Occupational Safety and Health

At-Home Workplace: Secretary of Labor Withdraws Controversial Occupational Safety and Health Advisory Letter on At-Home Workplaces; Employers With Telecommuters Still Face Serious Issues

Introduction
On November 15, 1999, the Occupational Safety and Health Administration (OSHA) issued an interpretation and compliance letter covering an employer’s liability for work conditions of at-home employees, copy attached. The issue had originally been raised in an August 15, 1997, letter sent to OSHA by CSC Credit Services of Houston, Texas. CSC was thinking of placing some of its sales executives in their home offices and wrote to inquire of OSHA what its legal liability would be. The fact that OSHA spent over two years crafting its response indicates that the agency spent considerable time debating the merits of its position.

The letter attracted little attention until The Washington Post ran a cover story on January 4, 2000. The issue quickly attracted negative criticism from groups representing employers and at-home workers. On January 5, the Secretary of Labor withdrew the letter. She did not disavow it. Indeed, in the press release announcing its withdrawal, she reaffirms that the letter provided its recipient with the guidance he needs and states that since 1971 “employers have had the responsibility for making sure that all employees work in safe and healthful conditions.” Thus, the Department’s position on the responsibility of employers for at-home workers remains ambiguous, although we may assume that the thrust of the policy guidance in the letter and press release remains in effect.

An interpretation and compliance letter is a statement of the agency’s position on the status of existing law as it applies to an individual set of facts and circumstances. Thus, OSHA was not proposing additional legislation or regulation. In the agency’s view, the letter summarized what existing law already requires of an employer. It is not clear to what extent OSHA now believes that its original interpretation was mistaken. Although the letter is not legally binding on the courts or the agency, the agency normally can be expected to adhere to its own interpretation. Under the Administrative Procedures Act, federal courts normally give great deference to an agency’s interpretation of the statutes and regulations when applying it to specific cases. For this reason, the letter remains important.

Why the Letter Is Important
The number of at-home workers has grown rapidly over the past few years. According to one survey, 27.4 percent of all U.S. households conducted work from home in some capacity, either as telecommuters, corporate after-hours workers, or home-based business operators.1 The number of teleworkers rose from 15.7 million in 1998 to 19.6 million by 1999.2 As workplaces continue to change

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2 Ibid.
and employers continue to have difficulty attracting talented people, work-at-home arrangements are likely to continue growing.

Many employers remain skeptical of work-at-home arrangements. One study showed that roughly half of all such attempts fail, for a variety of reasons. For most employees in successful situations, the opportunity to work at home represents a significant benefit. For some, it might mean the opportunity to get more work done free from the distractions of the office. For others, it means the ability to spend less time commuting and more time with children. For the handicapped, such arrangements may be a prerequisite to entering the workforce.

The continued growth of telecommuting, together with the simultaneous increase in part-time and contract workers, threatens to change existing lines of authority and relations between labor and management. The need to manage at-home workers places new strains on managers and Human Resources departments. Unions are likely to find it more difficult to organize at-home workers, especially since their individual interests are likely to be more diverse than those of on-site workers. Further, government policies written on the assumption that all workers are located in central sites directly under the control of a single employer may be ineffective in the at-home environment.

As the OSHA letter points out, more than the safety regulations are involved. Zoning laws, public health and fire codes, worker’s compensation statutes, and the Americans With Disabilities Act all tend to be based on the assumption of a clean dividing line between home and work. As this line breaks down, the ability to neatly apply these other laws is likely to suffer. As the agency charged with enforcing federal standards for workplace safety, OSHA’s position will carry some weight in influencing how other authorities redraw the line. Its interpretation and compliance letter represented OSHA’s first attempt to sort these issues out. In our view, the agency got it wrong.

What the Interpretation and Compliance Letter Says

OSHA begins with the position that the Occupational Safety and Health Act (Act) applies to any workplace within the United States, ignoring the question of whether telecommuting has made the traditional definition of “workplace” irrelevant. OSHA makes it clear, however, that the employee is responsible only for the workplace itself and not the entire home.

