

October 30, 2002

Mr. John L. Henshaw
Assistant Secretary of Labor
Occupational Safety and Health Administration
OSHA Docket Office, Rm. N2625
U. S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

Re: Ergonomics for the Prevention of Musculoskeletal Disorders: Guidelines for Nursing Homes, Docket No. GE2002-1 (67 FR 55884; August 30, 2002)

Dear Mr. Henshaw:

The Office of Advocacy of the U.S. Small Business Administration offers the following comments in response to the Occupational Safety and Health Administration's (OSHA) publication of Draft Ergonomics Guidelines for Nursing Homes ("Draft Guidelines").

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. The views reflected in this comment letter, therefore, do not necessarily reflect the views of the U. S. Small Business Administration (SBA). Pursuant to our statutory authority, the Office of Advocacy regularly disseminates information to, and solicits comments from, small businesses regarding Federal government activities affecting our Nation's small business. Toward this end, the Office of Advocacy often convenes small business roundtables as one effective means to gather information from small businesses. We held such a roundtable on October 21, 2002, to obtain small business comments on OSHA's Draft Guidelines. This comment is based on information exchanged at that roundtable, as well as Advocacy's extensive involvement with small businesses during OSHA's prior rulemaking to establish an Ergonomics Program Standard.¹

Advocacy Supports Non-Regulatory Guidance on Ergonomics

The Office of Advocacy is on record in support of OSHA issuing Non-Regulatory Guidance with an intensive small business outreach component.² To serve the needs of small businesses, we urge OSHA to incorporate small business outreach as an important component of the guidelines development and dissemination process. Adopting an outreach approach, similar in spirit to OSHA's experience with the panel process pursuant to the Small Business Regulatory

¹ The Office of Advocacy's official regulatory comments on OSHA's proposed ergonomics program standard (29 CFR Part 1910; November 23, 1999; Docket NO. S-777) are available at http://www.sba.gov/advo/laws/comments/osha00_0302.html. Hereinafter referred to as Advocacy's March 2000 comments.

² Advocacy's March 2000 comments, page 14, "Non-Regulatory Guidance and Outreach."

Enforcement Fairness Act, will better ensure that any ergonomics guidelines developed by OSHA are suitable for application in small business workplaces. Consistent with our statutory responsibilities, the Office of Advocacy is available to assist OSHA in these information collection and dissemination efforts.

Advocacy Urges OSHA to Narrow Both the Scope of the Draft Guidelines and the Protocol for their Development

As currently drafted, the scope and emphasis of the Draft Guidelines and the OSHA Protocol for Developing Industry and Task Specific Ergonomics Guidelines (the “Protocol”)³ are too broad and reminiscent of the programmatic approach of OSHA’s previously proposed ergonomics program standard. OSHA’s Protocol provides that each of the guidelines will consist of a three-part program: (1) program management recommendations; (2) worksite analysis, and (3) hazard control recommendations. This Protocol assumes the existence (or creation) of formal ergonomics programs, which do not now exist in small businesses and would be prohibitively expensive for small businesses to implement.

Pursuant to the current Protocol, the Draft Guidelines call for program management, worksite analysis that involves assessment of all the tasks present in the industry, and hazard control “recommendations.” As stated in Advocacy’s March 2000 Comments, when the services of safety and health experts are required, small businesses must hire outside consultants, raising the costs significantly for small businesses, and thus are disproportionately higher than for larger businesses in the same industry. This one-size-fits-all program approach does not offer the flexibility required to meet the needs of small business.

To serve small businesses and their employees, we encourage OSHA to narrow the focus of the Draft Guidelines and the OSHA Protocol for all of the upcoming industry guidelines on Ergonomics. Advocacy recommends that OSHA issue ergonomics guidance that is appropriately tailored to address only the specific tasks, as carried out in the particular industry, that pose the risk of work-related musculoskeletal disorders. OSHA should limit the guidance to a specific list of problem tasks with practical solutions. Consistent with Advocacy’s March 2000 Comments, hazard controls should not be prioritized and flexibility in addressing hazards is needed. In this regard, Advocacy applauds the series of illustrated controls that OSHA has included in the guidelines, as well as the disclaimer language that states that the list of controls presented is not intended to be an exhaustive list.

The strength of any guideline is the use of industry-identified solutions to industry-identified problem tasks. By narrowing the scope of the Ergonomics guidelines (and the Protocol), OSHA would avoid the problem of determining the work-relatedness of a given injury, by focusing on the tasks, rather than the injury. A useful example to follow is the section entitled “Assessment of Resident Handling Tasks,” which analyzes information on a problem task and specific solutions which are in use in the nursing home industry.

³ The Protocol is available at <http://www.osha.gov/ergonomics/protocol.html>.

Cost Analysis for Small Business

Should OSHA retain the current programmatic focus, Advocacy recommends, at a minimum, that OSHA carefully delineate the resources required to put such a program into effect, and provide information on alternatives to businesses too small to utilize such a broad program. For instance, while OSHA provides examples of successful interventions (P. 3 of the Draft Guidelines), OSHA does not identify the size of any of the three establishments, and offers little descriptive information other than they appear to be three different types of nursing home facilities. There is no discussion of whether any of these facilities are small businesses. It may be that particular solutions work better or make more sense than others in a small establishment context.

General Duty Clause Citations Will Increase

The disclaimer in the guidelines that they create no new legal duties, fails to achieve its stated objective. Small businesses are concerned that the guidelines represent a new basis for General Duty Clause citations.⁴ The issuance of these guidelines coincides with OSHA's announcement of a stepped-up enforcement policy for ergonomics violations under the General Duty Clause. Despite the disclaimer that the guidelines "are not a new standard or regulation and impose no new legal requirements," Advocacy is not persuaded that the guidelines will not be construed as an announcement of newly recognized hazards in the nursing home industry, as well as a minimum standard for addressing those hazards.

Conclusions

Advocacy supports OSHA in providing non-regulatory guidance to address ergonomic concerns in the nursing home industry. As written, the guidelines lack flexibility, and raise the possibility of their use to increase citations under the General Duty Clause. OSHA should incorporate specific steps for gathering information from small businesses in the protocol for developing ergonomics guidelines for specific industries.

The Office of Advocacy stands ready and able to assist OSHA with improved outreach to small businesses to improve the utility of the non-regulatory guidance to small businesses. We will also assist OSHA with the dissemination of this information through Advocacy's numerous avenues to reach out to small businesses across the country.

⁴ 29 U.S.C. Sec. 564 (a)(1).

I welcome the opportunity to work with you on this and other issues of importance to our Nation's small businesses. Please do not hesitate to contact me directly or to contact Charles Maresca of my office at (202) 205-6533 if you have any questions regarding these comments.

Sincerely,

Thomas M. Sullivan
Chief Counsel for Advocacy

Charles Maresca
Assistant Chief Counsel for Safety and Health

Cc: Dr. John D. Graham, Administrator, Office of Information and Regulatory Affairs