

# NTSP

National Telecommunications Safety Panel

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The purpose of this letter is to provide comments to the Notice for Public Comment issues in the Federal Register, No. 64:65768-66078 on November 23, 1999 regarding the proposed rule for ergonomic programs. This is a response made by the National Telecommunications Safety Panel (NTSP), representing the major telecommunications companies in the United States and other telecommunications companies, (see attached list in Attachment A) who have a total of 898,000 employees. We collectively provide the following comments on the proposed rule.

## **EXECUTIVE SUMMARY**

The National Telecommunications Safety Panel supports voluntary ergonomics programs, but believes OSHA's proposed rule is problematic in several important respects. First, the Panel is deeply concerned with the "MSD management" section of the proposed rule and the "work restriction protection" it mandates. These provisions conflict with state workers' compensation laws, with the Americans with Disabilities Act and the Family and Medical Leave Act, and with the generally accepted practices of health care professionals and safety and health managers. Second, the rule's triggering of extensive requirements on the occurrence of broadly defined "MSD signs" conflicts with the recognition in the medical profession that a certain amount of musculoskeletal complaints will always exist in the general population and cannot necessarily be correlated with work. It is neither the employers' role, nor OSHA's, to assume responsibility for musculoskeletal conditions not caused by work. Third, the Panel is concerned that the rule does not sufficiently take account of the special characteristics of the telecommunications industry. Telecommunications companies typically find their operations covered by general industry standards and industry-specific standards as well, and in light of this need flexibility to develop effective alternative programs. Similarly, the agency's "grandfather clause" is unduly narrow, leaving insufficient room for innovative ergonomics programs such as have existed in our industry for years. Concerns addressed in these comments also include the rule's hazard analysis and recordkeeping requirements, its "Quick Fix" provision, and the rule's dictates regarding the roles of managers and employees in conducting effective ergonomics programs.

## **DISCUSSION**

The National Telecommunications Safety Panel serves as a forum for the exchange of safety information and safety “best practices” within the telecommunications industry. The member telecommunications companies have had significant experience in ergonomics and ergonomic program administration in its twenty years of existence. We feel that we are in a unique position to comment on what has been found to work and what is problematic with regards to ergonomics programs.

The National Telecommunications Safety Panel (henceforth referred to as the “Panel” or “we”) and its member companies support sound ergonomic programs that maintain the maximum flexibility to respond to employee needs. Because of the diversity of job functions and the rapid evolution of technology within the telecommunications industry, it has been member companies’ experience that one approach does not necessarily have the same effect in different instances. The ability to react to ergonomic issues in a manner that is consistent with the particular organization, its work population and its technology is critical. Because of this, all of our member companies have ergonomic programs that are successful. For this reason, we strongly believe it is improper for the government to mandate specific elements with detailed compliance criteria. The member company representatives to the Panel have significant issues of concern with the proposed rule and would like to comment on them in the order that they are found within the body of the proposed rule.

### **DOES THIS STANDARD APPLY TO ME?**

#### **1910.902 Does this standard allow me to rule out some MSDs?**

With regards to 1910.902 (b) of the proposed rule, the term “core element of the job and/or make up a significant amount of the employee’s worktime” is extremely unclear.

#### **1910.904 Are there areas this standard does not cover?**

1910.904 of the proposed rule exempts construction operations. Within the telecommunications industry, industry-unique operations are covered under the provisions of 29 CFR 1910.268. Furthermore, those covered activities not industry-unique are covered under other provisions of 29 CFR 1910, General Industry Standards. Some of our tasks in an outside environment are covered under 29 CFR 1926, Construction Industry Standards. We believe that it would be extremely difficult to differentiate between a musculoskeletal complaint associated with performing tasks covered under this proposed rule versus those associated with activities covered under 29 CFR 1926. This further could provide opportunity for accusation of discrimination based on the type of MSD. This issue demonstrates one of the problems with OSHA's across-the-board coverage of general industry under the “one trigger” rule.

The Panel strongly believes it is improper to have a rule that does not give consideration to allowing industries or organizations that have jobs that cross over into industries specified in 1910.904 of the proposed rule to develop alternative program requirements. This is based on the premise that a musculoskeletal complaint found to be associated with a task covered by the exempted industries would trigger full program requirements under the proposed rule. Additionally, the work restriction protection provisions of the proposed rule could create a disparity between employees reporting a musculoskeletal complaint in a general industry job and those who report the same complaint while performing a task under an exempted industry task. We believe that this approach could be extremely discriminatory and would create the impetus for false reporting of MSDs and fraudulent application of work restriction protection.

## **HOW DOES THIS STANDARD APPLY TO ME?**

### **1910.905 What are the elements of a complete ergonomics program?**

We believe that although OSHA has identified what many consider core elements of an effective ergonomics program under the provisions of 1910.905 of the proposed rule, a number of the requirements identified in the specific sections are problematic at best. The single element that is most problematic and is discussed at length below is MSD management. We respectfully and strongly recommend that OSHA pay particular attention to the Panel's comments regarding "MSD management."