Since the Act applies, according to OSHA, the employer is responsible for making sure that the workplace is free from hazards. This includes identifying potential hazards in advance and providing appropriate training and protective equipment. The letter states that “in some circumstances” on-site examinations may be necessary. Such periodic inspections are listed as one “obvious and effective means” of ensuring employee safety. Indeed, certain specific standards require periodic inspection, although most of the instances listed in the letter (such as compressed gas cylinders) do not apply to the average at-home worker. OSHA states that it does not anticipate performing its own inspections, except in cases involving work-related fatalities. The agency notes that such visits would require either consent to inspect or a court order. It does not indicate whether the agency would require the employer to pressure the employee to give consent.

Current law requires employers to keep a log on workplace injuries. Thus, employers would have to maintain a record of injuries and illnesses that occur to employees working at home. The employer may keep the records for each operation subject to common supervision in an established central place.

If an employee were injured while performing duties in the interest of the employer, the case would be considered work-related. If the injury were sustained performing normal nonwork-related living activities, the case would not be considered work-related. OSHA gives no indication that it understands that the division between work-related and nonwork-related activities can become blurred in the at-home environment. It also gives no clue as to how an employer is supposed to accurately determine how a particular injury such as a sore wrist or a back pain actually came about.

The letter contains advice on a number of specific items such as toxic materials, bloodborne pathogens, and personal protective equipment. Many of these would seem to have little relevance for the average at-home worker. Other cases, such as adequate means of ingress and egress, ergonomics, fire protection, lighting, and lead levels in old paint, have broader applicability and could require employers to spend significant resources making sure a home work space meets whatever standards would apply to a normal office setting.

OSHA correctly points out that in many cases, such as fire codes and environmental laws, it has no say in how applicable laws are applied to at-home workplaces. Employers should therefore look for other federal, state, and local agencies to clarify these issues. Indeed, in some cases, OSHA is surely correct that an employer that knew that the employee would be performing inherently danger-
ous activities, such as arc welding or processing hazardous chemicals from his home, would have some legal duty to ensure a safe condition. But these cases do not represent the typical situation and indeed are likely to be quite rare.

OSHA does not provide much guidance on the specific actions that an employer must take to adequately meet its responsibility. The letter states that employers must ensure that employees are not exposed to "reasonably foreseeable" hazards and should exercise "reasonable diligence" to identify in advance possible hazards. An employer has responsibility for conditions for which it "knows or has reason to know" and is "aware, or should be aware." These are extremely subjective standards, however. They provide little advice to employers who are trying to discover in advance of any problems what exactly the law requires them to do.

Why the Letter Is Wrong

In its letter, OSHA points out that at-home arrangements involve worker safety and that the employer has an interest in making sure that the employee is both safe and productive in this environment. However, the agency makes a fundamental error when it concludes that the employer must therefore be legally liable for any violations.

Despite the delay in responding to the original request for its opinion, it is not clear that OSHA devoted much research or thought to current practices regarding at-home work. The agency completely misses the fundamental shift in control over the physical workspace that this trend involves. Although the agency is correct in saying that "the employer retains some degree of control over the conditions of the 'work at home' agreement," this does not mean that the control is sufficient to significantly influence the physical environment within which the work occurs. And it certainly does not mean that the employer also has physical control over the workspace.

Legal liability is possible in the traditional workplace only because the employer has a strong degree of physical control over both the environment and the way in which individual workers carry out the tasks assigned to them. Employers lack this control over at-home workers. Most employees would regard an extension of this degree of control into their home as a serious infringement of privacy. Yet without it, the employer has no effective means to ensure compliance.

