annually. 210

- Air Contaminants

Following the Eleventh Circuit Court of Appeals ruling in AFL-CIO v. OSHA,211 striking down the 1989 air contaminant exposure limits, and the Clinton administration's decision not to appeal the ruling, 212 OSHA has announced that it will enforce the exposure limits in effect before 1989. 213 Some of these exposure limits date back to 1971. On August 5, 1993, OSHA issued guidance to its field offices, affirming its policy of citing employers under the general duty clause for air contaminant violations. 214


204 Id.

205 Id.


210 OSHA Proposes New Exposure Limits for Substances Based on Reproductive Hazards, 22 O.S.H. Rep. (BNA) 1755 (March 24, 1993).

211 965 F.2d 962 (11th Cir. 1992).


213 The exposure limits to be enforced are those found in the "Transitional Limits" columns of Tables 2-1-A, 2-2 and 2-3 in 29 C.F.R. § 1910.1000 (1993); see OSHA to Publish Revised Exposure Limits, 123 D.L.R. (BNA) D-19 (June 29, 1993).

In Congress, House Resolution 2919 would require EPA to promulgate guidelines for the identification and elimination of air contaminants. The bill would also require EPA to establish a certification program for indoor air consultants. No hearings have yet been held on H.R. 2919.

- Lead
On May 4, 1993, OSHA published an interim rule to protect more than 900,000 construction workers who are exposed to lead. The rule reduces the eight-hour time-weighted average permissible exposure limit from 200 micrograms per cubic meter to 50. It also establishes an action level of 30 micrograms per cubic meter. The rule became effective on June 3, 1993, and will remain in effect until a permanent standard is developed.

The interim standard is based on voluntary guidelines published in 1990 by the Department of Housing and Urban Development and OSHA's general industry standard. OSHA has been working on this standard since 1975. OSHA promulgated the rule after determining that existing standards did not adequately protect employees from atmospheric, mechanical or other hazards in confined spaces. Furthermore, OSHA decided to require comprehensive confined space entry programs to address ongoing monitoring, testing and communication needs in confined spaces. Immediate reaction from industry to the rule was generally favorable, with some concern that certain provisions are too vague. Organized labor's reaction was critical, especially with respect to the rule's exemption of construction workers.

In the meantime, EPA is working on proposed accreditation and certification requirements for lead abatement workers and plans to issue a proposal this fall. The impetus behind EPA's efforts is also the Housing and Community Development Act.

- Confined Space
On January 14, 1993, OSHA issued a final rule on Permit-Required Confined Spaces. The rule became effective on April 15, 1993. The rule is designed to protect approximately 1.6 million workers in about 240,000 workplaces. Over 5000 serious injuries and 54 fatalities annually should be prevented by the rule. The cost to industry (and, in particular, the electric, gas and sanitary services industries) is estimated at $202.4 million annually.

OSHA has been working on this standard since 1992. OSHA promulgated the rule after determining that existing standards did not adequately protect employees from atmospheric, mechanical or other hazards in confined spaces. Furthermore, OSHA decided to require comprehensive confined space entry programs to address ongoing monitoring, testing and communication needs in confined spaces.

Immediate reaction from industry to the rule was generally favorable, with some concern that certain provisions are too vague. Organized labor's reaction was critical, especially with respect to the rule's exemption of agriculture, construction and shipyard employment.

In mid-March 1993, three challenges to the rule were filed in federal court:
- Edison Elec. Inst. v. OSHA, No. 93-2251 (11th Cir. filed 3-11-93).
- American Gas Ass'n v. OSHA, No. 93-1302 (4th Cir. filed 3-12-93).
- United Steelworkers v. OSHA, No. 93-3112 (3d Cir. filed 3-15-93).

On April 14, 1993, OSHA and Edison Electric reached a settlement of the first challenge. In an interim interpretation of the rule, OSHA agreed not to enforce the rule with respect to electric and steam utility manholes, natural gas vaults, and other underground transmission facilities. The other two challenges are still pending.

By late June, OSHA plans to issue a compliance directive on enforcement of the rule. Publication of the directive was originally targeted for April 15, but has apparently been delayed in part pending nomination and approval of an OSHA director (which is expected soon). In the meantime, OSHA has published a 16-page booklet, entitled "Permit-Required Confined Spaces" (No. 3138), discussing the new rule.

