

PROHIBIT ERGONOMICS RULES

Mitchell Bean, Director
Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

Senate Bill 20 (Substitute S-1)

Sponsor: Rep. Rick Jones

Senate Committee: Economic Development

House Committee: Regulatory Reform

Complete to 2-15-11

A SUMMARY OF SENATE BILL 20 AS PASSED BY THE SENATE 2-10-11

The bill would amend the Michigan Occupational Safety and Health Act to prohibit the promulgation of rules establishing workplace ergonomics standards. The Michigan Occupational Safety and Health Administration (MIOSHA) could, however, adopt by reference any federal ergonomics standard. Additionally, MIOSHA could provide guidance and other assistance on the voluntary implementation of workplace ergonomics programs.

The bill defines "workplace ergonomics" as "a program or practice that addresses musculoskeletal disorders that are caused by repetitive motion or stress."

The act defines "standard" to mean "a health or safety standard which specifies conditions, or the adoption or use of one or more practices, means, methods, operations, or processes necessary to provide safe and healthful employment."

Regarding the promulgation of rules that adopt applicable federal rules by reference, the Administrative Procedures Act (MCL 24.232) provides, "[a]n agency may adopt, by reference in its rules and without publishing the adopted matter in full, all or any part of a code, standard or regulation which has been adopted by an agency of the United States or by a nationally recognized organization or association. The reference shall fully identify the adopted matter by date and otherwise. The reference shall not cover any later amendments and editions of the adopted matter, but if the agency wishes to incorporate them in its rule it shall amend the rule or promulgate a new rule therefor."

MCL 408.1017

FISCAL IMPACT:

The bill would have an indeterminate fiscal impact on the state and local units of government. Studies estimating the impact of the imposition of workplace ergonomics standards vary considerably, with some studies asserting ergonomic standards result in net benefits (cost savings) and others asserting the standards result in cost increases. That variability is due to the design of the standards being reviewed as well as differences in the methodology and assumptions used in deriving an estimate.

Public employers are subject to MIOSHA occupational safety and health standards in the same manner as other private employers.¹ In this regard, public employers would see increased costs if they have to implement ergonomics safety measures, with those costs potentially offset to some degree by savings stemming from reductions in workers compensation claims and lost work time, and increases in employee productivity, depending on the pervasiveness of ergonomics hazards at a place of employment and the type and effectiveness of the ergonomics safety measures implemented.

In a November 2010 study, the Bureau of Labor Statistics (BLS) estimates the 2009 incidence rate for work-related repetitive motion injuries requiring days away from work to be 4.1 cases per 10,000 full-time state government workers and 3.4 cases per 10,000 full-time local government workers.² The median number of days of work missed was 20 days for state workers and 24 for local government workers.³ Additionally, the BLS estimates the 2009 incidence rate for work-related overexertion injuries requiring days away from work to be 34.6 cases per 10,000 full-time state government workers and 33.4 cases per 10,000 full-time local government workers.⁴ The median number of days missed of work for overexertion injuries was 13 days for state workers and 10 days for local workers.⁵

In addition to the state's compliance costs and potential cost savings, if MIOSHA were to promulgate ergonomics standards, the agency could potentially be required to hire additional inspectors to ensure employers' compliance with the ergonomics standard as well as continued compliance with other existing occupational safety and health standards. Prohibiting ergonomics standards allows the agency to avoid those potential cost increases. The agency is funded through a mix of federal funding and state restricted funds. For FY 2011, the agency's budget authorization is \$27.7 million Gross and 229.0 FTE positions. By allowing the agency to adopt any federal ergonomics standard, the substitute continues to ensure that Michigan would operate as an OSHA State Plan state.

In May 2009, the State Administrative Board approved a contract between DELEG and Ruth Ruttenberg & Associates to assist MIOSHA in completing the cost-benefit analysis

¹ The act defines "employer" to mean an individual or organization, including the state or political subdivision, which employs 1 or more persons. "Political subdivision" means a city, village, township, county, school district, intermediate school district, or state or local government authorized or supported agency, authority, or institution.

