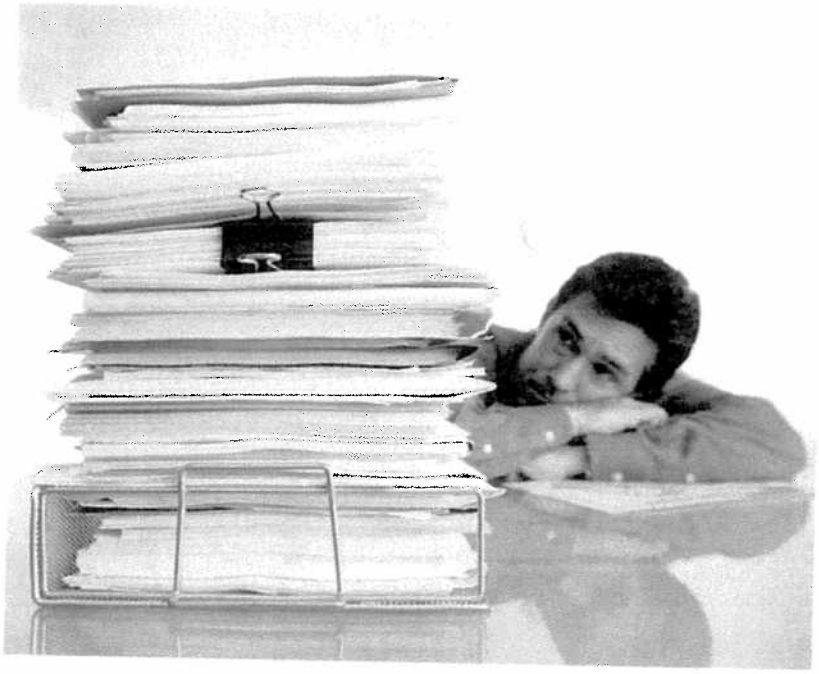
MIOSHA Efforts to Establish a Mandatory Ergonomics Standard in Michigan



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MIOSHA's Proposed Ergonomic Rule – Summary and Talking Points

- The Michigan Occupational Safety and Health Act (MIOSHA) was enacted in 1974. Michigan is one of 26 states and territories that administer their own occupational safety and health programs. Michigan is required to provide workplace safety and health protections that are "as effective as" those provided through federal Occupational Safety and Health Administration (OSHA). Although the vast majority of MIOSHA rules are identical to rules promulgated by federal OSHA, Michigan law permits the promulgation of rules differing from federal rules if there is a **"clear and convincing"** need for the standard.

- The ergonomics rule OSHA finalized in 2000 after almost 10 years of development would have been the most expensive mandate ever imposed on business. In 2001 Congress passed a Joint Resolution of Disapproval that rendered the ergonomics regulations null and void, and prohibited OSHA from issuing any similar rule.

- MIOSHA has never shown in any venue that there was **"clear and convincing"** need for this proposed rule, and if there were, then why would only one state in the union have a mandatory rule? The two MIOSHA standards commissions (General Industry Safety Standards Commission and the Occupational Health Standards Commission) that embarked on this process back in 2002 did so with almost no public process or notice to the business community.

- The entire push for a Michigan specific ergonomics standard can be attributed to career MIOSHA staff bureaucrats acting in concert with organized labor. MIOSHA staff has continually massaged meeting minutes and engaged in misinformation to legislative committees and the media on this issue[4].

- After the federal rule was struck down by Congress, OSHA encouraged states to develop voluntary guidelines and best practices to assist employers in ergonomic injury prevention.

- Only California has adopted a mandatory ergonomics standard after OSHA moved to a voluntary standard. However, because California's standard employs a "second injury trigger" (the ergonomics standard does not come into play unless there are two or more injuries from the same cause), **Michigan's mandatory ergonomics standard would be the toughest in the nation**.

- The only other state after California to adopt a mandatory ergonomics rule after federal OSHA withdrew theirs was Washington State. It adopted an ergonomics standard on May 26, 2000 and Washington state voters passed an initiative on November 4, 2003 to repeal the state's ergonomics standard.

- Nationwide voluntary ergonomic efforts have achieved substantial success. The national MSD (Muscular Skeletal Disorders) rate has dropped steadily (32.3 percent) and significantly in each of the past six years.[1]

- Michigan's experience, in the absence of a mandated standard, has mirrored this national pattern. MSDs in Michigan decreased by 38.8 percent between 1998 and 2004 – even better than the 32.3 percent nationwide decline[1], **all without any mandated standard!**

- MIOSHA does not need a mandatory ergonomics standard to address egregious ergonomic conditions at an employer's workplace. In such cases, MIOSHA can invoke the "General Duty Clause" provided in the MIOSHA Act for "failing to provide a workplace free from recognized hazards". MIOSHA would rather have a specific rule than use the General Duty Clause because General Duty Clause violations require more time to investigate and greater written documentation. In other words, MIOSHA prefers the "employer is guilty until proven innocent" approach because it puts the entire burden on the employer not the department.

- Small workplaces representing a business' only location were found to be among the safest places to work in the country, according to a study conducted by the RAND Corporation[2]. Yet MIOSHA's proposed standard makes no distinction between big or small – except that some of the state's biggest businesses would be exempted. **That's right; the business representatives on the Ergonomics Advisory Committee saw fit to exempt themselves while subjecting the smallest businesses in the state to the mandated standard**[3].

- An October 2000 Heritage Foundation analysis revealed that the annual cost to the public sector to administer the original OSHA ergonomics proposal in **Michigan would be $53.7 million to $101.1 million.**[5]

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1 United States: Bureau of Labor Statistics, Survey of Occupational Injuries and Illnesses

2 Are Small Businesses Riskier Than Larger Ones? Rand Corporation; John Mendeloff, Christopher Nelson, Kilkon Ko, Amelia Haviland

3 MIOSHA Ergonomics draft #15 Section B (4) "Employers with an effective ergonomic program established and documented by the effective date of these rules are exempt from the rules in this section."

4 MIOSHA staff and Tycho Fredricks indicated at the 1-7-04 Advisory Committee meeting that the committee was charged to develop a standard and not determine if one was needed, the minutes of the June 26 meeting of the OHSC do not support that statement. The OHSC minutes of June 26, 2002 state: "A motion was made by Commissioner Lucas and was seconded by Commissioner Olson to begin forming an 'advisory committee' to determine **if** (*emphasis added*) Michigan needs a Ergonomics Standard. MOTION CARRIED UNANIMOUSLY." The August 15, 2002 GISSC meeting motion did appear to specifically charge the committee with promulgating a standard.

In light of the discrepancy, at the 2-11-04 meeting, Advisory Committee member Owens requested that the two standards commissions be asked again what was the specific charge of the committee and that it be reflected accurately in the minutes. Marsh Parrot Boyle responded that "they (staff) were aware of the discrepancy and that they (staff) had replayed the tape from the June 26 meeting and the wording of the minutes did not accurately reflect the motion that was made". To be certain of the committee's charge they also asked Commissioner Lucas to restate his motion and intent at the February 4th, 2004 OHSC meeting.

At the 1-18-08 meeting, Advisory Committee member John Bavin was the lone "No" vote for forwarding the draft rule to the standards commissions for further action. However, in recording the minutes, staffer Marsha Parrot Boyle recorded the vote as "unanimous" and then tried to explain away the no vote in a footnote below the recorded motion.