### **1910.906 How does this standard apply to manufacturing and manual handling jobs?**

The provisions of 1910.906 allow employer's relief from implementation of all six ergonomic program elements of the proposed rule in manufacturing and material handling jobs "if no MSD has occurred in those jobs." This point is confusing and effectively states that the MSD is not required to be work-related or a "covered MSD" as defined in the proposed rule. Essentially, 1910.906 (a) implies that full programmatic requirements apply if any MSD-type injury or illness occurs, regardless of origin. The Panel strong believes that this language is confusing and contradictory and effectively applies all provisions of the proposed rule to all employers who have manufacturing and manual handling jobs, regardless of location or "covered MSD" history.

1910.906(b)(2) and (b)(2)(ii) refer to the term "MSD symptoms" as a reason for full program implementation. We believe that this reference to MSD symptoms as a reason to take appropriate action is not workable.

Another element of 1910.906 that is extremely problematic is "'have knowledge' that an MSD hazard exists in the job" in (b)(2)(i). 1910.945 defines "have knowledge" as meaning "that you have been provided information that MSD hazards exist in a manufacturing or material

handling job by any of the following: an insurance company; a consultant; a health care professional; a person or persons working for you who have the requisite training to identify and

analyze MSD hazards.” Many of these persons or entities will lack the knowledge or training to provide the employer with this information, even supposing MSD hazards exist. Additionally, in order to fully identify sources of MSD complaints in a particular workplace as they apply to individuals, highly specialized training is necessary. Within the telecommunications industry, employers already take corrective action as necessary and as appropriate to the individual’s needs. We believe that mandating full program implementation of all six elements is wrong based on the definitions of “have knowledge” as it related to 1910.906(b)(2)(i).

1910.906(b)(2)(ii) of the proposed rule states that another trigger for full implementation of all six ergonomic program elements rests, in addition to “Persistent MSD symptoms,” when “physical work activities and conditions in the job are reasonably likely to cause or contribute to the type of “MSD symptoms” reported.” This trigger language is extremely vague and again does not relate a “covered MSD” to the work-relatedness of the condition.

Finally, the terms “core element of the job and/or make up a significant amount of the employee’s worktime” found in 1910.906(b)(2)(iii) of the proposed rule are extremely problematic as these terms are not found in the “key terms” section under 1910.945. Even language in the Preamble of the proposed rule does not adequately define this term. The lack of quantification of these terms is significant because a core element could be one that the employee may at some time need to perform, but does not necessarily perform on a routine basis. Additionally, “significant amount of the employee’s worktime” could be construed as a majority (over 50 percent) of the worktime. Ergonomists acknowledge that temporal issues with regards to an employee’s worktime task may not necessarily be significant if other issues such as frequency or force within the temporal measure are absent or extremely low.

For example, a telephone operator works at a computer workstation for an 8 hour shift, but may key no more than the equivalent of 8 words per minute with programmed breaks of 15 minutes every two hours and with an hour long meal break. Keyboarding would meet the generally understood interpretation of “core element of the job and/or make up a significant amount of the employee’s worktime,” but would not constitute any reasonably expected hazard. Because of required motions involved and manual manipulation of the keyboard in this example, this job could be construed to be a manual handling job.

### **1910.907 How does this standard apply to other jobs in general industry?**

The provisions of 1910.907 of the proposed rule have the greatest impact on the telecommunications industry and various jobs performed in it because the provisions require full program implementation based upon a single “trigger” event (discussion will follow on the “Quick Fix” option). The Preamble states on page 65791 of the proposed rule “that if a covered MSD occurs in one of the “other” jobs, it becomes a “problem job,” as defined in the standard, and the full ergonomics program must be implemented for that job and all jobs in the workplace that involve the same physical work activities.” Although this provision is meant to limit the

implementation of all six elements of a program to one work site (if the term “site” is comparable to the term “workplace” found in the proposed rule), in reality, most employers

would be forced to implement the full program over all of their workplaces as a practicality. This is due in part to the fact that in telecommunications companies, most safety, health and medical management functions are centralized at one or more sites, which may not be resident in the employee’s workplace.

With regards to the provisions of 1910.907 in the proposed rule, office-type work such as performed by call centers, directory assistance operators, software designers, engineers and managers, would be covered as “other” jobs. The common denominator for these jobs is the microcomputer and input devices such as the keyboard and mouse. It is conceivable that if an operator in one location were determined to have sustained a “covered MSD” attributed to use of a keyboard, that would trigger full program implementation for anyone else in that location (in some cases over 3000 employees) who uses a keyboard. Additionally, under provisions of 1910.914 and 1910.915, there appears to be an implied obligation to inform others who are at other locations about the “hazards” associated with that “problem job.” If it is the intention of 1910.907 of the proposed rule that full program implementation be limited to the particular site where the “covered MSD” is reported, OSHA has failed to clearly limit the standard’s application to all other sites within a company where similar work tasks are performed. We strongly believe that this section of the proposed rule presents the potential for confusion and inability to meet the proposed rule’s intent.

