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Re: Docket No. OSHA-2012-0007; Standards Improvement Project—Phase IV; Control of Hazardous Energy (Lockout/Tagout) in 29 CFR 1910.147; 81 Fed. Reg. 68504 (October 4, 2016)

To the Docket:

The Chamber of Commerce of the United States submits these comments on that part of the proposed rule published at 81 Fed. Reg. 68504 (Oct. 4, 2016) that would amend 29 C.F.R. § 1910.147, the Lockout Standard, by deleting the word “unexpected.” We strongly urge that the proposed amendment not be adopted for the following reasons.

A. OSHA May Not Remove the Word “Unexpected” From the Lockout Standard Without Finding That Such A Change Would be Feasible and Would Address Risks That are “Significant.”

The proposed rule should be withdrawn because it is not accompanied by rulemaking findings required by the OSH Act as construed by the Supreme Court of the United States and by the United States Courts of Appeals—that the standard as amended would be “reasonably necessary or appropriate” within the meaning of OSH Act § 3(8), 29 U.S.C. § 652(8),¹ including that it would, as so amended, address a significant risk of harm (*Indus. Union Dep’t v Am. Petrol. Inst.*, 448 U.S. 607, 608 (1980); *AFL-CIO v. OSHA*, 965 F.2d 962, 980 (11th Cir. 1992) (record must “establish that existing exposure levels in the workplace present a significant risk ... or that the new standards eliminate or substantially lessen the risk”)), and be feasible, including feasible in the sense that “the expected costs ... be reasonably related to the expected benefits” *National Grain & Feed Ass’n v. OSHA*, 866 F.2d 717, 733 (5th Cir. 1989) (internal quotations omitted). See generally *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 504 (1981) (standards must be technologically and economically feasible); *AFL-CIO v. OSHA*, 965 F.2d 962, 980 (technological), 982 (economic) (11th Cir. 1992); *Steelworkers v. Marshall*, 647 F.2d 1189, 1272-73 (economic), 1301 (technological) (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).

OSHA’s apparent justification for not making the required findings is as follows (81 Fed. Reg. at 68529 col. 1):

Because removing the word “unexpected” from the language of this standard would not represent any revision in OSHA policy, but instead clarify the Agency’s original meaning of the term “energization” in the standard, OSHA preliminar[il]y concludes that this action would not result in any costs, compliance burdens, or additional employer responsibility other than what the Final Economic Analysis already considered for original § 1910.147 (OSHA, 1989).

This assertion is legally irrelevant and factually wrong.

First, OSHA’s assertion that “removing the word ‘unexpected’ ... would not represent any revision in OSHA policy” is legally irrelevant. The only question relevant to whether the feasibility and significant risk findings are required is whether removal of the word “unexpected” would change the Lockout Standard’s requirements—not “OSHA policy,” whatever that term might possibly mean. The requirements of (and thus the only relevant “policy” behind) a standard are set by its unambiguous words and, if ambiguous, its clear and unambiguous regulatory history—not what OSHA *thinks* a standard should have said or should be read to say. This is especially true here for, as shown below, both the Review Commission and the Sixth

¹ OSH Act § 652(8) defines an “occupational safety and health standard” as “a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.”

Circuit have held that the words and regulatory history of the Lockout Standard are unambiguous on this very point. Those decisions make clear that this proposal *does* represent a change in its requirements.

Second, the assertion is factually wrong because the scope of the Lockout Standard *is* unambiguously limited to energizations that are “unexpected.” Paragraph (a)(1)(i), entitled “Scope,” of the Lockout Standard limits its scope to “the servicing and maintenance of machines and equipment in which the *unexpected* energization or start up of the machines ... could cause injury to employees.” (Emphasis in the *original*). Furthermore, the key definition in the standard—that for “servicing and/or maintenance” in paragraph (b)—is likewise limited to activities in which energization would be “*unexpected*.” (Emphasis in the *original*.)² Not only does the standard use the word in these crucial places but it twice italicizes it.³ Moreover, the Lockout Standard uses the word “unexpected” eight times. As the Sixth Circuit stated, “The drafters of the language obviously assigned importance to the word, and it is unreasonable for the Secretary to ignore it.” *Reich v. General Motors Corp., Delco Chassis Div.*, 89 F.3d 313, 316 (6th Cir. 1996). So clear is the importance and lack of ambiguity in the word that the Review Commission held as a matter of law that, “the standard clearly and unambiguously applies only where the Secretary shows that unexpected energizing, start-up or release of stored energy could occur and cause injury. ... [W]e find it unnecessary to look outside the standard itself for guidance as to its meaning.” Similarly, the Sixth Circuit held: “By its terms, the lockout standard’s scope provision limits the applicability of the regulation to machines that could cause injury if they were to start up unexpectedly.” 89 F.3d at 315.