Public statements have been made by the representatives of the agency before legislative committees and in the media that a unanimous consensus of the committee was necessary before any rule would move forward. After the hearings and the media attention faded from memory, the Advisory Committee under direction by staff adopted a mission statement on September 22, 2004 where they indicate that the committee will *"pursue"* a consensus to present a draft rule to the Standards Commissions. Staff then recorded the minutes of the 1-18-08 meeting in such a way as to show unanimous consensus to forward the rule, when in fact there was none (John Bavin voted no).

5 http://www.heritage.org/Research/Labor/BG1376.cfm

Michigan MIOSHA
Ergonomics Rule Development Timeline

Federal Ergonomics Standard Timeline

November 1999	OSHA announces plans to promulgate federal ergonomic standard
November 2000	OSHA Publishes final rule in the Federal Register – 29 CFR Part 1910
November 2000	Business groups, insurance companies, and some states sue OSHA over ergo regs because or WC conflicts in rule
March 2001	Congress passes, and the President signs, a resolution of disapproval repealing the rule. OSHA withdraws the rule
April 2002	OSHA announces voluntary ergonomic guidelines in lieu of a rule

Michigan Ergonomics Standard Timeline

March 2001	After OSHA withdraws rule, MIOSHA withdraws its standard that would have adopted the OSHA rule by reference
June 26, 2002	OHSC (Occupational Health Standards Commission) directs staff to create advisory committee to draft MI ergonomics standard*
August 15, 2002	GISSC (General Industry Safety Standards Commission) directs staff to create advisory committee to draft MI ergonomics standard
October 30, 2002	GISSC forms steering committee to work with OHSC in forming advisory committee
November 13, 2002	OHSC forms steering committee to work with GISSC in forming advisory committee
September 15, 2003	GISSC approves Advisory Committee members
October 1, 2003	OHSC approves Advisory Committee members
October 30, 2003	First Advisory Committee Meeting
January 7, 2004	Second Advisory Committee Meeting
February 11, 2004	Third Advisory Committee Meeting (Meetings continued through January of 2008)
February 24, 2004	House Commerce Committee holds hearing on Ergonomics rule development
March 9, 2004	House Appropriations Subcommittee indicated effort to cut funding for rule development

August 19, 2004	Governor announces that funding cut for Ergonomics rule development is not "enforceable"
September 19, 2005	House Concurrent Resolution No. 19 introduced that urges agencies not to promulgate rules more stringent than Federal.
October 2005	Governor signs budget with funding cut for ergonomics rule development but directs agency to ignore the cut as not "enforceable"
October 27, 2005	Rep. Rick Jones announces introduction of legislation to prohibit MIOSHA from developing an Ergonomics rule.
January 17, 2006	House Commerce Committee holds hearing on HB5447 legislation to prohibit MIOSHA from developing an Ergonomics rule.
January 25, 2006	HB 5447 is passed by both Chambers and sent to Governor Granholm
February 3, 2006	HB 5447 is vetoed by Governor Granholm. The governor contends that the bill would put Michigan out of compliance with federal Department of Labor requirements that Michigan adopt federal rules by reference. The advisory committee continues to meet through 2006 and draft appendices to the proposed rule.
October 24, 2007	Sen. Alan Sanborn introduces SB 843 legislation to prohibit MIOSHA from developing an Ergonomics rule.
January 18, 2008	The Advisory Committee votes to send the proposed ergonomics standard (Ergonomics Draft #15 and Appendix Draft #9) back to the OHSC and the GISSC for further action.
February 5, 2008	SB 843 that would prohibit MIOSHA from developing a mandatory ergonomics standard is reported out of the Senate Economic Development Committee.
February 20, 2008	Senate Bill 843 passed by the Senate and referred to House Labor Committee.
July 17, 2008	Governor uses a "non-veto" to veto language in the Department of Labor and Economic Growth (DLEG) budget that would prohibit DLEG from spending any money or staff time on developing state ergonomic standards. Republicans in the legislature have routinely inserted these bans in the DLEG budget and Granholm has routinely responded that the restrictions are unenforceable.
August 25, 2008	A joint Meeting of the Occupational Health Standards Commission and the General Industry Safety Standards Commission is scheduled for presentation of the proposed draft Ergonomic Standard by the Ergonomic Standard Advisory Committee. The committees take no

action at the hearing.

January 14, 2009 — At a joint Meeting of the Occupational Health Standards Commission and the General Industry Safety Standards Commission, A vote is taken to move Draft Rule 17 to the Department of Energy, Labor and Economic Growth (DELEG) for informal approval and to begin the process of showing "clear and convincing need" and to develop the required Regulatory Impact Statement (RIS). At the meeting the rule is amended to remove the provision exempting businesses that already have a voluntary ergonomics program (essentially this would have exempted the business representatives on the commissions from the rule they foisted upon everyone else), language is inserted that would delay the implementation of the rule by six months from the date it becomes effective and language attempting to exempt railroads from the rule is added.

February 5, 2009 — The Senate passes SB 93 (similar to SB 843 of 2008) that would prohibit MIOSHA from developing an ergonomics rule. The bill includes language to address the governor's contention when she vetoed HB 5447 in 2005 that the bill would put Michigan out of compliance with federal Department of Labor requirements that Michigan adopt federal rules by reference. The bill language provided that any federal ergonomic standard would be adopted by reference. The bill remains in the state House Labor Committee.

February 27, 2009 — Attorney General Mike Cox issues an opinion that the governor's so-called non-veto is not legal. A non-veto veto happens when a governor, upon signing a bill, declares that certain aspects of the legislation is nonbinding, unenforceable or unconstitutional – however court action would have to be initiated to pursue the issue. The governor continues to direct agencies to ignore the language that would prohibit DLEG from spending any money or staff time on developing state ergonomic standards.

March 18, 2009 — The Senate Appropriations Subcommittee for DELEG's budget recommends sending MIOSHA back to the federal government and eliminating Michigan's delegated program.

March 31, 2009 — NFIB, MCC and MMA meet with the Attorney General's office to discuss possible APA violations by MIOSHA related to the "clear and convincing" need requirements of MCL 408.1014 (7).

April 17, 2009 — State Representative Jase Bolger sends a letter to the Attorney General requesting a formal opinion on whether or not MIOSHA violated the APA, specifically section MCL 408.1014 (7).

May 13, 2009	The Senate Economic Development Committee reported out Senate Bill 434 that would amend the Administrative Procedures Act to place limitations on an agencies ability to promulgate rules that go beyond federal standards. The bill is on the Senate floor.
May 20, 2009	The DELEG Administrative Board approves a $50,000 contract with Ruth Ruttenberg and Associates in Vermont to prepare information for a regulatory impact statement on the proposed standards. Ms. Ruttenberg's previous studies, all financed by organized labor, included such titles as: "Not Too Costly, After All: An Examination Of The Inflated Cost estimates Of Health, Safety And Environmental Protections"
January, 2010	Governor Granholm continues to direct agencies to ignore budget language that would prohibit DLEG from spending any money or staff time on developing state ergonomic standards.
February, 2010	MIOSHA indicates that the Regulatory Impact Statement was nearly completed and that the next step would be public hearings around the state that would take about 90 days to complete.
October 15, 2010	Business groups monitoring the Michigan Register and MIOSHA website for posting of rules hearings since February note that they have not been posted and time has run out for posting and moving forward with the rules in 2010.
January 19, 2011	Governor Snyder announces that the state will take no further action to implement a state specific ergonomics rule in Michigan.
February 2011	NFIB and other business groups begin working with the Legislature and the Administration to address problems with the administrative rules process that led to the promulgation of rules such as the Michigan-only ergonomics standard.