Furthermore, because of the epidemiological recognition that MSD complaints occur due to non-occupational etiological factors and that an ever present number of these disorders occur naturally in any target population, the requirement under 1910.907 for a single trigger event to require full program implementation is wrong. The Panel member companies feel strongly that incidence is the wrong trigger to use for program implementation. In fact, this concept has been articulated in OSHA’s Ergonomics Program Management Guidelines for Meatpacking Plants. Under the provisions of 1910.907 of the proposed rule, those companies who may meet “grandfathering” provisions for 1910.908, but experience one incident determined to be “covered MSD,” would possibly be required to implement all elements of an ergonomics program in this proposed rule. It was improper for OSHA not to give great attention to allowing other triggers, such as severity, as an alternative to a single incident.

### **1910.908 How does this standard apply to other jobs in general industry?**

Although the provisions of 1910.908 of the proposed rule allow existing ergonomics programs to exist as an alternative to the required elements of the proposed rule, the Panel believes that no member company could reasonably expect to maintain their existing programs. The telecommunications industry as a whole and the member companies of the Panel in particular have a long and significant experience with effective ergonomic programs. A major hallmark of the telecommunication industry’s success with ergonomic programs is the ability to rapidly react to a dynamic workplace, including issues such as changing technology, labor practices, diversity within the workplace and industry “best practices.” We believe that this

ability would be significantly reduced or eliminated under the provisions of 1910.908 of the proposed rule, especially because of the single trigger provisions of 1910.907.

Satisfaction of “the basic obligation section of each program element of this standard,” including MSD management which we have previously made significant comment on, would effectively prohibit any “grandfathering” of existing programs. We strongly believe that OSHA has erred by failing to include robust language regarding the allowance of alternative programs that meet performance requirements of an industry or professional organization. OSHA already has a precedent for this type of performance-based approach: 29 CFR 1910.119, Process Safety Management. That standard established a framework approach that recognized that each industry and organization needed the widest possible latitude to attain a safe workplace under the rule. Specific language was provided to recognize industry “best practices,” codes and standards. Furthermore, an alternative program requirement properly does not contain single trigger requirements such as found in 1910.906(b)(1) and 1910.908 of the proposed rule.

### **1910.909 May I do a Quick Fix instead of setting up a full ergonomics program?**

The provisions of 1910.909 for “Quick Fix” solutions for “problem jobs” as defined within the proposed rule is extremely problematic and has the potential to be unnecessarily wasteful of limited resources and highly disruptive to the workplace. Blanket application of “Quick Fix” solutions across entire ranges of “problem jobs” would be difficult at best and practically unfeasible.

For example, in an office environment if an employee states that they have “lower back pain,” which under existing “key terms” in 1910.945 is an example of a musculoskeletal disorder, a quick fix solution may be a chair with enhanced lumbar support. This “Quick Fix” solution may be wholly appropriate for that employee based on objective medical findings of lower back trauma. Definitionally, OSHA has referred to “lower back pain” as an MSD, absent any objective medical findings. Given that possible and wholly probable scenario, once that employee receives a new chair, is it discriminatory for the employer to not provide new chairs to all employees in all office jobs in that workplace? The requirements of 1910.909(b) implies that the employer must provide new seating to all of the employees in that “problem job” based only upon subjective reports (i.e., lower back pain) and on the opinion of other employees that they too may experience lower back pain at some time in the future.

The provisions of 1910.909 are unreasonable and the Panel unequivocally believes that the “Quick Fix” requirement is improper. Under 1910.909(e), the employer would be required to report its “Quick Fix” solution, and implicitly, offers this solution to all employees in similar “problem jobs” within 90 days. Additionally, provisions under 1910.909(d) for keeping records of every quick fix solution would require significant recordkeeping requirements above and beyond those required by the proposed rule. The Panel believes that the concept of “Quick Fix” is appropriate only when it lacks the problematic requirements aforementioned and when it is inapplicable to employees other than the single employee who developed the condition at issue.

### **1910.910 What must I do if the Quick Fix does not work?**

If the true intention of 1910.910 of the proposed rule is to allow employers relief from implementation of the last four elements of an ergonomics program as specified in 1910.905, then this provision fails practically. The responsibility for the success of the quick fix depends upon the employer. Definitionally, “MSD hazards” found in the “key terms” in 1910.945 states they are “physical work activities and/or physical work conditions, in which ergonomic risk factors are present, that are reasonably likely to cause or contribute to a covered MSD.” There may be instances when the employee will not accept the quick fix solution and will refer to the examples of MSDs found under “key terms” which in the case of lower back pain may be absent identifiable risk factors. Ultimately that failure of the “Quick Fix” controls under provisions of 1910.910(a) will require full ergonomic program implementation in that workplace. Another covered MSD incidence under 1910.910(b) would also trigger full program compliance. The Panel strongly believes that 1910.910 is improper for these reasons. The Panel believes that OSHA is mistaken to use the “Quick Fix” solution as another trigger for full regulatory compliance within the scope of the proposed rule rather than as a continuous improvement tool based on individual needs.