² U.S. Department of Labor, Bureau of Labor Statistics, Nonfatal Occupational Injuries and Illnesses Requiring Days Away from Work, 2009, November 9, 2010, <http://www.bls.gov/news.release/pdf/osh2.pdf>. This data isn't specific to Michigan, but is representative of all state and local government employers. By comparison, the incidence rate for private workers was 3.4 cases per 10,000 full-time workers. The BLS *Occupational Injury and Illness Classification Manual* (September 2007), states "[r]epetitive motion applies when an injury or illness resulted from bodily motion which imposed stress or strain upon some part of the body due to a task's repetitive nature."

³ By comparison, the median number of missed days of work for private sector workers was 20 days.

⁴ By comparison, the overexertion injury incidence rate for private sector workers was 25 cases per 10,000 full-time workers. The BLS *Occupational Injury and Illness Classification Manual* states "[o]verexertion applies to cases, usually non-impact, in which the injury or illness resulted from excessive physical effort directed at an outside source of injury or illness. The physical effort may involve lifting, pulling, pushing, turning, welding, holding, carrying, or throwing the source of injury/illness."

⁵ By comparison, the median number of days of worked missed due to an overexertion injury for private sector workers was 10 days.

that forms the basis of the agency's Regulatory Impact Statement on the proposed standards. That study was provided to MIOSHA early last year, but has not been released publicly.⁶

However, as a point of comparison, but also recognizing that it isn't an apples-to-apples comparison, a May 2000 cost-benefit study of its proposed ergonomics standards by the Washington Department of Labor and Industries estimated that compliance costs for Washington public employers would total approximately \$4.8 million annually, with the cost to all employers totaling \$80.4 million annually. Implementing the ergonomics standards, in the DLI's estimation, would also yield \$19.9 million in annual cost savings to public employers and \$340.7 million in annual savings to all employers.⁷ On the other hand, a June 2000 study by the Heritage Foundation found that the cost of the adoption of the OSHA ergonomics standards would cost Washington public employers from \$31.7 million to \$51.7 million annually, and would cost all Washington employers (private and public) from \$144.0 million to \$271.2 million annually.

As for Michigan, the Heritage Foundation estimated that under the OSHA standards Michigan public employers would see annual net cost increases of \$53.7 million to \$101.1 million, with a total net cost increase to all Michigan employers of \$269.7 million to \$508.0 million.⁸ While this latter figure is an oft-reported figure for MIOSHA-developed standards, there appear to be a number of differences between the final OSHA regulations and what has been proposed (thus far) by MIOSHA.⁹

⁶ See the minutes of the Occupational Health Standards Commission meeting from February 24, 2010, http://www.michigan.gov/documents/dleg/WSH_OHSCMinutesFeb10_318936_7.pdf and the minutes of the General Industry Safety Standards Commission meeting from March 3, 2010, http://www.michigan.gov/documents/dleg/WSH_GISSCMinutesMarch2010_325901_7.pdf.

⁷ Washington State Department of Labor and Industries *Cost-Benefit Analysis of the Ergonomic Standards*, May 2000, <http://www.lni.wa.gov/Safety/Topics/Ergonomics/History/Documents/cba.asp>. The findings here are similar in direction – i.e. ergonomics standards resulting in net benefits – as the original OSHA economic impact analysis of its proposed ergonomics standards. The OSHA economic impact analysis is archived at, http://lobby.la.psu.edu/062_Ergonomics_Standards/agency_ergonomics.html. As to the MIOSHA estimate, the March 3, 2010 GISSC minutes states that MIOSHA Management and Technical Services Director John Peck "stated last spring we put out a RFP on ergonomics. He stated that the Regulatory Impact Statement draft has been prepared, and he will share it when it has been finalized. He stated that the standard is cost effective..."

⁸ D. Mark Wilson, *OSHA's Ergonomics Rule: A Costly Unfunded Mandate for the States*, Backgrounder #1376, June 9, 2000, Heritage Foundation, <http://www.heritage.org/Research/Reports/2000/06/OSHAs-Ergonomics-Rule-A-Costly-Unfunded-Mandate-For-The-States>. The study relies on cost estimates of the OSHA ergonomics standard developed by researchers at the Mercatus Center at George Mason University. The original Mercatus study was reported in, Susan E. Dudley, "The Benefits and Costs of OSHA's Proposed Ergonomics Program Standard", *Journal of Labor Research*, Vol. XXII, No. 1 (Winter 2001).