Ergonomics Rule Moves From Committee

Businesses would need to train employees on the hazards of poor body alignment and proper technique when making repetitive on-the-job motions under a proposed standard an administrative committee kicked down the bureaucratic pipeline today.

Michigan would join California as the nation's only states to adopt an "ergonomics" standard if the recommendation made today by a state Ergonomics Advisory Committee is written into an administrative rule.

Doug **KALINOWSKI**, the director of the Michigan Occupational Safety and Health Administration (MIOSHA), said today's decision was only a step in a very long process and doesn't necessarily mean a rule is imminent.

But Charlie OWENS of the National Federation of Independent Businesses (NFIB), vehemently disagreed, calling such rhetoric "a bunch of hooey." The nation's strictest ergonomics rule is coming to Michigan at a time when the nation's most economically depressed state needs less government regulation, not more, he said.

"Many other states have wisely followed the federal OSHA lead and have taken a voluntary approach to ergonomics programs for employers, but not Michigan, our Administration and the labor unions," Owens said. "They just don't get it".

The MIOSHA Ergonomics Advisory Committee has met for the last five years on the necessity of a rule to address poor ergonomics, which Kalinowski noted is the nation's leading cause of workplace injury. Examples include carpal tunnel syndrome for those with poor typing techniques or severe back pain for those with don't lifting heavy objects properly.

The two-page recommendation asks employers to train employees on ergonomic hazards and to take action on any ergonomic risk it sees in the work place. A motion to move the proposal along the administrative chain passed with a lone no vote from John **BAVIN** of Consumers Power, representing the Michigan Chamber of Commerce.

From here, the rule goes to two other committees — the Commission Occupational Health Standards Commission and the General Industry Safety Standards Commission, both nine-member commissions appointed by the Governor. Both bodies are made up of four representatives of business, four from labor and a member of the general public.

One of the two can recommend to Department of Labor and Economic Growth (DLEG) Director Keith **COOLEY** that an administrative rule addressing this issue should be drafted. If Cooley agrees, it goes through a long process with no realistic shot of it being derailed.

Under then-Gov. John **ENGLER**, the Republican-led legislature cut itself out of the loop when it comes to stopping an administrative rule. Instead of simply voting to kill an administrative rule, the Legislature now must pass a bill to kill it — a bill that obviously needs the Governor's signature or two-thirds support in the Legislature to override a veto, something that's never happened.

Kalinowski noted that the MIOSHA commission had looked at the ergonomics issue for five years. It was made up of representatives of labor and business, but ultimately decided the process needed to move forward.

Owens argued that MIOSHA led the public to believe, first of all, that the commission's job was to only look into whether the ergonomics standard was needed, not draft a proposal. Second, Owens said MIOSHA officials also pledged only to move something out of the committee if it had unanimous consent, which today's recommendation did not.

Kalinowski said the committee had hoped to get "consensus".

NFIB®

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Comments on Proposed MIOSHA Ergonomics Standard Before the General Industry Safety Standards Commission and the Occupational Health Standards Commission Monday, August 25, 2008

My name is Charlie Owens and I am the State Director for the National Federation of Independent Business, an organization providing legislative advocacy for Michigan small businesses owners.

I come before this joint meeting of the General Industry Safety Standards Commission (GISS) and the Occupational Health Standards Commission (OHSC) today to again raise objection to MIOSHA's (Michigan Occupational Health & Safety Administration) attempts to develop a Michigan specific ergonomics standard that would be imposed upon Michigan's job providers.

I request that these written comments be made a part of the record of today's meeting and that they be acknowledged as received in the minutes of today's meeting.

Today the Ergonomics Advisory Committee formally presents to you their latest draft (15) and associated appendices. It is expected that they will recommend to you that you move forward with this draft rule by submitting a formal request for rulemaking to the State Office of Administrative Hearings and Rules (SOAHR). If you do this, you have effectively guaranteed that Michigan will establish a mandatory ergonomics standard.

MIOSHA Staff will assure you that this is not the case because there must be public hearings and many more meetings and steps before any final rule is promulgated. They will tell you – as they have been telling the general public, the media, and the legislature all along that this is "just the start of a long process". They will also suggest that the legislature could still have the proposed rule withdrawn by action of the Joint Committee on Administrative Rules (JCAR). All of these assurances are misleading and disingenuous.

The fact is that public hearings and input from business and labor should have been sought BEFORE the GISS and OHSC acted to charge the ergonomics advisory committee to develop a rule back in

2002. The real public input that should have been heard by these committees should have been as to whether or not a mandatory standard was necessary in lieu of the withdrawal of the federal standard in 2001. This is what the majority of states did. All of them, except California and Washington State, determined that the rule you have been developing for the last 5 years was not necessary. Washington State's rule was rescinded as the result of a state ballot initiative in 2003. As currently written, draft 15 would be more restrictive than California's rule, giving Michigan the dubious distinction of having the toughest anti-employer mandatory ergonomics rule in the country.

The two MIOSHA standards commissions (General Industry Safety Standards Commission and the Occupational Health Standards Commission) that embarked on this process back in 2002 did so with almost no public process or notice to the business community. In doing so, they have not met the requirement included in the 1991 amendments (Act 105 of 1991) to the Michigan Occupational Safety and Health Act that require MIOSHA to demonstrate a "clear and convincing need" for the promulgation of rules more stringent than federal requirements.

In addition to the absence of public input before deciding to develop a rule, data from the Bureau of Labor statistics shows that, in the absence of a mandatory rule, the national MSD (Muscular Skeletal Disorders) rate has dropped steadily (32.3 percent) and significantly in each of the past six years. Michigan's experience, in the absence of a mandated standard, has mirrored this national pattern. MSDs in Michigan decreased by 38.8 percent between 1998 and 2004 – even better than the 32.3 percent nationwide decline, all without any mandated standard. Given these statistics, where is the "clear and convincing need" required in the MIOSHA Act to develop this rule?

As regards JCAR, and the myth that they could overturn the rule, staff is well aware that the likelihood of this occurring is remote at best. It would require both chambers to pass legislation and submit it to the governor for approval within 15 session days. Even if this happened, the governor has already indicated support for a mandatory ergonomics rule and would likely veto any such legislation.

Finally, at a time when Michigan is shedding jobs by the thousands, we find it incredible that we are about to become only the second state in the country, besides California, to have our own state specific ergonomics standard replete with fines, penalties and compliance enforcement. Many other states have wisely followed the federal OSHA lead and have taken a voluntary approach to ergonomics programs for employers. As mentioned previously, Washington State repealed its state specific ergonomic standard by ballot initiative in November of 2003. For Michigan to move in the opposite direction by adopting a state standard certainly does not seem to indicate that we are serious about saving and creating jobs in Michigan. In addition to the negative message that such an action sends to job providers, it is also important to note that at a time of budget deficits the cost to state and local governments to administer a new ergonomics program for government employees has been estimated at somewhere between $53.7 to 101.1 million.