## **MANAGEMENT LEADERSHIP AND EMPLOYEE PARTICIPATION**

### **1910.911 What is my basic obligation?**

The Panel and its member companies strongly support the concept of management leadership in all health and safety programs and in ergonomics programs. However, provisions of 1910.911 of the proposed rule are problematic. The term “MSD signs” is mistaken and should not have been included in the body of the proposed rule, including in the “key terms” in 1910.945 and in particular in 1910.911. We believe that MSD signs may be redundant, too subjective and irrelevant to a covered MSD in some cases. The Panel also believes that the language that reads “be involved in developing, implementing and evaluating each element of your program” is overly intrusive of managerial prerogatives and may violate the National Labor Relations Act and expose non-managerial employees and their representatives to legal liability under the “General Duty Clause” in section 5(a)(1) of the Occupational Safety and Health Act of 1970. Furthermore, the requirement under 1910.912 that “you must not have policies or practices that discourage employees from participating in the program or reporting MSDs signs or symptoms” is problematic due to OSHA’s position on failure to report MSDs because of drug screening programs.

## **1910.912 What must I do to provide management leadership?**

The Panel finds certain elements of 1910.912 problematic as management leadership requirements will devolve to a level of management that does not necessarily have the resources or the authority available presently to comply with the proposed rule. The Panel recommends that the phrase "...and how you will hold them accountable for meeting those responsibilities" in 1910.912(a) be removed as this implies disciplinary action, unlike any other standard that OSHA has promulgated. Second, the Panel strongly believes that 1910.912(a) is inappropriate because managers normally having health and safety responsibilities within an organization do not normally have "authority" and "resources" for compliance with this proposed rule. Finally, the Panel also strongly believes that 1910.912(c) is inappropriate for the reasons discussed previously with regards to drug screening programs.

We believe that the "management leadership" element of OSHA's recommended ergonomics program would result in a de facto prohibition on workplace drug testing programs and other management policies that OSHA believes may discourage employee reporting of MSDs. These policies play an important and legitimate role in reducing employee practices that may cause workplace accidents and enhancing employee awareness of safe workplace practices. By opposing such policies, OSHA is attempting to replace proven safety management policies with new federal mandates that are not guaranteed to substantially improve workplace safety.

The management leadership element of the proposed ergonomics standard requires employers to examine existing employer policies and practices "to ensure that they encourage and do not discourage reporting and participation in the ergonomics program." OSHA further explains in the Preamble that this requirement prohibits any workplace policy that may discourage "full and early reporting" of MSDs such as a policy that requires drug testing of every employee who reports an injury or a supervisory practice of withholding overtime work for anyone who reports MSD signs or symptom.

In most cases, various Panel member companies have long-established and sensible reasons for implementing such policies to manage safety and health. Drug tests have been shown to substantially reduce workplace accidents from careless work habits by impaired employees. Furthermore, because some telecommunications operations fall within U.S. Department of Transportation regulation for commercial motor vehicle licensing (CDL), random and post-accident drug testing is mandatory.

The Preamble to the proposed rule implicitly prohibits employer drug testing programs that may "discourage early reporting of MSDs." It makes clear that any drug testing policy "that had a chilling effect on employees' willingness to report" an MSD could be considered in violation of an ergonomics standard. Thus, an OSHA compliance officer who discovers that an employee failed to report an MSD out of fear of undergoing a drug test would have grounds to

cite the employer for violating the “management leadership” element of the ergonomics standard, regardless of the effectiveness of the drug testing program.

Post-accident testing is an important part of employers’ drug testing program. It serves several purposes, such as determining whether drug use played a part in an accident or near miss that involved or would have involved serious personal injury or property damage. This type of testing also acts as a deterrent to would-be-drug users to avoid future drug use. In many industries or cases, drug testing has been mandated by regulatory agencies.

Under the Drug Free Workplace Act of 1988, employers such as various member companies on the Panel that have a single contract of at least \$25,000 with the federal government are required to certify that they are maintaining a drug-free workplace and to take certain steps to demonstrate their compliance. Although the law does not require contractors to engage in drug testing per se, many implement drug tests to ensure that they are providing accurate certifications to the government.

Policies such as limiting the amount of overtime work injured employees may perform, and protecting employer paid leave policies against abuse, support OSHA’s goals overall and may be inconsistent with its explanations elsewhere in the Preamble. The Panel strongly believes that this interpretation in the Preamble is counterproductive.

### **1910.913 What ways must employees have to participate in the ergonomics program?**

The Panel has grave concern over the language that OSHA uses in 1910.913 of the proposed rule to accomplish employee participation in ergonomics programs. The Panel believes it is improper, for instance, to use the term ‘designated representatives’ rather than the term “authorized representatives.” This is inconsistent both with other OSHA regulations and with the National Labor Relations Act. The Panel also believes that the term “MSD signs” is improper for reasons previously stated with regard to 1910.913(a).