1. The Standard’s Legislative History Makes Clear That Removing the Word “Unexpected” Would Substantively Change the Duties Imposed by the Lockout Standard.

This lack of ambiguity is further shown by the standard’s legislative history. As the Commission observed in the *Delco* case, OSHA’s own preamble and contemporaneous publications emphasized that the standard applies only to “unexpected” energizations. *E.g.*, 54 Fed. Reg. 36,644 (1989), *as corrected by* 55 Fed. Reg. 38,677 (1990); *id.* at 36659; OSHA Pub. No. 3120, *Control of Hazardous Energy (Lockout/Tagout)* 2 (1991); OSHA Instruction STD 1-7.3, *Control of Hazardous Energy Lockout-Tagout--Inspection Procedures and Interpretive Guidance*, I.1.b., d., e. (Sept. 11, 1990). As the Commission stated, “The plain and unambiguous terms of the standard, and the support of the legislative history, is so overwhelming that the Commission need not even consider the Secretary's current interpretation.”

² Paragraph (b) states in part: “*Servicing and/or maintenance*. Workplace activities such as constructing, installing, setting up, adjusting, inspecting, modifying, and maintaining and/or servicing machines or equipment. These activities include lubrication, cleaning or unjamming of machines or equipment and making adjustments or tool changes, where the employee may be exposed to the *unexpected* energization or startup of the equipment or release of hazardous energy.” (Emphasis in the *original*.)

³ Indeed, the word “unexpected” is likely the only word in the body of any OSHA standard to have ever been italicized.

Moreover, the Commission could have pointed to strong additional evidence from the Lockout Standard's legislative history that its original intent was to limit it to "unexpected" activations. OSHA stated in the preamble to the final Lockout Standard that ANSI Z244.1-1982, *American National Standard for Personnel Protection--Lockout/Tagout of Energy Sources--Minimum Safety Requirements*, was "the primary basis for development of its proposed standard" and of "great assistance to OSHA." 54 Fed. Reg. at 36645.⁴ Yet, the "application" provision of that ANSI standard states: "1.3 *Application*. The requirements of this standard apply to all situations where the *unexpected* energization ... of the equipment... would be likely to endanger personnel." (Emphasis added.) The ANSI standard mentions the "unexpected" criterion twice more and in key provisions.⁵ Thus, OSHA not only originally agreed with ANSI that "unexpected" should be a criterion for the application of lockout requirements but *added* emphasis to it.

2. OSHA's Own Economic Analysis in 1989 Makes Clear That Removing the Word "Unexpected" Would Substantively Change the Duties Imposed by the Lockout Standard.

OSHA's assertion that removing "unexpected" as a criterion "would not result in any costs, compliance burdens, or additional employer responsibility other than what the Final Economic Analysis already considered for original § 1910.147 (OSHA, 1989)" is also contradicted by the economic analysis that OSHA itself made in 1989. OSHA's *Regulatory Impact and Regulatory Flexibility Analysis of 29 CFR 1910.147 (The Control of Hazardous Energy Sources—Lockout/Tagout)* (August 1989), cited in the preamble at 36683 col. 3,

⁴ The preamble to the final standard stated:

Of great assistance to OSHA in this undertaking was the publication on March 8, 1982, of the American National Standards Institute (ANSI) national consensus standard for lockout/tagout, ANSI Z244.1-1982, "American National Standard for Personnel Protection--Lockout/Tagout of Energy Sources--Minimum Safety Requirements" [Ex. 3-9]. This standard lists the uniform performance requirements for developing and utilizing a lockout or tagout procedure for the protection of employees from the unexpected energization, start-up of machines or equipment or release of stored energy during repair, maintenance, and associated activities. The consensus standard was utilized by OSHA as the primary basis for development of its proposed standard.

The proposed standard's preamble said the same. 53 Fed. Reg. 15496, 15497 (1988).