This committee should not move forward on this proposed rule. It is time that the General Industry Safety Standards Commission and the Occupational Health Standards Commission fulfill the duties of their appointed positions by sending this entire process back to square one and appointing a new advisory commission whose charge is to determine if any mandatory rule is needed in the first place.

MIRS Capitol Capsule, Monday, August 25, 2008

Ergonomics Headed For Court?

Michigan's business community may turn to the courts in its battle against state ergonomics standards.

At a Lansing hearing today, the Ergonomics Advisory Committee presented its draft of possible ergonomic regulations to the two commissions that created it -- the GISS (General Industry Safety Standards) Commission and the OHSC (Occupational Health Safety Commission).

The draft was five years in the making, but from a political standpoint its time may have arrived, which is why members of the business community presented its response through a legal lens, presumably setting the groundwork for a possible court challenge.

Ultimately, ergonomics regulations could be promulgated and enforced without legislation through the Michigan Occupational Safety and Health Administration (MiOSHA). A divided legislature wouldn't be expected to stand in the way or mitigate the new rules.

Statewide ergonomics standards have been a longstanding point of contention between Michigan's business community and the Gov. Jennifer **GRANHOLM** administration.

Business groups claim such regulations would create one more disincentive to doing business in Michigan and be a blow to the state's already hurting economy. But, because the GOP-controlled Senate is out of the equation, ergonomic standards are one item on labor's wish list that the administration could deliver.

If the legislature was still under the complete control of the Republicans, something might be done to mitigate the situation, but with the House firmly under Democratic control (and likely to stay that way) it appears that nothing outside of court action could put a stop to the new rules.

Business groups, such as the National Federation of Independent Business (NFIB), the Michigan Chamber of Commerce and the Michigan Manufacturers Association (MMA) fear that it's just a matter of time before Granholm signs off on the ergonomics standards. And the most likely timeframe would be after the November election.

The administration's position has been consistent and conveniently evasive.

Since MiOSHA's involvement with prospective ergonomics standards started under the Gov. John **ENGLER** administration it has coyly stressed that it won't interfere with the already existing process. This tack has only served to frustrate business groups all the more.

NFIB's official news release on the ergonomics hearing today included wording that appears to set up a potential legal battle over future ergonomics standards, if such standards were to be eventually promulgated.

"The fact is that public hearings and input from business and labor should have been sought before the GISS and the OHSC acted to charge the ergonomics advisory committee to develop a rule back in 2002," said NFIB State Director Charles **OWENS**. "The real public input that should have been heard by these committees should have been as to whether or not a mandatory standard was necessary in lieu of the withdrawal of the federal standard in 2001."

Owens' point is that hearings, etc should have been held to determine whether or not ergonomics standards were needed, before any advisory committee was formed.

This may seem to be an obscure argument, but it's aimed directly at what the business community believes could be labor's legal Achilles heel in regard to ergonomic regulations in Michigan.

"In doing so, they have not met the requirement included in the 1991 amendments (Act 105 of 1991) to the Michigan Occupational Safety and Health Act that require MiOSHA to demonstrate a 'clear and convincing need' for the promulgation of rules more stringent than federal requirements," said Owens. "In addition to the absence of public input before deciding to develop a rule, data from the Bureau of Labor statistics shows that Michigan's incidence of ergonomics injuries has decreased by 38.8 percent between 1998 and 2004 without any mandated standard, given these statistics, where is the 'clear and convincing need' required in the MiOSHA Act to develop this rule?"

Meanwhile at the hearing today, Owens argued that the business representatives on the ergonomics advisory committee had exempted themselves from the ergonomics standards.

This will almost certainly form a major part of the business community's rhetorical argument as the issue heats up.

MIRS Capitol Capsule, Wednesday, January 14, 2009

Ergonomics Rule Moves Another Step

A state commission today adopted a statewide ergonomics standard that the business community has long claimed would be yet another blow to Michigan's economy.

Administration officials say today's move by the General Industry Safety Standards Commission and Occupational Health Standards Commission is just another step in a long process of investigating the benefits of rules that promote a healthy workforce.

The business community, led by the National Federation of Independent Business (NFIB) state director Charlie **OWENS**, claims the rules are unnecessary, would be the most stringent in the nation, and would kill jobs and businesses. Owens is willing to go to court to stop its implication.

"We technically can't go to court until they actually do it," Owens said. "So first they'll do their hearings around the state -- which as far as I'm concerned is just for show. I'd say this would probably be done (the rule become official) in about a year. Then we'll take a look at going to court."

The NFIB and other business groups have been battling the Michigan Occupational Safety and Health Administration (MIOSHA) over the proposed standard for years.

However, the battle has been as much over the process of promulgating the rules as it has been over the rules themselves. The Gov. Jennifer **GRANHOLM** administration and MIOSHA argue that several hurdles would still have to be cleared before the rules would go into effect.

"What happened today just means that this is now at the department level," MIOSHA director Douglas **KALINOWSKI** told *MIRS*. "We still have to do the regulatory study then have the director (Skip **PRUSS**) decide whether or not to move forward on it -- not to mention the public hearings, where we'd be taking input. I just don't see why some people are acting as if this were going into effect tomorrow."

But Owens claimed that today's action means the standards are definitively destined to be put in place.

"After spending six and a half years of staff time and taxpayer money to produce this rule, only then do they begin a process of determining if it necessary or not," said Owens. "Obviously, they have made up their mind and the rest of the process is for show."

If Michigan does adopt the rules, it will be one of only two states (the other being California) with ergonomics standards that aren't voluntary.

Last week, the business community introduced Michigan Businesses Against Ergo-Nonsense (MBAE-N), a coalition opposing the ergonomics rules. In addition, it announced a last-ditch effort to try to stop the rules from moving forward (See "Businesses: 'Stop The Ergo-Nonsense,'" 01/09/09).

The NFIB news release on the action of the commissions today was titled: "Bureaucrats Move Forward on Unnecessary Ergonomics Rule." It was subtitled: "MIOSHA Commissions ignore small business concerns -- hurt Michigan's economy."

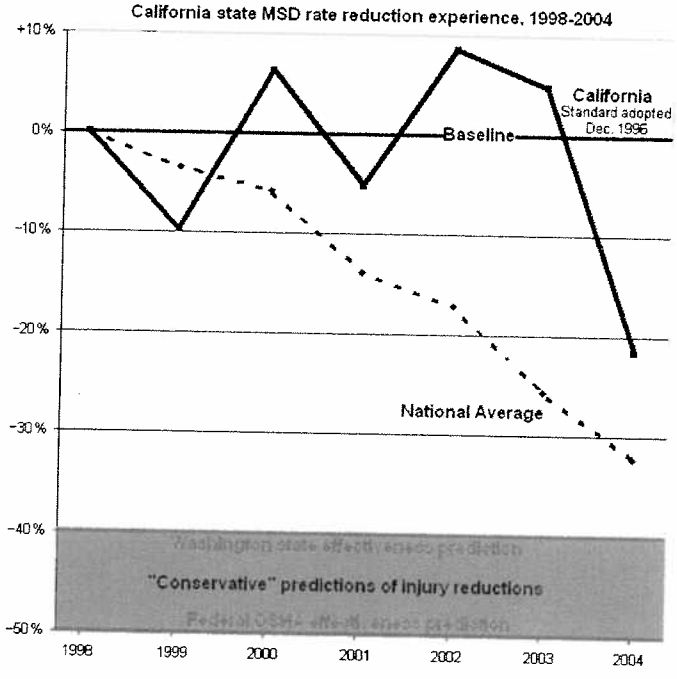
Due to the difficult economy in Michigan, the two standards commissions voted today to