## **HAZARD INFORMATION AND REPORTING**

### **1910.914 What is my basic obligation?**

1910.914 requires employers to “set up a way for employees to report MSD signs and symptoms and to get prompt responses.” The Panel finds this requirement to be confusing due to the lack of discussion of what constitutes “prompt responses.” Additionally, employee reporting of MSD signs and a requirement for prompt response is again problematic. MSD signs are defined under “key terms” in 1910.945 as “objective physical findings” without describing who validates or confirms this finding. Additionally, the requirement for prompt response is less than for a “covered MSD” that would be defined by objective medical findings. The Panel finds this requirement too vague and strongly believes its inclusion in the rule is improper, as is inclusion of the “key term” for “MSD signs.”

### **1910.916 What must I do to set up a reporting system?**

The Panel recommends that 1910.916 be removed from the proposed rule as both (a) and (b) are redundant of 1910.914.

## **JOB HAZARD ANALYSIS AND CONTROL**

### **1910.917 What is my basic obligation?**

The Panel feels strongly that it is a mistake to require a job analysis for each and every employee rather than focusing on the job holistically as it is performed. The Panel also feels strongly that the term “materially reduce” is unacceptably vague, as the question arises if an employer can be cited under this standard for non-compliance if last year the problem job experienced as little as two covered MSDs and this year that same job experienced one covered MSD. Background epidemiological occurrence of MSDs unfortunately exist in any work population. “Material reduction” may not take this phenomenon into consideration and may be the basis for a non-compliance citation.

### **1910.918 What must I do to analyze a problem job?**

The members of the Panel believe OSHA has erred by including in 1910.918(a) the phrase “...all of the employees in the problem job or...” as this could be problematic in workplaces with a large number of employees performing the same tasks. Furthermore, the provision is deficient because it does not contain language recognizing the individuality of some MSD “hazards” (such as pregnancy as a risk factor for recognizing carpal tunnel syndrome). Because it lacks such a proviso the rule could trigger mass interventions in a workplace to abate MSD hazards that are not work-caused. In the case of pregnancy, the employee’s MSD hazards are fundamentally different than the population as a whole that is engaged in that “problem job.”

The members of the Panel strongly believe that the matrix of “physical work activities and conditions” and “ergonomic risk factors that may be present” found immediately below 1910.918(c) provides insufficient guidance to be included as a mandatory item in a federal rule.

### **1910.919 What hazard control steps must I follow?**

Under 1910.919, the Panel believes it is a mistake to use the term “recommendations” rather than to require the term “suggestions,” because “recommendations” may be misconstrued to require acquiescence to employees’ wishes rather than implementing that which is conservatively necessary under the circumstances. For example, the employee or employees may recommend that new chairs in an office environment be procured when training on the use

of existing seating and workstation adjustment would be sufficient. Furthermore, the Panel believes the sentence “This includes consulting with employees in problem jobs about whether the implemented controls have eliminated or materially reduced the hazard” is problematic for

the same reasons. Programmatically, it is feasible to reach an impasse with employees if conservative, but sound control steps do not necessarily meet with their approval.

## **TRAINING**

### **1910.923 What is my basic obligation?**

Under the provisions of 1910.923 of the proposed rule, training would occur “...initially, periodically, and at least every three years at no cost to the employees.” A frequency requirement of full retraining every three years may in fact be redundant and unnecessary in a workplace with an active ergonomics program or where no relevant changes in equipment or tasks have occurred.

### **1910.927 When must I train employees?**

As indicated above, the three-year frequency for complete retraining is inappropriate when there have not been material changes in the work environment.

### **1910.928 Must I retrain employees who have received training already?**

Once again, the automatic three-year full retraining requirement is unnecessarily burdensome when there have not been material changes in the work environment.

## **MSD MANAGEMENT**

### **1910.929 What is my basic obligation?**

The most significant issue that is found within the proposed rule is the MSD Management provision found in 1910.929 to 1910.935. The member companies of the Panel believe the language in the proposed rule on MSD management is in direct conflict with existing state workers’ compensation and medical management procedures. It is improper to do anything more

than refer employers to these existing statutory procedures for MSD management. For multi-state employers, this is not only logical, but would be easily managed from a programmatic perspective.

The proposed rule appears to classify “jobs with a musculoskeletal disorder,” rather than focus on the employees who may have a musculoskeletal complaint associated with working in a position that requires some sort of physical activity. Therefore, from a clinical perspective, provisions for MSD management are extremely vague since any job could be associated with what the rule calls symptoms of musculoskeletal disorders as all jobs require some sort of causal activity.

### **1910.930 How must I make MSD management available?**

In 1910.930 as proposed, the most significant areas of concern are in the medical management of the conditions and the redundancy that these proposed standards have with current handling of on the job illness/injuries under workers’ compensation. Employees who report a medical problem, such as complaints of musculoskeletal symptoms, are, under many applicable state workers’ compensation statutes, treated medically. A health care provider then reviews the employee’s condition and prescribes appropriate treatment modalities, with light duty or modified duty frequently one of the prescribed treatments. The health care providers are given information concerning the employment activities and illness or injury under workers’ compensation and care is provided at no cost to employees. This protocol, common in all states, satisfies the proposed rule’s provisions of MSD management.

