

OSHA PROPOSES NEW INTERPRETATION OF NOISE STANDARD FOR CONSTRUCTION AND GENERAL INDUSTRY

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On October 19, 2010, the Occupational Safety and Health Administration (OSHA) published a notice in the Federal Register proposing to change the way in which the noise exposure standards for construction and general industry are interpreted, and modifying its enforcement policy accordingly. See 75 Fed. Reg. 64216 (Oct. 19, 2010). Comments on the proposed interpretation are due on or before December 20, 2010.

OSHA's proposed interpretation would effectively turn existing practice under the noise exposure standards on its head. Currently, OSHA's enforcement policy generally permits employers to utilize a hearing conservation program, including the use of personal protective equipment (PPE) such as ear plugs or ear muffs, to protect workers against hearing loss in high noise environments. Engineering controls, such as "modifications to plant, equipment, processes or materials," or administrative controls, such as "modifications of work assignments to reduce employees' exposure to noise," are only required when a hearing conservation program is ineffective, e.g., when noise levels are especially elevated, or when "the costs of such controls are less than the cost of an effective hearing conservation program."

According to OSHA's proposed interpretation, the current enforcement policy is contrary to the plain language of the noise exposure standards (29 C.F.R. § 1910.95(b)(1) (general industry) and 29 C.F.R. § 1926.52(b) (construction), which require the use of "feasible administrative or engineering controls" to reduce noise to within permissible limits, and provide for the use of personal protective equipment only if such controls fail to achieve the necessary reduction in sound

levels. OSHA intends to interpret the term "feasible" to mean "capable of being done," or "achievable," without regard to any cost-benefit analysis except in extreme circumstances. Under its new interpretation, "OSHA proposes to consider administrative or engineering controls economically feasible under the noise standards when the cost of these controls will not threaten the cited employer's ability to stay in business or when the threat to viability results from the employer's having lagged behind the industry in providing safety and health protection for employees." OSHA likewise intends to "change its enforcement policy to authorize the issuance of citations requiring the use of administrative or engineering controls when these controls are feasible in accordance with this interpretation."

OSHA's new interpretation of the noise exposure standards represents a heavy-handed intrusion into settled business practices that, as proposed, would preclude employers from utilizing cost-effective and safe means of protecting employees from excessive noise levels, and force them to make costly modifications to the physical plant or equipment, or work schedules, currently being used, even if those modifications are less effective than existing hearing conservation programs.

OSHA needs to hear from members of the business community concerning their reactions to the proposed interpretation. Comments are being accepted until December 20, 2010. Cozen O'Connor's Labor and Employment lawyers can assist employers in making their views known to the appropriate officials within the Department of Labor.