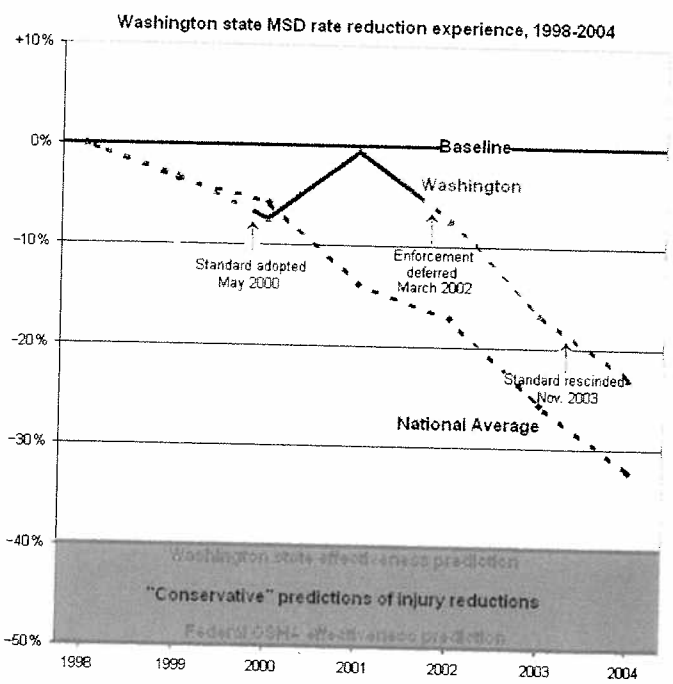
allow businesses an extra six months to implement the standard. This "phase-in" provision only succeeded in drawing sarcasm from Owens.

"What a joke," Owens said. "We thank the commissioners and MIOSHA for giving Michigan business an extra six months to secure new locations in other states and to determine which employees to lay off in order to pay for the compliance costs."

DO ERGONOMICS STANDARDS PREVENT INJURIES?

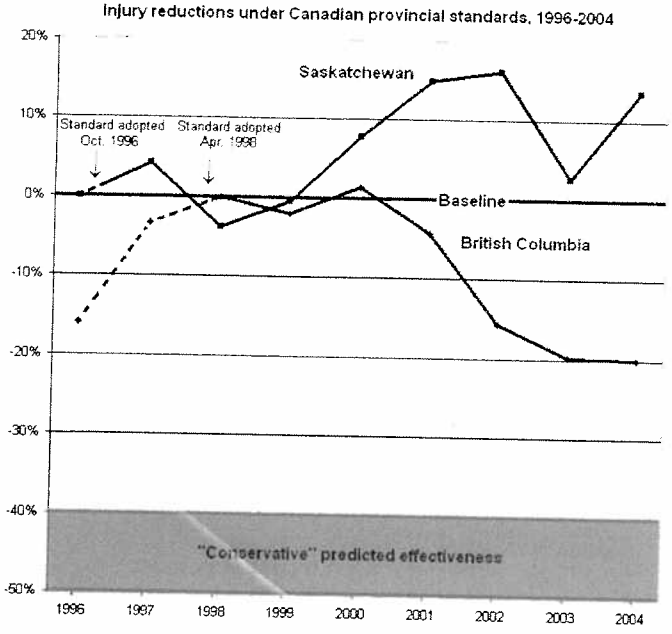
- The goal of any ergonomics standard is to reduce injuries. Advocates of these regulations predict remarkable success:
  - OSHA asserted that the now-rescinded federal standard would reduce musculoskeletal disorders ("MSDs") by 50%. (OSHA *Final Economic Analysis*, Docket No. S-777, Ex. 900, at IV-35 and IV-46.)
  - The State of Washington forecast that its standard would prevent 40% of work-related MSDs and 50% of costs. (*Cost-Benefit Analysis* at 50, http://www.lni.wa.gov/wisha/ergo/rule_docs/CBA/CBAText.PDF.)
  - Both agencies claimed these estimates were "conservative." *Id.*
- The predicted benefits never materialized. In fact, ergonomics standards have proved less effective than voluntary initiatives.
- The following charts compare the only two states that have implemented ergonomics standards – California and Washington – with the rest of the nation.

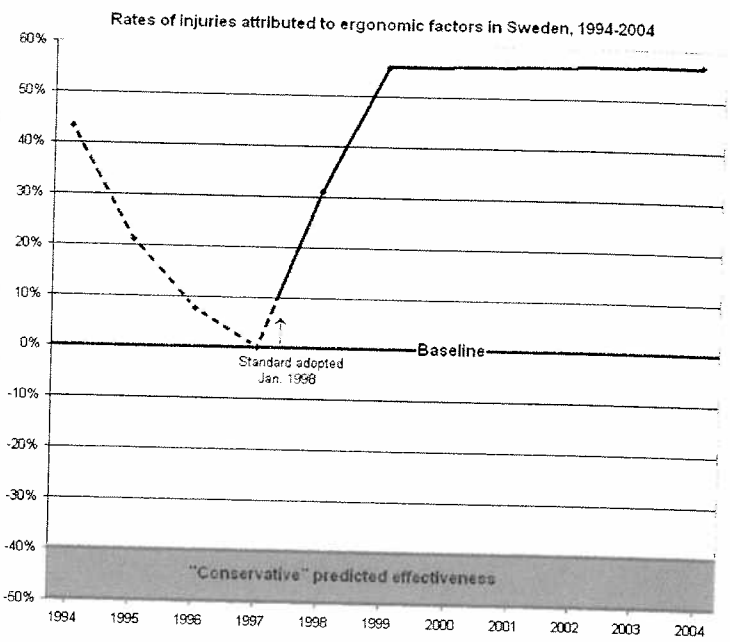




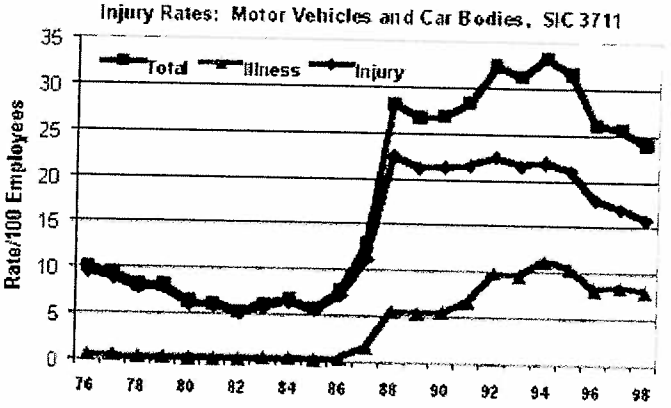
- California MSDs have moved up and down in alternating years. As of 2003, the rate was higher than in 1998. Despite a 2004 decline, no consistent trend has taken hold. Washington MSDs increased after the standard was adopted, and the rate did not drop below pre-standard levels until enforcement was deferred two years later.
- By contrast, nationwide voluntary efforts have achieved substantial success. The national MSD rate has dropped steadily and significantly in each of the past six years.
- Michigan's experience, in the absence of a standard, has mirrored this national pattern. MSDs in Michigan decreased by 38.8 percent between 1998 and 2004 – even better than the 32.3 percent nationwide decline.
- Other countries with ergonomics standards have had the same adverse experience as California and Washington – or worse. The charts on the next page show the following:
  - Two Canadian provinces, Saskatchewan and British Columbia, have enacted ergonomics standards. Ergonomic injury rates in Saskatchewan have increased since the provincial rule was issued in October 1996. Ergonomic injury rates in British Columbia were relatively steady for two years after the standard, and they declined slightly thereafter. These rates now are about equivalent to levels two years before the standard. The reduction remains far short of "conservative" predictions.