Under 1910.930(b), who would be responsible for “determining whether temporary work restrictions or other measures are necessary”? Consistent with the Americans with Disabilities Act and our member companies’ commitment to the privacy of employee’s medical conditions, employees are not required to give the details of their medical problems (signs/symptoms/diagnosis) to their supervisor/department. It appears that there is an expectation under the proposed rule that lay personnel should make such judgments about imposing work restrictions. This appears to present an opportunity for an employee to report vague symptoms (e.g. “my hands hurt”) in an attempt to be placed under the protection of the proposed rule and have a potentially lower performance expectation (particularly if an assessment yields recommendations to reduce the “hazard” by reducing work in a given time frame). Additionally, member companies already have significant plans and protocols for treatment of medically restricted employees. Member companies utilize health care provider’s assessments, including work-site visits, to ensure employees’ return to work at maximum health.

### **1910.932 What must the HCP’s written opinion contain?**

With regards to 1910.132 under the proposed rule, many health care providers lack specific skills in assessing occupational matters. Given the vague clinical definition of musculoskeletal disorders in this proposed rule, the possibility exists that an employee would not receive adequate medical care. It is extremely vague as to which HCP an employee would go; to their personal provider or to a provider directed by the employer. In those states where

employers designate health care providers under the applicable workers' compensation system, this probably would not be much of an issue as those providers could evaluate the medical condition, assess the work environment and give an opinion regarding the work-ability of an

employee. This proposed rule appears to be in conflict with workers' compensation provisions in those states where employers do not direct care under workers' compensation. It appears to imply that employers can in fact direct care (e.g., designate the health care provider). The proposed rule also implies that the health care provider must be quite adept at assessing more than an employee's health condition and do much more than treat the employee's medical condition. Experience is, for most member companies with current ergonomic programs, that many personal health care providers give little thought to employee's functionality and work capability. The MSD management provisions of the proposed rule do not focus on work functionality, but rather on work restriction.

Many of the provisions of the proposed rule would incorporate what the employee thinks (about cause, redesign of job, etc.) into most elements of an ergonomic program, but in 1910.932 (d), the HCP must "inform the employee about other physical activities that could aggravate the covered MSD during the recovery period." This is potentially problematic as a difference in opinion between employee and health care provider could serve to hold the employer responsible for further work restrictions and work restriction protection measures.

### **1910.933 What must I do if temporary work restrictions are needed?**

In 1910.933 of the proposed rule, the focus is again on temporary work restrictions, rather than on functionality and in (b), follow-up is a responsibility of the employer. There is not any responsibility or accountability on the part of the employee to participate in this follow-up. While the employer must do whatever necessary to help the employee achieve restoration of health and functioning, the employee has no obligation for active participation. Nothing in this proposed rule speaks to the employee's responsibility in attaining and maintaining optimal health, therefore the MSD management provisions of the proposed rule are flawed.

The provisions of 1910.933 of the proposed rules are unanimously found to be unacceptable to the member companies as intrusive on state workers' compensation issues, tantamount to the federalization of workers' compensation which exists as a state prerogative and having precedent-setting influence on a number of other significant issues such as ADA, FMLA and collective bargaining agreements among various member companies and their respective bargaining units.

There is case law indicating that under the Americans with Disabilities Act, employers are not necessarily required to create a light duty position as an accommodation for an employee's disability. Under the MSD management provisions of the proposed rule, however, employees with "covered MSDs" must be placed on light duty if that is what the HCP orders. In the event that the MSD is also a disability, there would be a conflict between the ADA case law

and the proposed rule in present form. Moreover, employees with other conditions that are disabilities may reasonably assert that they are being discriminated against if employees with MSDs are given light duty but employees with other conditions that are disabilities are not.

Although the ADA indicates that time off may be a reasonable accommodation for a person's disability, it is unclear how much time off is required. Currently, many employers who are accused of violating the ADA by failing to accommodate a request for time off argue that the twelve weeks provided for by the FMLA should be the maximum that an employer is required to offer as a reasonable accommodation. The decisions on point vary greatly as to how much time off must be given to satisfy the "reasonable accommodation" requirement of the ADA. If the proposed rule is enacted, there is a possibility that it could lead to a presumption that six months off is a reasonable accommodation for disabilities because OSHA has said that employers must pay employees for up to six months off when they have MSDs.

It is unclear under the proposed rule and in the Preamble whether employers can count work restriction time off for MSDs as Family and Medical Leave Act leave. If not, there is a potential problem with employees stringing together leaves. Currently, employers do not have to provide FMLA leave to employees who have not worked for the company for a year. However, the proposed rule, including the Preamble, did not identify any time restrictions for MSD management requirements. Thus, technically, it appears that employees who have been on the job for only a day could conceivably be entitled to six months paid time off for a covered MSD. Additionally, if collective bargaining agreements between employers and unions provide for FMLA-related leave, employees with MSDs could receive more favorable treatment than employees with other medical conditions. This would not only create problems with FMLA administration, but also lead to discrimination claims where employees with disabilities that are not MSDs assert that they have been treated less favorably based on their disability.