Even if such an extension of control were desirable, it may not be feasible. The agency's assumption that the workspace constitutes a designated area within the employee's home need not be true. Many home workers need only a lap top computer to do their work. Workers may often work on the front porch one day, in bed the next, and at the kitchen table the following day. In this case, the agency's attempt to make the employer responsible for only the work area—and not the entire home—would break down. Similarly, the time division between when an employee is working and conducting personal business tends to break down. The employee may often shift from working on the computer, to answering a personal telephone call, fixing lunch, or responding to an infant's cry. In fact it is possible to do more than one of these activities at once. It is impossible to apply the traditional time and location barriers to the home setting.

But the main reason that OSHA's guidance is wrong is because it would necessarily impose a degree of supervision over the home environment that most employees would find unacceptable. OSHA strongly hints that on-site inspections are recommended. In fact, an employer would seem to be taking a risk if it decided not to conduct them. And in order to provide the employer with reliable knowledge of the true extent of any hazards, such inspections would have to be conducted with little or no notice. Most employees would resent any requirement that they give employers this degree of access to their homes.

Since the story broke, the Department of Labor has tried to make it clear that "the federal government has neither the desire nor the resources to investigate private homes." Despite its reluctance, OSHA would quickly find itself forced to verify the accuracy of any employer inspections. Without such inspections the agency could not adequately enforce its interpretation of the law. Employers who ensure safe workplaces would have the right to have this compliance included in their records. Workers with complaints would have the right to have OSHA inspect their homes. In such cases, OSHA will have to direct other inspections in order to determine whether the complaint is an isolated case or part of a broader pattern of noncompliance.

A Constructive Alternative

There is a better alternative available to OSHA. One that requires a fundamental shift in the way the agency views its role and that of employers. Both employees and employers have an interest in making at-home arrangements work. To the extent that OSHA can help collect and communicate information on how to make workspaces safer and more productive, it is likely to find an appreciative audience. The agency hints at this role when it discusses its consulting services. But it promptly dismisses this as a major focus of its attention.
The OSHA letter seems to ignore the possibility that consumers/workers are intelligent individuals with a wide range of choices available to them and a strong motive to make the choice that best matches the large number of interests (cost, convenience, quality of life, etc.) peculiar to them. OSHA does not see its role as helping employers in their current efforts to design continuously safer working environments. Instead it tries to hold employers responsible for a minimum standard which often reflects the bureaucracy’s ideal rather than any objective level of what the average employer currently provides or what workers want. In this view, the movement toward at-home workers represents a threat to the agency’s role as the guardian of workers’ safety, a role it feels neither employers nor workers are capable of assuming on their own.

Until OSHA adopts a fundamentally different view, changes in the nature of work and the relationship between employers and employees will continue to erode its effectiveness.

Conclusion

The growth in telecommuting raises interesting questions in a number of legal areas including health and safety standards. The traditional answer of looking to the employer to take responsibility for sorting everything out is unlikely to work in most of these areas because both employers and employees will resist the transfer of physical control over the home that it entails. Yet both parties retain their existing interest in making sure that telecommuting arrangements are safe and productive.

If governments decide to encourage telecommuting as a positive trend, many of these issues will resolve themselves, usually by placing ultimate responsibility on the homeowner and applying government guidelines more flexibly to homes than to office buildings. But if policymakers decide that telecommuting threatens their vision of the “proper” employer-employee relationship, companies can expect still more impractical attempts to shift liability in their direction.

This report was prepared by
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November 15, 1999

Mr. T. Trahan
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Dear Mr. Trahan:

Thank you for your August 21, 1997 letter to the Occupational Safety and Health Administration's (OSHA's) Directorate of Compliance Programs (DCP), requesting information on OSHA's policies concerning employees working at home. We apologize for the delay in responding.

Specifically, you state that your company will be placing some of its sales executives in home office environments. You state that the home office is generally a single room within the home of the sales executive that would have a desk, chair, file cabinet, business telephone, desktop or laptop computer, printer and a fax machine. You ask several specific questions that would apply specifically to your sales executives, as well as general questions that could apply to many other types of home work situations.

Question #1:

What is the employer's obligation within the home work environment?