- After Sweden enacted an ergonomics ordinance in 1998, a long-standing trend toward lower ergonomic injury rates abruptly reversed. As of 2004, levels remain nearly 60 percent higher than when the standard was instituted.





- Regulatory advocates often attribute surges in injury rates to "increased awareness." They argue that this effect is temporary, and that positive results will be realized once the programs "mature." (See 65 Fed. Reg. 68,274.)



- The chart on the left, prepared by the UAW for OSHA's ergonomics hearings, shows the typical experience. (*UAW Comments*, Docket S-777, Ex. 32-185-3, at 3-1.) Collectively bargained ergonomic programs were instituted in the auto industry no later than 1987. (See Chico McGill, presentation to NIOSH conference, http://www.cdc.gov/NIOSH/ec4mcgil.html, describing ergonomic requirements in 1987 Ford agreement.) Shortly thereafter, injury rates increased by almost 400%. Although they have declined slightly from their peak, they remain far higher than pre-program levels.

- When OSHA issued its ergonomic standard, it asserted that the adverse effect "is short-lived, generally lasting less than a year and almost never more than two years." (65 Fed. Reg. 68,274.) UAW members – many of whom live in Michigan – have experienced adverse effects for more than a decade. Standards in places like California and Saskatchewan have been in effect for nearly 10 years without substantial benefits. Clearly, ergonomic mandates do not work.

- Michigan should not expect a new state standard to achieve significant injury reductions. It most certainly will not create benefits on a scale that would justify the huge cost and economic impact. Michigan would be better served by continuing its current approach, which has generated steady improvement on par with the national results achieved by federal OSHA's voluntary initiatives.

Statistics in this document were obtained from the following sources:
- United States: Bureau of Labor Statistics, Survey of Occupational Injuries and Illnesses, http://www.bls.gov/iif.
- British Columbia: Workers Comp. Bd. of Br. Columbia, http://www.worksafebc.com/publications/reports/statistics_reports/default.asp.
- Saskatchewan: Saskatchewan Workers Compensation Board, http://www.wcbsask.com/Facts_&_Figures/Statistics.html.
- Sweden: Swedish Work Environment Authority, http://www.av.se/dokument/inenglish/reports/2000_15.pdf and http://www.av.se/dokument/statistik/english/Occupational_2004.pdf.

Ergonomics On Senate Panel's Mind

The subject of ergonomics inevitably arose today when a Senate Appropriations panel heard an update on the Michigan Occupational Safety and Health Administration (MIOSHA).

Sen. Mark **JANSEN** (R-Grand Rapids), chair of the Senate Economic Development Appropriations Subcommittee, asked MIOSHA Director Doug **KALINOWSKI** if he'd heard complaints from business owners about the proposed ergonomics rules going through the state system. Kalinowski demurred, saying that MIOSHA's job was to provide consultation and provided enforcement for "really egregious" cases.

"It's about fitting the job to the person, rather than fitting the person to the job," he said.

Kalinowski said ergonomics problems are the No. 1 cause of workplace injury, so it's a big concern. He said that contributes to 40 percent of worker's compensation claims.

Sen. Tony **STAMAS** (R-Midland) said he heard plenty from small-and mid-size businesses in his district wary of the regulation and the cost to comply.

"'I'm from the government and I'm here to help' doesn't give great confidence," he said.

Ergonomics rules have been a sore spot for Senate Republicans. Last week, the Senate Economic Development and Regulatory Reform Committee kicked out SB 0093 to ban state government from mandating ergonomics standards (See "Anti-Ergonomics Bill Moves Again," 1/27/09). But Gov. Jennifer **GRANHOLM** has vetoed similar measures in the past.

Sen. Glenn **ANDERSON** (D-Westland), who said he'd had two hand surgeries from his work at Ford, said there's a "tremendous" cost to employers who don't have ergonomics standards in terms of health care and employee time loss.

"This isn't just some crazy thing someone pulled out of the air," Anderson said.

He also said standards weren't being rushed through, noting the process has been going on for years. Jansen said he'd heard that the rules could cost businesses big money, perhaps alluding to business groups' claim that it would be a $500 million hit. Kalinowski said that was probably based on a federal standard rescinded eight years ago that wasn't applicable to the Michigan rules.

The subcommittee received an update on MIOSHA. Michigan is one of 26 states with a state-run program. Kalinowski sought to portray the agency as working hand and glove with businesses, stressing training sessions and comment cards.

Kalinowski said MIOSHA completed 5,098 enforcement investigations in 2008, noting that the number had stayed consistent even as staffing levels had declined over five years. There were 16,242 alleged violations, 131 discrimination investigations, 4,002 hazard surveys and 1,455 training seminars.

There were 37 worker deaths in Michigan in 2007, excluding auto accidents. Michigan does have a high rate of illness and injury compared to other states, Kalinowski said. There were 162,000 cases in 2007. From 2004 to 2008, Michigan saw a 12 percent decline in amputations, **49 percent decline in ergonomics-related injuries** and 25 percent reduction in hearing loss.

Liesl **CLARK**, deputy director for the Department of Energy, Labor and Economic Growth (DELEG), gave an update of the department. She said details of the Michigan Saves Program highlighted by Granholm on Tuesday in her State of the State would be out in six to 12 months (See "Granholm Flips New Energy Switch," 2/3/09).

Clark said DELEG was working with every other agency on projects that could qualify for the federal stimulus.

New ergonomics rules could strain small business

Fellows, Mark
8-28-2008 Kalamazoo Gazette

New state regulations targeting repetitive-stress injuries on the job would require more employers to offer ergonomic training and work to correct reported injuries.

The proposed rules, outlined for two regulatory panels Aug. 25, would impose new costs on already hard-pressed small businesses, critics say, while supporters call them a reasonable response to growing concerns about workplace injuries.

The standards would exceed those of California -- the only other state to institute such regulations -- while making it easier for state regulators to punish employers for repeated worker injuries.

"It's a significant issue, even though the standard is fairly minimal," said Doug Kalinowski, Michigan Occupational Safety and Health Administration director. "It's been very contentious."

The last thing businesses need is more paperwork, said Todd Anderson, a lobbyist for the Small Business Association of Michigan.

"Especially when we've actually shown in our statistics that injuries due to ergonomics are going down without any regulations," Anderson said.

Small employers, in particular, would be hit by new training and reporting regulations, he said, as larger companies often already have their own ergonomics programs and would be exempted under the draft rules.