Under the work restriction protection provisions of the proposed rule, employees with covered MSDs would have to be maintained on the payroll at 90% or 100% plus benefits (depending on whether they were completely removed from the workplace or permitted to continue working with restrictions) for six months regardless of whether they were ever expected to return to work. Employees who have temporary work restrictions because of MSDs and are assigned to lower paying jobs are entitled to be paid 100% of what they earned at the higher paying job for six months, regardless of how long they have been employed. This could conflict with the pay protection allowance system that is currently in place under collective bargaining agreements.

OSHA also suggests that it may cite an employer who withholds overtime from an employee who reports an MSD, because the effect of withholding the overtime would discourage other employees from reporting MSDs. In reality, by curbing the amount of work time, an employer is attempting to prevent further aggravating a musculoskeletal complaint. The MSD management section of the standard requires this type of temporary work restriction once an employee reports a "covered MSD" as defined under the standard.

**1910.935 May I offset an employee’s WRP if the employee receives workers’ compensation or other income?**

1910.935 of the proposed rule is erroneous to the extent it implies that it is always preferable when an employee has work restrictions that the employee be off work, rather than placed in a light duty job or other position that accommodates the restriction. If this is a possible interpretation of this section, there is a major disconnect between the proposed rule and typical medical management, which supports the premise that work is therapeutic and a necessary component of the return-to-work emphasis of occupational health programs. Current medical management for short term disability plans normally incorporate modified duty/light duty/transitional duty assignments to return people to meaningful work as soon as medically appropriate. We strongly believe that work is therapeutic and that many times, people don’t recover as well if at home. In fact in some cases, work is an important part of the treatment plan. Each situation would have to be evaluated on a case by case basis, reviewing the objective findings of the individual. If employees under a WRP could opt for absence, is there an expectation under the proposed rule that such absence could be covered under a STD plan? In order to be eligible for wage replacement under typical STD plans, employees must have objective findings consistent with an inability to perform their job or another job in a modified capacity.

**PROGRAM EVALUATION**

**1910.936 What is my basic obligation?**

Under provisions of 1910.936, each employer would have to perform an audit of their ergonomics program at a minimum of every three years. The Panel member companies find this requirement to be problematic in light of the composition of most large telecommunications companies (geographically dispersed workplaces, the dynamic nature of the work performed, centralized occupational health and safety staffing, etc.). The Panel believes that OSHA has failed to provide clear guidance, either within the body of the proposed rule or in the Preamble, on what specific components of the elements of an ergonomics program would be evaluated and in what way they would be evaluated.

Page 65859 of the Preamble includes discussion of “basic tools” that are common for ergonomic evaluations under 1910.936 of the proposed rule. Although OSHA “believes that the employer is in the best position to determine how often the ergonomics program at a particular worksite needs to be evaluated to ensure its effectiveness,” current language under 1910.911 and 1910.913 of the proposed rule on employee participation in “developing, implementing and evaluating” each element of the program appears to contradict the employer’s purview in this matter. The Panel strongly believes that the rule is problematic in that it fails to clearly state that program evaluation frequency is the sole responsibility of the employer.

### **1910.937 What must I do to evaluate my ergonomics program?**

The Panel strongly believes that 1910.937 also is flawed because it fails to reflect the purview of the employer with regards to program evaluation content and context. Furthermore, the panel believes that the phrase “eliminating or materially” in 1910.937(c) is improper because some MSDs exist epidemiologically in any workplace.

## **WHAT RECORDS MUST I KEEP?**

### **1910.939 Do I have to keep records of the ergonomics program?**

The Panel and its member companies find it particularly interesting that OSHA has identified six elements necessary for an ergonomics program, but in light of proposed requirements under 1019.939 and 1910.940, does not state that recordkeeping is a program element. The Panel expresses grave concern over the amount of time and resources that would be dedicated to recordkeeping requirements under this proposed rule.

### **1910.940 What records must I keep and for how long?**

The Panel strongly believes that the three-year record retention requirements under 1910.940 of the proposed rule may in fact be at odds with other medical record retention requirements. As this rule is proposed as a health standard, the panel strongly believes OSHA may have given insufficient consideration to what record retention requirements are truly appropriate and who is most appropriate to retain these records. The probability that some of these records, especially those that are very personal and individual in nature (e.g., job hazard analyses to accommodate individual injury or illness) could have significant employee privacy issues beyond mere compliance with 1910.940 of the proposed rule. The Panel also notes that the record retention requirements of the proposed rule appear to have been imposed without consideration to the potentially contradictory requirements of 1910.1020.

## **WHEN MUST MY PROGRAM BE IN PLACE?**

### **1910.942 When do I have to be in compliance with this standard?**

The Panel and its member companies have considered the program implementation requirements found in 1910.941 through 1910.944 with regards to feasibility, disruption to existing operations and the dynamics of the modern telecommunications industry. The Panel believes that because of the decentralized nature of a typical telecommunications company’s operations (geographically dispersed and a dynamic, constantly evolving workplace), the program element implementation requirements found in 1910.942 do not appear appropriate.