Response #1: WITHDRAWN 1/5/2000

The OSH Act applies to work performed by an employee in any workplace within the United States, including a workplace located in the employee's home. All employers, including those which have entered into "work at home" agreements with employees, are responsible for complying with the OSH Act and with safety and health standards. Even when the workplace is in a designated area in an employee's home, the employer retains some degree of control over the conditions of the "work at home" agreement. An important factor in the development of these arrangements is to ensure that employees are not exposed to reasonably foreseeable hazards created by their at-home employment. Ensuring safe and healthful working conditions for the employee should be a precondition for any home-based work assignments. Employers should exercise reasonable diligence to identify in advance the possible hazards associated with particular home work assignments, and should provide the necessary protection through training, personal protective equipment, or other controls appropriate to reduce or eliminate the hazard. In some circumstances the exercise of reasonable diligence may necessitate an on-site examination of the working environment by the employer. Employers must take steps to reduce or eliminate any work-related safety or health problems they become aware of through on-site visits or other means.

Certainly, where the employer provides work materials for use in the employee's home, the employer should ensure that employer-provided tools or supplies pose no hazard under reasonably foreseeable conditions of storage or use by employees. An employer must also take appropriate steps when the employer knows or has reason to know that employee-provided tools or supplies could create a safety or health risk.

Question #2:

Is the employer responsible for compliance with the home itself?

Response #2: WITHDRAWN 1/5/2000

An employer is responsible for ensuring that its employees have a safe and healthful workplace, not a safe and healthful home. The employer is responsible only for preventing or correcting hazards to which employees may be exposed in the course of their work. For example: if work is performed in the basement space of a residence and the stairs leading to the space are unsafe, the employer could be liable if the employer knows or reasonably should have known of the dangerous condition.
Question #3:
Is the employer required to do periodic compliance inspections in the home, which may include safety, health, fire, and environmental issues?
Response #3: WITHDRAWN 1/5/2000
There is no general requirement in OSHA’s standards or regulations that employers routinely conduct safety inspections of all work locations. However, certain specific standards require periodic inspection of specific kinds of equipment and work operations, such as:
- ladders (§1910.25(d)(1)(i));
- compressed gas cylinders (§1910.101(a));
- electrical protective equipment (§1910.137(b)(2)(ii));
- mechanical power-transmission equipment (§1910.219(p));
- resistance welding (§1910.255(e)); and
- portable electric equipment (§1910.334(a)(2)).
Although some of these operations may not be found in home-based workplaces, nevertheless, if an employer of home-based employees is aware of safety or health hazards, or has reason to be aware of such hazards, the OSH Act requires the employer to pursue all feasible steps to protect its employees; one obvious and effective means of ensuring employee safety would be periodic safety checks of employee working spaces.
This letter addresses only the employer’s responsibilities under the OSH Act. Depending on what kind of business the “at home” employer is engaged in, he or she may have additional responsibilities under other federal labor or environmental laws, as well as under state laws of general applicability, such as public health, licensing, zoning, fire and building codes, and other matters.

Question #4:
What would be OSHA’s Inspection procedures in a private home?
Response #4: WITHDRAWN 1/5/2000
OSHA’s health and safety inspection program is directed primarily toward industrial and commercial establishments and construction sites. We do not ordinarily conduct inspections of home-based workplaces, although from time to time we have visited private homes or apartments to investigate reports of sweatshop-type working conditions in the garment industry and other businesses. We would also investigate work-related fatalities occurring in home-based workplaces. Any OSHA enforcement visit must, of course, be conducted in compliance with the Fourth Amendment which would require that OSHA obtain either consent to inspect or a judicially-issued warrant.