⁵ Thus paragraphs 1.2 and 3.1.2 of the ANSI standard state in part (emphasis added throughout):

1.2 *Purpose*. The purpose of this standard is to establish performance objectives for procedures for the protection of personnel in, on, or around machines or equipment during repair, maintenance, operation, and associated activities, from injury due to *unexpected* energization....

* * *

3.1.2 *Procedure*. The lockout/tagout procedure shall specify that prior to the performance of any of the activities listed in 3.1 where *unexpected* energization ... could occur and cause injury, all potentially hazardous energy sources shall be isolated and locked/tagged out.

repeatedly analyzes the costs and benefits of a standard limited to “unexpected” startups. It stated (emphasis added throughout):

- “The standard would cover all workplaces and activities where the *unexpected* release of energy could cause injury to employees.” [Page II-1.]
- “The standard is designed to cover all workplaces where the *unexpected* energization or movement of machinery can cause injury to workers.” [Page II-1.]
- “Only firms ... that have situations and workplaces where the *unexpected* energization ... of machines ... could cause injury to employees must comply with the standard.” [Page II-2.]
- “Therefore, the effect of the rule on individual firms will depend on their potential for an *unexpected* release of energy. As a means of determining these effects, OSHA devised a classification scheme consisting of three groups of firms: (1) those that have a high potential of an accident related to the *unexpected* release of energy (high impact firms) (2) those that have a low potential of *such* an accident (low impact firms) and (3) those that have either no potential, or very little potential, for *such* an accident (negligible impact firms).” [Pages 11-1 to 11-3.]
- “This high percentage of accidents indicates that there is a large potential for ‘*unexpected* energizations’ in this sector. Firms in manufacturing SICs were, therefore, classified by ERG as “high-impact” firms.” [Page II-3.]
- “CONCLUSION. The final rule would regulate almost all industries covered by 29 CFR 1910 where the potential for *unexpected* energization exists.” [Page II-18.]
- “As a lock or tag would be removed by the employee who applied it, OSHA has determined that following proper procedures for locking or tagging of equipment, in conjunction with training to ensure that workers understand the appropriate procedures, will directly reduce the risk of injury created by the *unexpected and inadvertent* energization of energy sources.” [Page III-21.]

See also pp. III-12 and III-15, also using the word “unexpected.”

3. The Case Law Makes Clear That Removing the Word “Unexpected” Would Substantively Change the Duties Imposed by the Lockout Standard.

The case law under the Lockout Standard demonstrates unequivocally that removing the word “unexpected” *would* indeed represent a change in its requirements and thus that OSHA’s current preamble statement is wrong.

For example, the *GM Delco* case held that it was permissible for the employer to not lockout if, with respect to one machine, an electronically interlocked gate surrounded the machine area, and then after an employee opened that gate or pushed an emergency stop button,

a “time-consuming series of eight to twelve steps”—which include alarms and visible motions that “would provide plenty of warning to the employees so that they could avoid any hazardous movement of the machinery”—“were required before any hazardous movement of the machine could occur.” The Sixth Circuit then stated that “*the plain language* of the lockout standard *unambiguously*” means that employers are not required to lockout “where an employee is alerted or warned that the machine being serviced is about to activate. In such a situation, ‘energization’ . . . cannot be said to be ‘unexpected’ since the employee knows in advance that machine startup is imminent and can safely evacuate the area. The standard is meant to apply where a service employee is endangered by a machine that can start up *without the employee’s foreknowledge.*” (Emphasis added.)

But the proposed change would prohibit more than reliance on warnings. Although the preamble tries to give the impression that the change would merely outlaw reliance on “the exclusive use of warning devices,” it would also ban every device and method that may now be used to negate the unexpectedness of a startup, including highly reliable modern control circuitry, such as the devices that controlled the hazardous energy in the *Delco* case, which (as Bruce Main observes in his comments submitted to this docket) OSHA completely ignores. This is clear from the Sixth Circuit’s summary of the facts in the *Delco* case. As the Sixth Circuit stated, “to service any of the three machines, an employee had to pass through electronically inter-locked gates *that immediately deactivated the machines when opened.* . . . [O]nce deactivated, an eight to twelve step process had to be followed to restart each of the machines and that, either by audible or visual signals or the presence of company workers in the immediate area, this multi-step process would have alerted servicing employees that the machines were about to start up.” (Emphasis added.) The use that General Motors made of reliable control circuitry in the *Delco* case to prevent the unexpectedness of a startup is common throughout the Nation. The use of the word “unexpected” makes it lawful. The deletion of the word would, however, make that practice unlawful. Thus, the proposal would substantially change the standard.