IV. ENFORCEMENT HIGHLIGHTS AND TRENDS
A) General
OSHA continues to encourage voluntary compliance and offers many training, consultation, and incentive programs to employers; however, OSHA also backs this assis-

221 To order a copy, contact an OSHA regional or area office (the St. Louis office can be reached at 314/425-4249, or send a self-addressed label to: OSHA Publications Office, OSHA, Room N-3101, 200 Constitution Avenue, N.W., Washington, D.C. 20210.
tance with enforcement. During fiscal year 1992, OSHA conducted about 42,500 inspections, including about 9000 health inspections and about 33,000 safety inspections. OSHA plans approximately the same number of inspections for fiscal year 1993.

In general, these inspections were much more comprehensive and resulted in more serious, willful, repeat and failure-to-abate citations than in past years. In fact, total penalties reached $116.1 million for the fiscal year ending September 30, 1992, well ahead of the previous high of $91 million that was recorded in fiscal year 1991. Average penalties for serious violations rose to $800, while the average penalty per enforcement case was $3396. As in past years, the Hazard Communication Standard continued to be the most frequently cited OSHA standard in 1992.

B) Civil Penalties

In an attempt to raise additional revenue (estimated at $900 million) to offset the budget deficit, Congress gave OSHA the ability to levy significant new financial penalties for violations of OSHA standards. Under the Omnibus Budget Reconciliation Act of 1990, maximums for most OSHA violations increased sevenfold with the ceiling reaching $70,000 for willful and repeat violations. In addition, the Act instituted a new minimum penalty of $5,000 for willful violations. This new penalty structure is applied in all inspections initiated on or after March 1, 1991, for violations determined to be existing after November 5, 1990.

OSHA used the new penalty structure against CITGO Petroleum Corporation in an August 1991 enforcement action. That action resulted in $8.1 million in proposed fines and a settlement under which the company agreed to pay $6 million. The agency used the new $70,000 ceiling for the first time on September 26, 1991, in proposing $2.78 million in fines against General Motors Corporation.

To implement the new penalty scheme, OSHA revised its Field Operations Manual (FOM). The FOM contains directions on conducting inspections and on calculating penalties. Penalties are calculated on a matrix, depending upon the violation's severity and probability. OSHA determines fines by assessing the gravity of the violation, which is determined by the severity of likely injuries and illnesses, plus the prospect that an injury or illness would result. OSHA also considers the size of businesses, the good faith of the employer, and the employer's history of previous violations. Then the Gravity Based Penalty is adjusted; increases are made if, for example, the violation is willful or repeated.

In practice, employers can expect OSHA civil penalties to increase 3½ to 4 times over what they once were. So far, the sevenfold increases only have been applied in the most egregious cases. In fact, on October 1, 1990, the Department of Labor formalized its policy for handling those egregious cases — cases OSHA considers to involve flagrant violations. In February 1993 the egregious case policy was upheld by the OSH Review Commission.

Under the egregious case policy, OSHA penalizes the employer for each instance of a violation, rather than grouping similar violations under one overall penalty. The result is a large (often multi-million dollar) fine intended to deter willful violators and to emphasize the importance that OSHA places on workplace health and safety.

OSHA inspectors are to evaluate the following criteria in determining whether to issue violation-by-violation citations to willful violators:

- Worker fatalities, work site catastrophe, or a large number of serious injuries or illnesses resulting from the violation;
- Persistently high rates of worker injuries or illnesses resulting from the violation;
- Extensive history of prior violations by the employer;
- Intentional disregard of workplace safety and health responsibilities by the employer;
- Employer's conduct which amounts to clear bad faith in carrying out its responsibilities under the OSH Act; or
- A large number of violations that significantly undermine the effectiveness of any existing safety and health plan.

OSHA uses the egregious case policy primarily as a tool to effect corporate-wide settlements — settlements in which the employer agrees to correct widespread problems throughout its facilities in exchange for a reduced penalty. In 1985 to 1990,
OSHA has used this technique to issue approximately 100 citations against 90 employers, and to impose fines totalling $45 million.\textsuperscript{254} Nearly two-thirds of these citations were settled, often with the employer agreeing to a corporate-wide abatement of the violating practice.\textsuperscript{255} Administrator Zeigler recently predicted that OSHA will have 33 corporate-wide settlements in place by the end of 1994.\textsuperscript{256}

C) Criminal Penalties

In the past couple of years, Congress considered increasing criminal sanctions for OSHA violations, but to date no such increases have been enacted into law. Considerable congressional interest still exists on the subject, however, and legislation regarding criminal sanctions has been introduced into both houses of Congress as part of the OSH Reform Act legislation discussed above.

