

OSHA's Proposed Changes to Lockout/Tagout Rule Issued

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PRACTICES OSHA, Labor and Employment

The Occupational Safety and Health Administration (“OSHA”) has proposed a controversial revision to the lockout/tagout rule.¹ OSHA made its proposed revisions to the rule, and many others, under OSHA’s Standards Improvement Project-Phase IV (“SIP IV”), a collection of 18 OSHA rule revisions changed to “remove or revise outdated, duplicative, unnecessary, and inconsistent requirements” in OSHA’s standards.²

The current lockout/tagout standard applies to servicing and maintenance operations “in which the *unexpected energization* or startup of the machine or equipment, or release of stored energy could harm employees.”³ OSHA intends to revise the lockout/tagout rule by removing the word “unexpected,” such that the standard would apply to any energization, not just unexpected ones.

In 1996, the Sixth Circuit Court of Appeals interpreted “unexpected energization” in the landmark decision, *Reich v. General Motors Corp.*, 89 F.3d 313 (6th Cir. 1996). The court concluded that “the plain language of the lockout standard unambiguously renders the rule inapplicable where an employee is alerted or warned that the machine being serviced is about to activate.”⁴ There, the court reasoned that “‘energization’ of the machine cannot be said to be ‘unexpected’ since the employee knows in advance that machine startup is imminent and can safely evacuate the area.”⁵

OSHA believes, however, that the Sixth Circuit interpreted the standard incorrectly in *General Motors* when it fundamentally misconstrued the “unexpected energization” language of the lockout/tagout rule by allowing employers to use warning and delay systems as alternatives to following the requirements of the standard. As a result, “OSHA is proposing to remove the term ‘unexpected’ from the standard to revert to its original understanding of the standard. The proposal is intended to make clear that the lockout/tagout standard covers all equipment servicing activities in which there are energization, startup, or stored energy hazards.”⁶

In the SIP IV Proposed Rule, OSHA cites other cases where courts have supported OSHA’s reading of the lockout/tagout standard. For example, in *Otis Elevator Co. v. Secretary of Labor*, the court held that although a servicing employee had warning that a machine would start when unjammed, the energization was still “unexpected” because the employee could not predict when the machine would become unjammed.⁷ However, on balance, the majority of Occupational Safety and Health Review Commission decisions have agreed with the Sixth Circuit and adopted the *General Motors* more narrow construction of “unexpected energization.”

A change in the language of the lockout/tagout rule will certainly affect employers. Removal of “unexpected” from the standard limits employers’ ability to use alternatives to lockout/tagout that provide warning to employees that a machine is about to start. For instance, OSHA’s proposal would make it more difficult for employers to show that automated controls that eliminate unexpected energization are an effective substitute for lockout/tagout. The fact that the proposed

changes do not align with existing precedent makes OSHA's proposal a substantive change rather than a change to remove "outdated, duplicative, and inconsistent requirements," making OSHA's use of the Standards Improvement Project process questionable, particularly in light of the recent decision regarding changes to the Process Safety Management standard, where the D.C. Circuit Court decided that a new "interpretation" was a standard under the OSH Act.⁸ Employers have the right to publicly comment on the proposed rule through December 5, 2016.⁹

¹ 29 C.F.R. § 1910.147.

² Department of Labor, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, Standards Improvement Project-Phase IV at 4 (Oct. 4, 2016) [hereinafter *SIP IV Proposed Rule*], available [here](#).

³ 29 C.F.R. § 1910.147(a)(1)(i) (emphasis added).

⁴ *Id.* at 315.

⁵ *Id.*

⁶ *SIP IV Proposed Rule*, at 13.

⁷ 762 F.3d 116 (D.C. Cir. 2014).

⁸ See *Agricultural Retailers Ass'n & Fertilizer Inst. v. United States Department of Labor*, No. 15-1326 (D.C. Cir. Sept. 23, 2016).

⁹ Comments can be submitted online via the Federal eRulemaking Portal at www.regulations.gov and should reference Docket No. OSHA-2012-0007.