If the *GM Delco* decision correctly interpreted the word “unexpected,” then this proposal *does* represent a change in the requirements of the Lockout Standard. OSHA does not cite a single decision by any tribunal—court of appeals, Commission or even administrative law judge—that states or even implies that *GM Delco* erroneously interpreted the Lockout Standard. Instead, OSHA implies (without outright asserting) that there is some sort of disagreement between the Sixth Circuit in *Reich v. General Motors Corp., Delco Chassis Div.*, 89 F.3d 313 (6th Cir. 1996), on the one hand, and the D.C. Circuit (in *Otis Elevator Co. v. Sec’y of Labor*, 762 F.3d 116 (D.C. Cir. 2014), and the Commission decision in *Burkes Mechanical, Inc.*, 21 BNA OSHC 2136, 2139 & n.4 (OSHRC 2007), on the other hand, as to whether the word “unexpected” would permit reliance on warning devices. But that is obviously untrue. Neither *Otis Elevator* nor *Burkes Mechanical* spoke about *GM Delco* with disfavor. On the contrary, both decisions accepted and distinguished it, not rejected it. Most important, neither *Otis Elevator* nor *Burkes Mechanical* rejected reliance on the “unexpected” criterion or disapproved of devices that prevent the unexpectedness of a startup. Thus, *Otis Elevator* stated:

This case thus is unlike *Reich v. General Motors Corporation*, 89 F.3d 313 (6th Cir. 1996), on which Otis Elevator relies. In *Reich*, the machines under repair were specifically designed not to start up until an eight to twelve step process was completed, and “audible or visual signals * * * alerted servicing employees that the machines were about to start up.” *Id.* at 314–315. Here, by contrast, the only notice the mechanic had that the chain assembly would start moving was the movement itself. Indeed, as the Commission found, “the mechanic’s own testimony shows that the release of energy surprised him.” *Comm’n Dec.* at *3.

The same is true of *Burkes Mechanical*, which states (21 BNA OSHC at 2139 & n.4) that, “*GM-Delco* is easily distinguished from the instant case. The deactivated machines in *GM-Delco* had specific precautions designed to ensure employees had adequate notice to get out of the way before start-up occurred.” Those cases nowhere express disapproval of reliance on machinery that prevent the unexpectedness of a startup. OSHA’s reliance on them is therefore arbitrary and capricious.

This can also be seen from other decisions that have applied the word “unexpected” in the Lockout Standard. For example, in *Alro Steel Corp.*, No. 13-2115 (September 25, 2015) (Judge Baumerich), a decision as to which OSHA did not seek Commission review, a band saw operator, when changing a band saw blade, would turn off the band saw by turning the “start” switch/button to the off position, place a plastic cover over the button located on the machine operating control panel, lock the cover in place with a single key, and retain possession of the cover key during the blade change. The electrical circuits of the machine were so designed that they would not energize unexpectedly during a blade change when the motors are de-energized and locked out at the control panel. Based on the electrical design of the machines, unexpected energization would not occur, even if the control circuit components failed. Even if there was an equipment malfunction regarding the electrical contacts, the contacts would fail in the open position and, therefore, the failure would not result in the saw unexpectedly energizing. Further, in the unlikely event that the electrical contacts were to fail in the closed position, the band saws would continue to run, providing obvious advance notice to the operator not to begin a blade change.

The case law therefore makes clear that the proposal would substantively change the standard and thus that OSHA’s failure to make required rulemaking findings would invalidate the proposed amendment.

4. Highly Respected Safety Experts Have Made Clear That Removing the Word “Unexpected” Would Substantively Change the Duties Imposed by the Lockout Standard.