Question #5:
Does the employer have to include these home locations in its file regarding record keeping on the OSHA 200 logs?
Response #5: WITHDRAWN 1/5/2000
Employers are not required to maintain an OSHA 200 Log for each home. As stated in 29 CFR 1904.14, which concerns employees not in fixed establishments, employers of employees engaged in physically dispersed operations may satisfy the provisions of 1904.2, 1904.4, and 1904.6 with respect to such employees by maintaining the required records for each operation or group of operations subject to common supervision (field superintendent, field supervisor, etc.) in an established central place.
Injuries and illnesses that occur to employees working at a home location are recordable on the employer’s OSHA 200 Log, if they are work-related and meet the criteria for an OSHA recordable injury or illness under 29 CFR Part 1904.2 and the Recordkeeping Guidelines for Occupational Injuries and Illnesses. Injuries and illnesses that result from an event or exposure off the employer’s premises are work-related if the worker was engaged in work-related activities or was present as a condition of his or her employment (see Recordkeeping Guidelines, page 35, Section 2). These criteria must be applied to employees who work at their homes. The Recordkeeping Guidelines are available from the Government Printing Office, OSHA’s CD-ROM, and the OSHA website — www.osha.gov.
If an employee was injured or became ill while performing duties in the interest of the employer, the case would be considered work-related. If an employee was injured or became ill while performing normal living conditions (e.g., eating), the case would not be considered work-related. For example, when an employee who works at home doing typing develops carpal tunnel syndrome, it must be determined whether the employee’s work duties in any way caused, contributed to, or aggravated the condition. If so, the condition is considered work-related for OSHA recordkeeping purposes.
Below are responses to other general questions.

WITHDRAWN 1/5/2000 Workplace Analysis and Hazard Prevention: The employer is responsible for correcting hazards of which it is aware, or should be aware. If, for example, the work requires the use of office equipment (computer, printer, scanner, fax machine, copying machine, etc.) in an employee’s home, it must be done manner. [sic] For example, from a fire safety aspect the installation must not overload the home electrical circuits.

WITHDRAWN 1/5/2000 Training -- Can the training be in written form? In addition to any training requirements imposed by specific standards, employee training is one way for an employer to meet its general responsibility under the OSH Act for preventing violations. In the absence of specific requirements, the type of training that should be provided will be measured by what a reasonably prudent employer would do under the circumstances.
taking into consideration such factors as the nature of the potential hazards and the abilities of the employees. It will not always be necessary for training to be in written form. On the other hand, written training alone may not be sufficient.

WITHDRAWN 1/5/2000 Ergonomics: From the information you have provided, your employees could be exposed to ergonomic hazards. We have, therefore, enclosed a booklet entitled, Working Safely with Video Display Terminals, 1997 OSHA Publication 3092, which may be helpful in addressing these hazards. This publication is available on OSHA's CD-ROM and at the OSHA Internet site.


WITHDRAWN 1/5/2000 Asbestos, Chemicals or Toxic Materials within the Home Itself -- Would Material Safety Data Sheets (MSDS) be Required? The employer is responsible for making the workplace of its employees safe, not the entire home. If the employee will be performing work for the employer that involves exposure to any chemical substance for which an MSDS is required, then the MSDS must be present at the home worksite. However, an employer need not supply an MSDS if the hazardous chemical is a consumer product that is being used by an employee in the home office for the purpose intended by the manufacturer, and the use results in a duration and frequency of exposure which is not greater than that experienced by consumers.

WITHDRAWN 1/5/2000 Lockout/Tagout and Confined Spaces: If an employee is performing servicing and maintenance on machines or equipment which are used to perform his or her job, then the 1910.147 lockout/tagout standard applies. With regard to other equipment that may be in the home, the employer would have no responsibility. As long as the designated workplace is within the existing habitat space of the home, then the 1910.146 confined space standard would not apply. However, since you have not provided examples of such situations, we can give only general answers.

WITHDRAWN 1/5/2000 Bloodborne Pathogen Exposures: A home office for a sales executive is not covered by OSHA's bloodborne pathogen standard since the standard is intended to protect employees who are exposed or potentially exposed to blood or Other Potentially Infectious Materials (OPIM). This issue cannot be addressed further without knowing a specific factual situation in which employees in their own homes would be exposed to bloodborne pathogens while performing a work-related task.