⁹ Perhaps the most notable of these differences was the inclusion in the OSHA standard of a work restriction protection (WRP) that required that injured employees who are removed from the workplace be paid at least 90% of their after-tax wages and full benefits. The January 2009 draft of the MIOSHA standard does not contain any similar WRP provision. By comparison, under the state Workers' Disability Compensation Act (1969 PA 317), workers compensation benefits are generally calculated as 80% of the after-tax value of the average weekly wage at the date of injury. Also, under the OSHA standards, an employer did not have to establish a workplace ergonomics program proactively, but had to do so after a musculoskeletal disorder was reported if the job met certain criteria such as being characterized by repetitive motions, awkward positions, or forceful exertions. That first "injury trigger" was not included in the January 2009 draft of the proposed MIOSHA ergonomics standard.

As a practical matter, given recent events, formal legislation prohibiting ergonomics rules would have no real fiscal impact in the immediate future. At last month's State of the State address Gov. Snyder stated that he would work to stop the efforts to establish mandatory ergonomic standards that have been discussed for the past few years. Legislation need not be enacted to accomplish that goal. Certainly, though, the bill would restrict the ability of future administrations from promulgating such standards. While MIOSHA hasn't made any formal pronouncements as to the fate of its recent efforts to promulgate ergonomics standards, previously approved drafts of such standards have now been removed from the agency's website. Moreover, department officials have indicated to HFA that no additional work on the promulgation of the ergonomics standards has been scheduled.

BACKGROUND INFORMATION:

Section 18 of the federal Occupational Safety and Health Act of 1970¹⁰ allows for states to assume the responsibility for the development and enforcement of occupational safety and health standards by having a state plan approved by the Occupational Safety and Health Administration (OSHA). To have an approved state plan, the state must demonstrate that the plan, among other things, provides for the development and enforcement of safety and health standards that are "at least as effective in providing safe and healthful employment and places of employment" as similar federal standards.¹¹ This responsibility falls on the Michigan Occupational Safety and Health Administration (MIOSHA) within the Department of Energy, Labor, and Economic Growth under the Michigan Occupational Safety and Health Act, 1974 PA 154.

Public Act 154 grants rule-making authority concerning general industry safety standards, construction industry safety standards, and occupational health safety standards to the General Industry Safety Standards Commission,¹² the Construction Safety Standards Commission,¹³ and the Occupational Health Standards Commission respectively.¹⁴ These standards are to be promulgated in accordance with the Administrative Procedures Act.¹⁵ Public Act 154 also provides that within 10 working

¹⁰ Public Law 91-596, 29 USC 667.

¹¹ See, also, Title 29 Part 1902 (State Plans for the Development and Enforcement of State Standards) of the Code of Federal Regulations, 29 CFR 1902.1 et seq., and Title 29 Part 1952 (Approved State Plans for Enforcement of State Standards) of the Code of Federal Regulations, 29 CFR 1952.1 et seq.

¹² Under Section 16 (MCL 408.1016), the General Industry Safety Standards Commission may promulgate standards "to prevent accidents in places of employment and to protect the life and safety of employees."

¹³ Under Section 19 (MCL 408.1019), the Construction Safety Standards Commission may promulgate standards based upon "generally accepted nationwide engineering standards and practices designed to prevent accidents and to protect the life and safety of employees engaged in construction operations."

¹⁴ Under Section 24 (MCL 408.1024), the Occupational Health Standards Commission shall promulgate a standard that "adequately assures, to the extent feasible and on the basis of the best available evidence, that an employee will not suffer material impairment of health or functional capacity, even if the employee has regular exposure to a hazard dealt with by the standard for the period of his or her working life."

