

OSHA intended to change noise standard enforcement but then withdrew its proposal

By: Edwin S. Hopson
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(Editor's note: This "noise standard" story comes in two parts. The first article, printed immediately below, was written by Mr. Hopson for the October 2010 issue of Kentucky OSHA Journal; and the second article, which begins on page two, was written by Mr. Hopson in February 2011. Within the next few weeks, the Kentucky OSHA Journal will be back on a timely print schedule. Readers will miss no issues.)

According to a press release from the U.S. Occupational Safety & Health Administration (OSHA), the agency plans to issue an "interpretation" of the term "feasible administrative or engineering controls" under the general industry and construction occupational noise exposure standards (see *Federal Register*, Oct. 19, 2010, pages 64216-64221), and to amend its enforcement policy to reflect that interpretation.

For the purpose of enforcing compliance with these standards, the proposed "interpretation" states that the word "feasible" carries its ordinary meaning of "capable of being done."

OSHA pointed out that each year, it is estimated that some 30 million workers are exposed to hazardous noise and that workers exposed to high noise levels can develop elevated blood pressure, ringing in the ears, and permanent hearing loss. It also stated that since 2004, the Bureau of Labor Statistics (BLS) has reported that more than 125,000 workers have suffered significant, permanent hearing loss. Moreover, in 2008, BLS reported 22,000 hearing loss cases.

OSHA's actual noise standard specifies that feasible administrative or engineering controls must be used to reduce noise to acceptable levels and that personal protective equipment, such as ear plugs and ear muffs, must be used only as supplements when administrative or engineering controls are not completely effective.

The preference for engineering and administrative controls, although typically more expensive for the employer, as opposed to personal protective equipment, is according to OSHA consistent with the approach taken in all of its health standards and is reflective of the fact that such controls are generally more effective. Under the agency's current enforcement policy, however, the agency issues citations for failure to use engineering and administrative controls only when they cost less than a hearing conservation program or when use of personal protective equipment would be ineffective.

Indeed, OSHA has allowed many employers to rely upon a hearing conservation program, including the use of hearing protectors such as ear plugs.

According to the press release, OSHA's Administrator was quoted as saying, "[t]here is sufficient evidence that hearing protection alone cannot prevent workers from suffering preventable hearing loss. Easily applied administrative or engineering controls can and must be used to protect workers."

The agency is now proposing to interpret the term "feasible" in conformity with its ordinary meaning. OSHA points out that the U.S. Supreme Court has held that the term "feasible" as used in the standard-setting provision of the OSH Act means capable of being done.

Thus, OSHA opines that the proposal "interpretation" aligns the noise standard with the Court's holding and with OSHA's other standards that require feasible engineering controls. OSHA stated that it intends to change its noise enforcement policy to authorize issuance of citations requiring the use of administrative and engineering controls when feasible.

Comments on the interpretation must be submitted on or before March 21, 2011. They can be submitted to <http://www.regulations.gov> <<http://www.regulations.gov>>. Individuals who mail or deliver com-

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ments must submit three copies to the OSHA Docket Office, Docket No. OSHA-2010-0032, U.S. Department of Labor, Room N-2625, 200 Constitution Ave., N.W., Washington, DC 20210. Submissions not longer than 10 pages can be faxed to (202) 693-1648.

The agency also announced that it will hold a stakeholder meeting before the end of the comment period to listen to the concerns of businesses and workers about the proposed noise interpretation. ▲

OSHA withdraws proposed "Interpretation" regarding its noise standard enforcement

By: Edwin S. Hopson
Wyatt, Tarrant & Combs, LLP
(Feb. 17, 2011)

Recently, the U.S. Occupational Safety and Health Administration announced that it was withdrawing its proposed interpretation titled "Interpretation of OSHA's Provisions for Feasible Administrative or Engineering Controls of Occupational Noise." The interpretation had been intended to clarify the term "feasible administrative or engineering controls" as used in OSHA's noise standard so as to emphasize its preference for engineering and administrative controls as opposed to personal protective equipment such as ear plugs.

OSHA's noise standard specifies that feasible administrative or engineering controls must be used to reduce noise to acceptable levels and that personal protective equipment, such as ear plugs and ear muffs, must be used only as supplements when administrative or engineering controls are not completely effective. The preference for engineering and administrative controls, although typically more expensive for the employer, as opposed to personal protective equipment, was according to OSHA consistent with the approach taken in all of its health standards and is reflective of the fact that such controls are generally more effective.

Under the agency's current enforcement policy, however, the agency issues citations for failure to use engineering and administrative controls only when they cost less than a hearing conservation program or when use of personal protective equipment would be ineffective. Indeed, OSHA has allowed many employers for some time to rely upon a hearing conservation program, including the use of hearing protectors such as ear plugs.

The proposed interpretation was originally published in the *Federal Register* on October 19, 2010. Prior to making the withdrawal announcement, OSHA Administrator Michaels met earlier this month with personnel from the offices of Sen. Olympia Snowe and Sen. Joseph Lieberman, members of the Senate Committee on Small Business and Entrepreneurship, in response to a letter from the Senators voicing concern over the cost of the change in enforcement emphasis and the agency's

failure to utilize the normal rule-making process. Sens. Snowe and Lieberman are also co-chairs of the Senate Task Force on Manufacturing.

In an effort, however, to address exposure to excessive noise in the workplace, OSHA also announced that it will:

- Conduct a thorough review of comments that have been submitted in response to the *Federal Register* notice and of any other information it receives on this issue.
- Hold a stakeholder meeting on preventing occupational hearing loss to elicit the views of employers, workers, and noise control and public health professionals.
- Consult with experts from the National Institute for Occupational Safety and Health, and the National Academy of Engineering.
- Initiate a robust outreach and compliance assistance effort to provide enhanced technical information and guidance on the many inexpensive, effective engineering controls for dangerous noise levels. ▲

CITATIONS & FINES

Below is a listing of the citations and fines issued by the Kentucky Occupational Safety and Health agency during the month of August 2010. Provided here are summaries of the citations and the total amount of the fines. A company has 15 working days from receipt of the citations and proposed penalties to either elect to comply with them, to request and participate in an informal conference with the KOSH area director, or to contest them before the independent Occupational Safety and Health Review Commission.

GENERAL ELECTRIC CO.
Appliance Park, Bldg 3, Room 215, Louisville
Inspection site: Appliance Park, Bldg 3, Rm 215, Louisville
8-24-10 **\$32,225**

Serious

- Employer did not have certified written workplace hazard assessment for electrical maintenance employees. \$5,000
- Branch circuits on electrical panels were not properly labeled; branch circuits on breaker were not properly labeled. \$5,000
- Two maintenance employees were working on 480-volt electric panel that had not been de-energized. \$5,000
- Employer did not have specific safe procedures in place explaining how and when to de-energize electrical panel. \$5,000
- Employees working on electrical panel were not wearing electrical PPE. \$5,000
- Employees working on electrical panel were not wearing non-conductive head protection. \$2,975
- Employees working on electrical panel were wearing safety glasses but no protective equipment for their faces. \$2,125
- Employees were working on electrical panel with no protective shield or barrier. \$2,125

Other

- Employer did not complete OSHA 301 log for employee burned in an arc flash. \$0