WITHDRAWN 1/5/2000 Means of Ingress and Egress: Many building/fire codes require offices to have two entrances/exits. This, however, does not mean that OSHA would require installation of a second entrance/exit in an employee's worksroom in the employee's home unless the nature of the work and the surroundings create a heightened risk of fire. However, see response to Question #3, above.

WITHDRAWN 1/5/2000 Personal Protective Equipment (PPE): The employer is required to assess the workplace to determine if hazards which necessitate the use of personal protective equipment (PPE) are present, or are likely to be present. If these hazards are or are likely to be present then the employer must provide both the PPE and the necessary training. Employees must be trained in the proper use and maintenance of personal protective equipment, and the employer must verify, through a written certification, that each affected employee has received and understands the required training.

OSHA requires employers to make sure employees have and use safe tools and equipment and that such equipment is properly maintained. Employers are also required to establish or update operating procedures and communicate them to employees so that they will follow safety and health requirements.

WITHDRAWN 1/5/2000 Emergency Plans, Medical Assistance Services, and First Aid Kits and Training: Until OSHA develops policies for these issues as they apply to employees working in their homes, enforcement will necessarily be on a case-by-case basis. The seriousness of the potential hazards will be an important consideration.

WITHDRAWN 1/5/2000 Lead Levels in Old Paint: See response to Question #2, above.

WITHDRAWN 1/5/2000 OSHA Consulting Services: Consultation is a voluntary activity; i.e., the service is not automatic, but must be requested by the employer -- it cannot be requested by the employee. The service is provided chiefly at the worksite, but limited services may be provided away from the worksite via offsite training to employers and their employees. When an employer requests onsite Consultation services, the request is prioritized according to the nature of the workplace and any existing backlog of requests. In the case of home-based worksites, a Consultation visit would be classified as "high hazard" only if particularly dangerous work processes or work areas are within the "work zone" of the home.

Due to the limited resources available to the State Consultation Projects, requests for (sic) employers that cover only one employee at a home-based worksite would usually be given a very low scheduling priority, particularly when the requested service relates to low hazard activities. In all likelihood, therefore, a Consultation visit would occur only in unusual situations, and then only with the consent of the home-based employee. The inability of
OSHA to provide such free onsite assistance in such cases does not, however, relieve the employer of the responsibility to continue to provide safe and healthful work and workplace conditions for all employees, including those based at home. Other Consultation services are available to employers and their employees, such as dissemination of informational materials and providing telephone assistance on technical and compliance-related issues. Further, offsite technical assistance could be provided to employers and their employees at locations other than the employee’s home-based worksite, such as in the State Consultation Project office. Offsite assistance is typically provided in situations where offsite training would be the best use of Consultation resources to address a training need common to a number of employers.

The involvement of employees is key:
- to ensuring the fullest protection of employees in the workplace;
- to properly identifying and assessing the nature and extent of hazards; and
- in determining the effectiveness of the employer’s efforts to establish and maintain a workplace safety and management program.

However, in the case of home-based worksites, employees would be involved only where they had freely consented to the provision of assistance requested by the employer, and then only within the parameters defined above.

Americans with Disabilities Act (ADA) compliance and Workers’ Compensation: An employer’s responsibility under the ADA falls outside OSHA’s statutory authority. Similarly, OSHA cannot address the responsibility for workers’ compensation in this type of situation, since OSHA does not have statutory authority in this area. For information concerning an employer’s responsibility for workers’ compensation the employer should contact the workers’ compensation agency in the State in which the workplace is located.

Thank you for your interest in occupational safety and health. We hope you find this information helpful. Please be aware that OSHA’s enforcement guidance is subject to periodic review and clarification, amplification, or correction. Such guidance could also be affected by subsequent rulemaking. In the future, should you wish to verify that the guidance provided herein remains current, you may consult OSHA’s website at www.osha.gov. If you have any questions, please feel free to contact Helen Rogers in the Office of General Industry Compliance Assistance at (202) 693-1867.

Sincerely,

Richard E. Fairfax, Director
Directorate of Compliance Programs