¹⁵ Chapter 3 of 1969 PA 306, MCL 24.231 et seq. The APA (MCL 24.244) provides that MIOSHA standards that are "substantially similar" - i.e. identical except in style or format - to existing federal OSHA standards do not require a public hearing, although such rules must still be published in the *Michigan Register* and MIOSHA must

days after the adoption or promulgation of a federal standard by OSHA, MIOSHA shall begin the process to establish a substantially similar state standard.¹⁶ The act further provides that proposed rules (standards) that address a matter not addressed by any federal standard shall not be processed unless the appropriate standards commission determines and certifies that there is "a clear and convincing need for the standard."

There are, however, currently no similar federal ergonomics standards that Michigan, as an OSHA State Plan state, would have to incorporate into its own occupational safety and health standards. On November 14, 2000, OSHA published final rules establishing ergonomics standards.¹⁷ These rules engendered a great deal of interest¹⁸ with Congress and President Bush ultimately enacting legislation, PL 107-5, that prevented the rules from taking effect, under the authority of the Congressional Review Act.¹⁹ Under current practice, OSHA develops industry-specific or task-specific voluntary ergonomics guidelines and provides selective enforcement under the general duty clause of the OSHA Act in instances "where ergonomic hazards exist and employers are not making good-faith efforts to prevent injuries."²⁰

MIOSHA has adopted a similar approach as OSHA, by opting to enforce ergonomics violations under the general duty clause of Public Act 154.²¹ The agency has incorporated its ergonomics assessment/enforcement efforts into its programmed inspections for certain high hazard industries – furniture and fixtures, primary metal, fabricated metal, industrial machines and equipment, and transportation equipment – with the agency issuing citations only for "serious ergonomic hazards."²² There are four criteria that must be met for a violation: (1) a hazard exists – the employer failed to keep

still allow time for written comments to be submitted to the agency. Given that there is no federal standard, any proposed MIOSHA ergonomics standard would still be subject to the public hearing requirement.

¹⁶ Section 14(6), MCL 408.1014(6).

¹⁷ http://www.osha.gov/FedReg_oshapdf/FED20001114.pdf. Following the November 2000 issuance of final ergonomics rules by OSHA, MIOSHA began the state-level rule making process with the submission of a Request for Rulemaking (RFR) submitted to, and approved by, the Office of Regulatory Reform (now, the State Office of Administrative Hearings and Rules) in January 2001. The rule set, 2001-010 LG, was withdrawn by MIOSHA in March 2001 with the repeal of the OSHA rules by Congress.

¹⁸ Indeed, in publishing its final rule, OSHA noted that it heard testimony from 714 witnesses over the course of nine weeks of public hearings and received an additional 11,000 written comments. See, also, Stuart Shapiro, "The Role of Procedural Controls in OSHA's Ergonomics Rulemaking", *Public Administration Review*, Vol. 67, No. 4 (July/ August 2007), pp. 588-701.

¹⁹ Under the Congressional Review Act, 5 USC 801(b)(2), a rule that does not take effect cannot be reissued in substantially the same form unless Congress enacts a law (after passage of the joint resolution that negated the initial rule) specifically authorizing such a rule to be issued.

²⁰ <http://www.osha.gov/SLTC/ergonomics/index.html>. The general duty clause, Section 5(a)(1) of the federal OSHA Act, 29 USC 654, provides that each employer has a duty to provide employees with a workplace "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." Voluntary ergonomics guidelines are in place for retail grocery stores, nursing homes, poultry processing plants, and shipyards.

²¹ Section 11, MCL 408.1011. The provision is nearly identical to the general duty clause under federal law.

²² MIOSHA General Industry Safety and Health Division Instruction *GISHD-GEN-05-01* (July 11, 2005), http://www.dleg.state.mi.us/wsh/docs/inst/gishd_gen_05_1.doc. Section 5 of the act defines "inspection" to mean "the examination or survey of a place of employment to detect the presence of an existing or potential occupational safety or health hazard or to determine compliance with this act, rules or standards promulgated, or orders issued pursuant to this act."