Manufacturers, too, are girding to oppose the long-planned rules.

"It's a pretty broad issue, and there are a lot of costs involved," said Amy Shaw of the Michigan Manufacturers Association. "We don't know what the true costs are going to be until we know how strict the department is going to be in enforcing this."

The rules would cover only general industry, specifically excluding construction, agriculture, mining and domestic employment.

"I believe at some point this thing will spill over into the construction side," said William Borch, a labor representative on one of the commissions reviewing the proposed rules.

"There are many within the building trades, or ironworkers, that suffer from repetitive-motion injuries," said Borch, the Saginaw-based president of Ironworkers Local 25. "The problem is that, much like asbestos ..., these types of injuries are not an imminent danger, even though they can be career-ending types of injuries and cause long-term pain and suffering."

Small-business advocates argue that maintaining productivity and minimizing downtime and workers' compensation costs is inducement enough to offer ergonomically safe workplaces.

"It's simply going to increase our costs of operation," said David Rhoa, president of Kalamazoo-based Lake Michigan Mailers Inc. "The presumption of this type of legislation -- legislation that goes beyond what (federal) OSHA currently has in place -- is that, without this legislation, employers wouldn't care about injuries or potential injuries to their employees.

"We are driven by concern for our employees and a desire to be productive at all times. We know when our people are injured we're not productive."

The new requirements will strain businesses too far, said Charles Owens, director of the Michigan chapter of the National Federation of Independent Business.

"With this rule they don't have to do their homework," he argued. "It will make us uncompetitive with rest of country, and it's just astounding that they're contemplating even making this rule mandatory."

Mark Fellows is managing editor of Michigan Business Review.

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Responses to common administration and MIOHSA disinformation (responses in blue)

ENGLER ISSUE

Gongwer News Service
Volume #44, Report #209 –Thursday, October 27, 2005

But Maura Campbell, spokesperson for the Department of Labor and Economic Growth, said that while the Legislature tried to block the advisory board from studying the ergonomic issue through MIOSHA's budget, it is the department's constitutional right to analyze the issues and that the genesis for **the advisory board was actually born out of the Engler administration**.

"What we said all along is that it's a process," Ms. Campbell said.

MIRS Capitol Capsule, Tuesday, January 10, 2006

The administration hasn't openly embraced promulgation of ergonomic regulations. In fact, when the issue has been brought up, **the administration typically points out that MIOSHA started talking about the topic during the Gov. John ENGLER administration**.

Talking about an issue and promulgating rules are two very different things. They "talked" about an ergonomics standard during the Engler administration because they knew it would never pass muster under the "clear and convincing" requirement for promulgating a rule stricter than federal OSHA law and that it wouldn't go anywhere. They waited until 2002 to make their move.

PREMATURE – NO DRAFTS

MIRS Capitol Capsule, Thursday, October 27, 2005

However, Maura **CAMPBELL**, speaking on behalf of MIOSHA, told *MIRS* that Granholm informed the Legislature, when she signed the DLEG budget that the language was "unenforceable" because it was an amendment by reference.

"Everything they (the business groups and lawmakers) are saying is premature," Campbell said. **"There are no drafts of anything yet**. It may well be that after they (the committee) look into this, they may decide just to go with the established federal rules."

When Maura Campbell made this statement, the Advisory Committee was already on draft #10.

CHARGE OF THE COMMITTEE

Gongwer News Service
Volume #45, Report #6 –Tuesday, January 10, 2006

"Maura Campbell, spokesperson for the Department of Labor and Economic Growth, has said it's the **right of the department to look into how to promulgate a rule and should be given time to decide whether a rule is needed or not, without influence from the Legislature.** "

Thanks for making our point, Maura. That is exactly what the department SHOULD have done - decide whether a rule is needed or not, but they didn't. The fact of the matter is that the critical decision of whether a rule is necessary in the first place was already made back in 2002 without appropriate public input.

CONSENSUS

Consensus: agreement in the judgment or opinion reached by a group as a whole. (Mirriam-Webster)

MIOSHA Director, Doug Kalinowski, noted that to be enacted, any state ergonomics standard would still have to arrive at a **consensus** agreement by all interested parties. "If there's polarization, it's very unlikely any rule will be finalized," Kalinowski told *Occupational Hazards. Sources: Occupational Hazards; NFIB -- Jeanie Croasmun*

He (Kalinowski)added that no new rules are even on paper yet. It could be at least a year before something gets back to the commissions. "These advisory committees operate on a **consensus** basis. If there is no consensus, these rules are not going to go forward. We have seen similar situations where an advisory committee was appointed and went back to the commission and said they couldn't reach a **consensus**." Monday, July 12, 2004 - MiBiz Network

He (Kalinowski)said the advisory committee, which will report back to the Occupational Safety Standards Commission and the General Industry Safety Standards Commission, would need **unanimous consensus** to go forward with a rule and said it may very well conclude a rule would not work. - Gongwer Volume #43, Report #35, Article #08 --Tuesday, February 24, 2004.

On 1-18-08 the advisory committee forwarded the rule without consensus to the standards commissions.

MIOSHA Standards Commissions and Federal Rule Adoption

Michigan is a "delegated" state. Michigan is one of 26 states and territories that administer their own occupational safety and health programs. Michigan is required to provide workplace safety and health protections that are "as effective as" those provided through federal Occupational Safety and Health Administration (OSHA). Although the vast majority of MIOSHA rules are identical to rules promulgated by federal OSHA, Michigan law permits the promulgation of rules differing from federal rules if there is a "clear and convincing" need for the standard.

The Michigan Occupational Safety and Health Act (MIOSHA) was enacted in 1974.

There are three standards commissions created by the Act that adopt federal OSHA rules and promulgate state rules

Construction Safety Standards Commission (CSSC)

Nine members, appointed by the governor. Three representing management, three representing labor, one representing the general public and two representing public employees.

General Industry Safety Standards Commission (GISSC)

Nine members, appointed by the governor. Three representing management, three representing labor, one representing the general public and two representing public employees.

Occupational Health Standards Commission (OHSC)

Nine members, appointed by the governor. Three representing management, three representing labor, one representing the general public and two representing public employees.

1991 Legislative changes in MIOSHA Act 154

- Michigan's program is audited by federal OSHA
- Michigan's three standards commissions were "activist"
- Michigan was not adopting federal standards on time
- Governor Engler threatens to return program to feds
- Act was amended to adopt fed rules by reference
- "Clear and convincing need" threshold established
- Office of Regulatory Reform (ORR) Created

Comments:

Michigan's program is audited by federal OSHA. Audits by OSHA often include "critiques" which identify deficiencies in the state program that must be corrected for program delegation to continue.

In the late 1980's and early 90's a recurring OSHA critique of the Michigan program was the inability of the three standards commissions to adopt new or revised federal standards within the required timeline of 90 days.

Michigan's three standards commissions were "activist" and were consistently holding up the adoption of federal rules and rule revisions in order to make them more stringent, which

required public hearings and more commission meetings. After calls for reform by the business community, Governor Engler threatened to return Michigan's program to the federal government and abolish the three standards commissions.