Based on previous discussions of individual program elements within the proposed rule, the Panel believes it would be necessary for employers with more than 10 worksites and 2500 employees across those multiple worksites to have two years after a rule becomes effective to

implement “management leadership” and “hazard information and reporting” as defined in the rule, three years to implement “job hazard analysis,” “interim controls,” and training, and four years for “permanent controls” and “program evaluation.” This reflects the distinct probability that most telecommunications companies will maintain a corporate ergonomics program to ensure consistency of compliance, adequate communications and sharing of “best practices” across all of their workplaces.

## DEFINITIONS

### **1910.945 What are the key terms in this standard?**

There exists under the ‘key terms’ found in 1910.945 of the proposed rule many confusing issues related to the MSD management provisions. These include the following:

**Administrative Controls:** (1) Employee rotation may be difficult to implement because of the extensive technical training requirements of many of our jobs, and the rule is flawed to the extent it attempts to require rotation when not feasible. Further, the definition is flawed to the extent it suggests that a significant “rest break” is an appropriate administrative control.

**Covered MSD:** We believe strongly that the definition of a “recordable MSD” found in (1)(i) is unclear and inconsistent with existing OSHA recordkeeping requirements. The term “reasonably likely to cause or contribute to the type of MSD reported” found in (1)(iii) and (2)(iii) also is unclear within the body of the proposed rule and the term “signs” found in (2)(iii) is wholly inappropriate.

**Have Knowledge Of:** We believe that this term is improper for reasons stated in connection with 1910.906 of the proposed rule.

**Health Care Professional (HCP):** The definition of HCP is extremely vague as some states grant licenses and/or certifications (e.g., Naturopaths) for those who are not otherwise covered under the workers’ compensation or employee health plans. We strongly believe that it is improper for OSHA to attempt to overrule respective state workers’ compensation programs for HCP identification. We also strongly believe that appropriate HCPs are physicians (MDs or DOs), physical and occupational therapists and occupational nurses with significant knowledge and experience in musculoskeletal complaints.

**Musculoskeletal Disorders (MSDs):** The definition of musculoskeletal disorders is subject to some debate. We believe it is improper not to provide that MSDs must be medically diagnosed by a licensed physician, experienced in treatment of this type of injury or illness based on objective medical findings. Only such an individual is appropriate to define an injury or illness of this type for clinical and practical purposes. Since MSDs are medical conditions, the member

companies strongly believe that MSD diagnosis is the prerogative of physicians. We also strongly believe that the 12 “examples of MSDs” are erroneous and we strongly disagree with

the premise that “(12) Low back pain” meets the definition of an MSD either clinically or within the context of the proposed rule.

**MSD Signs:** We believe that this term is extremely subjective and significantly diverts medical resources from actual medical problems. This term is extremely vague and is confusing from a clinical standpoint.

**MSD Symptoms:** MSD symptoms listed in (1) through (6) can also be signs and symptoms of other conditions. We believe that the last sentence of the paragraph is flawed to the extent it suggests that the conditions listed necessarily are MSD symptoms.

**OSHA Recordable MSD:**

In 1910.945(2)(i), a diagnosis of muscle aches, strains, tendonitis, etc. can be made without any objective findings and without specific documentation as to etiology. In (2)(iii)(A) medical treatment is not defined and is unclear. (2)(iii)(B) does not specify that the lost workday is because of an incapacity. The entire section appears to attempt to amend the occupational injury and illness recording requirements of 29 CFR 1904 without acknowledging it is doing so.

**Work Practice Controls:** The Panel believes that the last example of work practice controls, “Employer-authorized micro breaks,” may be construed by employees as mandatory and wholly applicable across a job if one employee sustains a “covered MSD” due to highly individualized risk factors or to non-occupational factors.

**Work Restriction Protection (WRP):** We believe that this program is improper for reasons explained above.

**Work Restrictions:** We believe that it is inappropriate to state, “To be effective, work restrictions must not expose the injured employee to the same MSD hazards as were present in the job giving rise to the covered MSD.” This sentence is inconsistent with restrictions that may involve acceptable levels of activity as defined by a health care provider.

## CONCLUSION

The National Telecommunications Safety Panel wishes to thank OSHA for the opportunity to comment publicly on the proposed rule for ergonomic programs. If we may be of any further assistance in this matter, please feel free to contact me at your convenience.

Sincerely,

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**Attachment A**  
**Telecommunications Companies Participating in the Comments**

ALLTEL  
Ameritech  
Bell Atlantic  
BellSouth  
Broadwing  
Commonwealth Telephone Enterprises  
Global Crossing  
GTE  
Lucent Technologies  
MediaOne Group  
MCI WorldCom  
Pacific Bell  
Qwest  
Southern New England Telecommunications  
Southwestern Bell Corporation  
Sprint Corporation  
U S WEST, Inc.  
Worldwide Fiber, Inc.