the workplace free of a recognized hazard to which employees were exposed; (2) the hazard can cause serious physical harm; (3) the hazard was recognized – the employer has knowledge of the hazard; (4) a feasible method of abatement exists.²³ The agency notes that OSHA guidelines "are not standards and therefore cannot be used as the sole basis for a citation" and "should not be specifically referenced in a citation."²⁴ Moreover, if a serious ergonomic hazard exists but does not meet the four-part test, the agency will issue corrective recommendations, but not a citation. MIOSHA issues very few citations under the general duty clause, and virtually no citations for an ergonomics violation.²⁵ The department indicates that they issued one citation, back in 2005, for an ergonomics violation.²⁶

Ergonomics safety issues have also been incorporated into the MIOSHA's consultation education and training (CET) program, in which the agency provides on-site consultation services and other training services to Michigan employers.²⁷ MIOSHA also provides CET grants, totaling about \$1 million annually, aimed at increasing the number of employers and employees receiving occupational safety and health education training and prevention services, with ergonomics issues being an eligible use of grant funds.²⁸

The proposed development of workplace ergonomics standards has been an issue of continuing interest to the Legislature since the creation of the Ergonomics Standards Advisory Committee in 2002.²⁹ Since that time, the committee has worked to develop an ergonomics standard.³⁰ On January 14, 2009, the General Industry Safety Standards Commission and the Occupational Health Standards Commission voted unanimously to send the proposed standard to DELEG for informal approval and the start of the rule promulgation process.³¹ Subsequently, the department began the process to formulate the Regulatory Impact State (RIS), required of proposed administrative rules under Section

²³ MIOSHA *Field Operations Manual* (June 2010),

http://www.dleg.state.mi.us/wsh/docs/inst/field_operations_manual.doc

²⁴ MIOSHA General Industry Safety and Health Division Instruction *GISHD-GEN-05-01* (July 11, 2005)

²⁵ According to OSHA, of the 16,381 citations issued by MIOSHA during FY 2010 only 63 were for violations of the general duty clause of its General Industry Safety Standards (R 484.10011). Those violations generated \$8,435 in fine revenue, or about \$133.89 per citation. Apparently none of these citations were related to an ergonomics hazard. http://www.osha.gov/pls/imis/citedstandard.sic?p_esize=&p_state=MIMichigan&p_sic=ALL

²⁶ See, also, Brent Rector and Gregory Ripple, *Occupational Safety and Health: Guide for Michigan Employers*, Michigan Chamber of Commerce, 2009. On this point, the authors noted, "[a]lthough the previous MIOSHA five-year plan included enforcement by citations as an approach to ergonomic issues, in reality there were very few citations issued for ergonomic reasons."

²⁷ http://www.michigan.gov/dleg/0,1607,7-154-11407_15317-207493--,00.html

²⁸ http://www.michigan.gov/dleg/0,1607,7-154-11407_15317_15346--,00.html

²⁹ Public Act 154 generally provides that before promulgating a standard, except for emergency standards, the safety commissions shall consult an advisory committee consisting members "representative of the major interests affected by the proposed standard."

³⁰ Of the 27 State Plan states - five of which only cover public sector employers - only California has an ergonomics standard currently in place. The State of Washington enacted an ergonomics standard in May 2000, with voters ultimately repealing that standard in December 2003. The Washington State Department of Labor and Industry website contains a wealth of materials on its short-lived ergonomics standard, including copies of the rules, various legal filings, and a cost-benefit analysis, <http://www.lni.wa.gov/Safety/Topics/Ergonomics/History/default.asp>.

³¹ While a copy of the draft standard was taken down from the MIOSHA website, it is still available at, http://www.ergoweb.com/forum/upload/WSH_Ergo_Draft_17_1-14-2009_263258_7.pdf

45 of the Administrative Procedures Act,³² with the May 2009 approval by the State Administrative Board of a contract with Ruth Ruttenberg and Associates (the lone bidder) to assist in the completion of the RIS.³³

The Legislature has taken two approaches aimed at stopping the development of an ergonomics standard by MIOSHA in the absence of any implicit federal requirement. First, for the past several years, the Legislature has included boilerplate language in the annual DELEG appropriations act. For FY 2011, this language reads:

(1) Of the funds appropriated in part 1, no funds shall be used to support the development of, staffing of, or activities promoting the development of guidelines, rules, standards, protocols, or other similar mandates that are more stringent than federal voluntary ergonomics guidelines. This section does not prohibit any person from adopting, or working with the state to develop voluntary ergonomics standards.