A legislative solution prevailed that amended the MIOSHA Act so that all federal OSHA standards, rules and rule revisions were adopted by reference. In addition, the standards commissions could not adopt or revise a rule that was more stringent than a federal rule or standard unless they could show a "clear and convincing" need. (408.1014 Act 154 of 1974 amended 10-3-91). Other changes were also made in sections 9, 16, 19 and 24 that required an advisory committee for promulgation of rules more stringent than federal rules for the Occupational Health Standards Commission (OHSC) and that at least one management representative vote affirmatively for promulgation of rules more stringent than federal rules for the General Industry Safety Standards Commission (GISSC) and the Construction Industry Safety Standards Commission (CISSC).

The Office of Regulatory Reform (ORR) was created that served as a clearing house for any request for rule making from a state agency (including MIOSHA). ORR had two functions, to determine if the rule request and draft rule was correct as to form (legal) and if the rule met the "clear and convincing" threshold established in statute for rules more stringent than federal rules.

The Granholm administration renamed the ORR to the State Office of Administrative Hearings and Rules (SOAHR), and narrowed its' function to determine only if the rule request and draft rule was correct as to form (legal) and not to make any determination as to whether a rule met the "clear and convincing" threshold established in statute for rules more stringent than federal rules. This change removed an important check on agency activity in seeking rules that went beyond federal standards.

Joint Committee on Administrative Rules Background

Constitutional Issues and Legal Background

Under the old rulemaking process, after the rules were drafted, submitted to review of the LSB, made subject to a public hearing, and reviewed by the attorney general, they were submitted to JCAR for review. The committee had two months to consider the proposed rule (though the time for review could be extended for one additional month). If JCAR approved of the rule within the time required, a certificate of the committee's approval would be attached to copies of the rule. If JCAR disapproved the proposed rule, the committee would report that fact to the legislature and return the rule to the agency. A rule could not be promulgated by the agency unless (1) the legislature adopted a concurrent resolution approving the rule within 60 days after the committee report was received by each house, or (2) JCAR subsequently approved the rule. If JCAR did not take any action within the time required, it would return the rule to the agency, and the chairperson or alternate would introduce a concurrent resolution in both houses approving the rule that would be placed directly on the calendar. The rule could not be promulgated unless the legislature adopted the concurrent resolution within 60 days or the rule was resubmitted to and approved by JCAR. Once the committee or the legislature approved the rule, the agency would formally adopt the rule

Court Action Changes the Role of JCAR

Following a series of court rulings that held sections 45 and 46 of the Administrative Procedures Act to be unconstitutional, the role and authority of JCAR in the rules process was greatly diminished. At issue in these cases were the prisoner visitation policies of the Department of Corrections. Initially, the department developed these policies outside of the rules process. However, after inmates challenged the policies - arguing that they should have been developed as administrative rules in accordance with the APA - the policies were formally promulgated as administrative rules. The inmates challenged the policy again, this time on the grounds that the rules were promulgated without subjecting them to review by JCAR or the legislature. In 1995, the Jackson County Circuit Court held that the rules were acceptable, and said that sections 45 and 46 of the APA were unconstitutional. The case was appealed to the Michigan Court of Appeals and the court consolidated the case with a similar case arising from Ingham County.

In 1997, the court of appeals ruled in *Blank v. Department of Corrections,* 222 Mich App 385, that section 45 of the APA violated the enactment and presentment clauses of Article 4 of the state constitution (thereby invalidating section 46), and that section 45 violated the doctrine of separation of powers. The court further held that sections 45 and 46 were severable from the remainder of the APA. Finally, the court upheld the rules despite the fact that typically the

failure of an agency to follow the process of the APA would render the rule void.

The court of appeals struck down section 45 based on its reading of sections 1, 22, 26, and 33 of Article 4 of the state constitution. Section 1 vests the legislative power in the House and Senate. Section 22 provides that legislation shall be by bill and may originate in either house. Section 26 provides that no bill shall become a law without the concurrence of a majority of the members elected to and serving in each house. Finally, section 33 requires every bill passed by the legislature to be presented to the governor before it becomes law.

In invalidating the legislature's role in the rulemaking process, the court of appeals stated, "[b]ecause the procedures in section 45 do not mirror the requirements of article 4 of our constitution, the Legislature is interfering with the delegated authority by something short of a 'law'. By giving the JCAR the authority to veto administrative rules proposed by an executive agency, the Legislature has delegated legislative power to a smaller legislative body that can effectively negate a valid action of an agency without following the restrictions of article 4 of our constitution."

The court of appeals also said that in violating the enactment and presentment clauses of article 4, section 45 of the APA also violated the doctrine of separation of powers. The court stated, "[b]ecause there is no provision in section 45 of the APA for presentment to the executive for approval of the Legislature's veto of a rule, such legislative power in regard to rule-making goes essentially unchecked, and unchecked power is precisely what the separation of powers doctrine sought to avoid." Further, the court noted that there was already a process in the APA whereby the legislature could register its disapproval of a proposed rule. Under that provision (MCL 24.251), if JCAR, an appropriate standing committee, or a member of the legislature believes a promulgated rule is unauthorized, not within the legislative intent, or inexpedient, JCAR or a member may introduce a concurrent resolution that expresses the determination of the legislature that the rule should be amended or rescinded or may introduce a bill that amends or rescinds the rule. The court noted that if the legislature approves a concurrent resolution expressing its disapproval of a rule, "the legislature in essence is making a recommendation to the administrative agency to withdraw or amend the rule." However, that method has no legal effect on the rule. For JCAR or a member of the legislature to legally impact the rule, a bill must be introduced and go through the law-making process.

In 2000, the Michigan Supreme Court upheld the court of appeals' decision to invalidate the legislative approval provisions on the APA (see *Blank v. Department of Corrections*, 462 Mich 103). In striking down the relevant portions of the APA, the court, relying on the U.S. Supreme Court's decision in *INS v. Chada* (1982), said the actions of JCAR or the legislature under sections 45 and 46 were inherently legislative and, therefore, in violation of the enactment and

presentment clauses in Article 4 of the state constitution and the doctrine of separation of powers embedded in Article 3, Section 2 of the state constitution. However, the supreme court differed with the court of appeals on the extent to which sections 45 and 46 were deemed unconstitutional. The court of appeals had struck down the two provisions in their entirety, meaning that portions of the authority granted to the Office of Regulatory Reform were also eliminated. However, the supreme court ruled that only subsections 8, 9, 10, and 12 of section 45, and the second sentence of subsection 1 of section 46 - which required an agency to file a rule with the Secretary of State until at least 10 days after approval of JCAR or the legislature – were involved.

Consequences and Current Status of JCAR

Prior to these court rulings, JCAR (Joint Committee on Administrative Rules) effectively had the authority to stop agency rules from being put into effect. Now, JCAR cannot prevent rules from going into effect unless a bill is introduced in both chambers, passed and signed by the governor. This change effectively puts most of the power to promulgate rules in the executive branch of state government.

Furthermore, legislation passed in 1999 (SB 877 – PA 262 of 1999), gave JCAR only 21 calendar days to review and object to a rule and pass legislation in both chambers to stop the rule from going into effect.

House Bill 4511, passed in 2003, would have extended the JCAR 21 calendar day time limit to 30 session days. It was vetoed by Governor Granholm in July of 2003.

House Bill 5670, passed in 2004 and signed by the governor (PA 491), changed the JCAR time to object limit to15 session days, rather than 21 calendar days.