A recent book by two preeminent experts in this field, Bruce Main and Edward Grund, makes crystal clear that current OSHA “policy” (as represented by the OSHA compliance directive designated CPL 02–00–147, *The Control of Hazardous Energy—Enforcement Policy*

and Inspection Procedures (Feb. 11, 2008)) is inconsistent with the words and original intent behind the Standard.⁶ Mr. Grund was a principal drafter of ANSI Z244.1, which, as indicated above, was the predecessor to OSHA's standard. He and Mr. Main carefully examined the very OSHA compliance directive said by OSHA in the preamble to this proposal to represent OSHA's "policy"—namely, CPL 02–00–147. On page 117 they stated that the CPL is “completely inconsistent with the ‘plain language’ requirements of the 29 CFR 1910.147 standard. The standard specifies the hazard of unexpected start or the release of stored energy. It does not address all ‘hazardous energy that has not been isolated.’” *See also id.* at 111 (“The CPL would appear to be written to include all energy. Yet the ‘plain language’ of 29 CFR 1910.147 is written specifically to address only a subset of potential hazards associated with service or maintenance—the hazard of ‘unexpected energization . . .’ In this view of the ‘plain language,’ the standard does not apply to all or any other hazard(s) that are not unexpected.”). The assertion in OSHA's preamble that nothing would change is, therefore, unarguably wrong.

Comments submitted to the docket for this rulemaking establish that, because many machines today are so configured as to prevent the unexpectedness of any startup, the current standard does not require lockout on them, but the standard as amended by the proposal would require lockout. Two examples are the comments by Roland Wagner, Vollmer Werke Maschindnfrabrik (Nov. 28, 2016), describing how the use of modern control techniques and circuitry on stationary grinding machines prevent “unexpected” startup so as to make lockout unnecessary; and by Frank Simon of H. Stoll A.G. & Co. (Dec. 5, 2016), describing not only devices that prevent unexpected startup but describes how their “machines can be viewed everywhere [because of its] compact dimensions so that a person who is involved in the maintenance of the machine can always be seen from anywhere.” Many other comments show that technology exists that is as effective, if not far more effective, at protecting employees as locking out but which the proposal would ban.

If OSHA is going to now, for the first time, ban reliance on control circuitry to prevent the unexpectedness of possible energizations, it must forthrightly acknowledge that effect and invite public comment on it, not portray its action as reaching only warnings. Given the great advances in technology since 1989, doing so would be profoundly irrational.

Inasmuch as OSHA cannot possibly justify its failure to have made the required rulemaking findings, and cannot make the findings in any final rule, this proposal should advance no further. For the machines in the *GM Delco, Alco* and the above cases—which are common throughout the country—the proposed change to the Lockout Standard would result in a waste of time and resources, and for no increase in employee safety. For such machines, the proposed change would not only generally fail to be “reasonably necessary or appropriate” under OSH Act 3(8). It would further fail to address a significant risk—indeed, it would address no risk—and it would therefore not be feasible in the sense that “the expected costs . . . be reasonably related to the expected benefits” *National Grain & Feed Ass'n v. OSHA*,

⁶ BRUCE MAIN & EDWARD GRUND, *THE BATTLE FOR THE CONTROL OF HAZARDOUS ENERGY: THE TORTUOUS CONFLICTS AND IMPACTS OF ANSI Z244.1 AND OSHA'S 29 CFR 1910.147* (2016).

866 F.2d 717, 733 (5th Cir. 1989) (internal quotations omitted). The proposal should, therefore, not be adopted.

B. OSHA Should Not Remove the Word “Unexpected” From the Lockout Standard for Sound Workplace Safety Reasons.

1. The Proposed Amendment Would Detract from Employee Safety.

OSHA should not as a matter of good safety policy remove the word “unexpected” from the Lockout Standard. OSHA should apply a systems analysis approach to the safety issue here and analyze the effect of the proposed revision on *total* safety. OSHA will find, as safety experts have stated, that a standard with the word “unexpected” permits employers to use devices that far better preserve employee safety than a standard without it. It will find that the word is needed to distinguish between startups that warrant the measures required by the Lockout Standard and those that do not.

Lockout is an expensive, inflexible and time-consuming administrative control. Because it is an administrative control, it is dependent on employee adherence to it to be effective, whereas more modern technology-based systems are engineering controls and thus not dependent on employee actions to be effective. As safety engineers intimately familiar with the practicalities of lockout compliance have observed, lockout is so time-consuming and onerous a step that employees will often bypass it in a favor of a way that they consider to be at least as safe, if not safer, and easier to implement.⁷ “The relevant comparison is not whether modern control systems can provide absolutely reliable performance compared with a metal lock on a disconnect switch, but rather the evaluation of how reliably the lockout procedures will be followed and the lock installed, versus the performance of the alternative method using an engineered control system.” Main and Grund, *Battle* at 223.