(2) On March 1 and September 1 of each year, the department shall provide a report to the fiscal agencies and subcommittees of any staffing time or activities regarding the development of a voluntary or mandatory, or both, ergonomic standard, whether contained in rules, guidelines, policy directives, or bulletins.

(3) The directions in this section are given in accordance with OAG, 2009, No. 7,225 (February 27, 2009).³⁴

Efforts to develop workplace ergonomics standards continued in spite of this boilerplate provision. In signing the FY 2009 DELEG budget, Governor Granholm stated that this provision was "unenforceable" as it "improperly attempts to amend by implication provisions of the Michigan Occupational Safety and Health Act." Essentially, the governor's position was that the Legislature couldn't grant rule-making authority to the commissions under Public Act 154, only to take part of that authority away under an appropriations act. Accordingly, this section was ignored by the prior administration.

The opinion of the Attorney General referenced in the latest edition of this boilerplate language was prompted by a question from Sen. Jansen asking whether the governor's statement in the signing letter that this section (and a similar one involving prohibiting insurance credit scoring rules) is unenforceable has the legal effect of rendering the boilerplate provisions void. The Attorney General opined that the governor's statements do not render the boilerplate language void. However, a key point noted by Attorney General Mike Cox was that he had not been asked, and did not address, the question of the constitutionality of the boilerplate provisions themselves.³⁵

³² http://www.michigan.gov/documents/dleg/Regulatory_Impact_statementRISJuly-06_297485_7.doc

³³ http://www.michigan.gov/documents/buymichiganfirst/05_19_2009_sab_mins_FULL_SET_281988_7.pdf

³⁴ The language was included in both the House-passed and Senate-passed versions of the FY 2005 DELEG bill, but was not included in the final conference report or enacted bill (2004 PA 354). The language was first included in the FY 2005-06 DELEG appropriations act (2005 PA 156). The reporting requirement was added in FY 2007 (2006 PA 354). The reference to the Attorney General opinion was added in FY 2010 (2009 PA 130).

³⁵ <http://www.ag.state.mi.us/opinion/datafiles/2000s/op10302.htm>

Secondly, as is the case here, the Legislature has proposed legislation amending Public Act 154 to prohibit MIOSHA and its standards commissions from promulgating rules establishing ergonomics standards. During the 2005-2006 legislative session, the Legislature passed House Bill 5447, which is identical to this bill. That bill was vetoed by Governor Granholm, who noted,

House Bill 5447 is a solution in search of a problem. No department, board, or commission in state government has proposed rules to address job-related musculoskeletal injuries. In fact, an advisory committee to consider whether rules or standards are necessary in Michigan was formed by the administration of my predecessor, Governor Engler. The advisory committee, which includes experts in health and ergonomics and representatives of both employers and employees, has neither completed its review nor made any recommendations. House Bill 5447 would prematurely terminate the work of this advisory body.

Furthermore, as Governor, because the Michigan Constitution separates the powers of government, I have an obligation to defend the prerogatives of the Legislative Branch. If the advisory committee determines that administrative rules are needed in this area, and the Executive Branch concurs, the Administrative Procedures Act of 1969 affords ample opportunity for legislative review and reaction. If it is determined that administrative rules are not needed at this time, I have a responsibility to preserve the ability of a future governor to decide otherwise.³⁶

Legislation similar to this current bill was taken up in both of the prior two legislative sessions, although neither bill reached the governor's desk.³⁷ Also, on May 5, 2004, the House of Representatives adopted HR 233, urging the governor and MIOSHA to not move forward with the ergonomics standards.

Fiscal Analyst: Mark Wolf

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

³⁶ As has been noted above, the advisory committee later made a recommendation to the General Industry Safety Standards Commission and the Occupational Health Standards Commission that workplace ergonomics standards were necessary.

³⁷ See SB 843 of the 2007-2008 legislative session and SB 93 of the 2009-2010 legislative session.