Regardless of the success of these legislative efforts, criminal enforcement already has increased dramatically. During the first six months of 1991, OSHA referred a record-setting ten workplace safety and health cases to the Department of Justice for possible prosecution. Since 1971, only 80 cases had been referred.\textsuperscript{257} Criminal sanctions also are being applied to workplace violations through innovative enforcement of environmental regulations. Because environmental laws often define criminal conduct to include endangerment and assault, enactment of environmental regulations can result in criminal penalties being applied to workplace violations found to endanger human life. Therefore, even if Congress fails to expand the use of criminal sanctions for OSHA violations beyond willful violations resulting in a worker fatality, the use of environmental laws will expand the application of criminal sanctions to workplace violations that endanger human life.

In addition, because of increased awareness of workplace health and safety, the public is pressuring states to prosecute employers for workplace deaths and injuries under state criminal laws such as reckless homicide, manslaughter and battery.\textsuperscript{258} California stands out as a prime example of increased criminal enforcement at the state level.\textsuperscript{259} Several state courts have ruled against preemption of local prosecutions by OSHA.\textsuperscript{260} Until the federal criminal penalties under the OSHA Act are stiffened to exceed those available under local state law, local prosecutions of workplace violations are likely to increase.

V. OSHA AND EPA

On November 23, 1990, OSHA and the EPA announced an inter-agency agreement which provided a framework under which the two agencies will work together to enforce both environmental and health and safety regulations in the workplace.\textsuperscript{261} A Memorandum of Understanding between the agencies, signed in November 1990, calls for certain cooperative efforts:\textsuperscript{262}

- Joint inspections by EPA and OSHA officials;
- A system of referrals between EPA and OSHA on hazards identified during separate inspections by either agency;
- Exchange of data relating to complaints, inspections, investigations, violations discovered or imposition of civil penalties; and
- Cross training programs for inspectors of both agencies to ensure that they are knowledgeable about regulations of both agencies.\textsuperscript{263}

In March 1991, the agencies fleshed out the Memorandum of Understanding with a detailed work plan to implement their cooperative efforts in 1991.\textsuperscript{264} During 1991, the agencies focused on data exchange, referrals, and training for inspections at petrochemical plants and lead smelters.\textsuperscript{265}

In July 1992, the agencies reaffirmed their commitment to continuing their efforts from 1991.\textsuperscript{266} Plans to focus on the issues of asbestos and premanufacture notices (under the Toxic Substances Control Act) were dropped for 1992. Instead, the agencies intended to target hazardous waste incinerators for joint inspections.\textsuperscript{267} Companies need to be aware that OSHA and EPA inspectors are being trained to recognize violations of both OSHA and environmental regulations. If violations of the other agency’s regulations are noted by an inspector, it is likely in the future that an inspector from the other agency will show up on site shortly thereafter because of the information-sharing between the two agencies. Although limited resources are available for enforcement by either OSHA or EPA, this cooperative agreement expands these limited resources by giving each agency the ability to have the other agency’s inspectors out in the workplace looking for its problems.

VI. CONCLUSION

Although no major changes are predicted to occur as Joe Dear is confirmed as OSHA head, it is clear that having him officially in charge should begin to speed the regulatory process at OSHA. Within the next year or so, major new programs should be in place. Thus, OSHA will likely move into its “thirty something” years as a revitalized force in the workplace.

\textsuperscript{254} Id.
\textsuperscript{255} Id.
\textsuperscript{256} Process Safety, Bloodborne Regulation Eat Up OSHA’s Funds, Zeigler Testifies on Hill, 22 O.S.H. Rep. (BNA) 2066 (May 5, 1993).
\textsuperscript{258} Local Officials Seen as Ever More likely to Seek Prosecution for Workplace Hazards, 71 D.L.R. (BNA) CC-1 (Apr. 14, 1986).
\textsuperscript{259} Prosecution of Safety Violations Reduces Construction Deaths, Study Says, 137 D.L.R. (BNA) A-4 (July 18, 1988).
\textsuperscript{263} Id.
\textsuperscript{265} Id.
\textsuperscript{267} Id.