Employees would be safer if their employers were permitted to distinguish between startups as to which there is and is not a significant risk of occurring, and to use such things as reliable control circuitry (an engineering control) to prevent unexpected startups. The distinction drawn by conscientious employers between such startups is far more likely to be respected by employees than a total ban that will inevitably strike them as unrealistic and unjustified. Even if compliance officers have difficulties evaluating the unexpectedness and consequent risk of a startup, avoiding those difficulties is not worth the risk to the many lives endangered by this proposal. As Ed Grund, a lead drafter of ANSI Z244.1, recently commented to OSHA, “OSHA’s success in deleting the critical word [“unexpected”] from the Shipyard standard is not ... a positive accomplishment and should be reversed.” Comment from Ed Grund (Nov. 18, 2016). Accordingly we urge OSHA to withdraw this proposal.

⁷ See, *e.g.*, the comment in the rulemaking docket from safety expert Bruce Main that, for this reason, the proposal will “result in more employee injuries.” Comment of Bruce Main, Design Safety Engineering, Inc. (Nov. 30, 2016); see also, *e.g.*, Comment by Peter J. Kapelle, Schroeder Maschinenbau GmbH & Co. (Dec. 6, 2015) (“operators will be tempted to bypass LOTO procedures because of a lack of alternative ways to fulfill required tasks effectively”).

2. The Lockout Standard As Amended Would Be Economically Wasteful and Overbroad.

The deletion of the word “unexpected” would also make the Lockout Standard economically wasteful and overbroad, for it would require lockout even when there is no significant risk, and often no risk, of employee harm.

Means of protection permitted by the word “unexpected”—such as reliable control circuitry (now common but of the kind not known in 1989 when the Standard was adopted)—would better protect employees from a significant risk of harm. See, for example, the comment by Fred Hayes, PMMI (Nov. 28, 2016), that current machines use “safety rated components that did not exist when [the Lockout Standard] was adopted.” Numerous comments already in the rulemaking record by those intimately familiar with the way that this modern technology works in practice have very credibly asserted that modern controls are at least as effective, if not more effective, in protecting employees than insistence on lockout. *E.g.*, the comment by John Myska, CSP, Trumpf Inc. (Dec. 15, 2016). Moreover, there are respected international standards the purpose of which is to require machines to be so designed as to prevent unexpected start-ups. *E.g.*, ISO/DIS 14118:2016, *Safety of machinery—Prevention of unexpected start-up*. The proposal’s failures to have evaluated these standards and the technologies that meet them undercut any argument that the standard is based on the best available technology or on substantial evidence, or is feasible in the sense that “the expected costs ... [would] be reasonably related to the expected benefits” *National Grain & Feed Ass’n v. OSHA*, 866 F.2d 717, 733 (5th Cir. 1989) (internal quotations omitted). As the Review Commission stated in the *Delco* decision, it would be “unreasonable” to “disallow reliance on even the most failsafe control circuit devices....” Therefore OSHA should put the proposal aside until it can assess the reliability of today’s technology and not rest on technology assessments made in 1989, when the Lockout Standard was adopted.

The proposal would also place American employers at a competitive disadvantage vis-à-vis European and other firms, which are permitted to use measures more nimble and just as safe to protect their employees. See the example from the semiconductor industry in Annex S of ANSI Z244.1-2016, which shows how following standard lockout procedures instead of alternative methods places American industry at a very significant competitive disadvantage and yet confers no safety advantage. The control circuitry used by European firms incorporates advances that make reliance on them much more safety-effective (as well as cost-effective) than reliance on employees to implement lockout. “The experience in Germany and Europe since about mid 1990ies with the then upcoming use of modern technology alternative methods of risk reduction instead of plain lockout is such that the numbers of casualties of safety incidents went down considerably.” Comment by Ulrich Hahn of Siemens (Dec. 2, 2016). Mr. Hahn attributes this reduction to lessened reliance on employees to lockout (an administrative control) and to the effectiveness of modern technology (engineering controls which the proposal would bar reliance upon), which eliminates the temptation of employees to circumvent time-consuming lockout procedures. The proposal will therefore needlessly contribute to the economic forces that have already driven many American jobs overseas.

3. The Amendment Would Violate OSH Act § 6(b)(8)

OSH Act § 6(b)(8) also requires that, “Whenever a rule promulgated by the Secretary differs substantially from an existing national consensus standard, the Secretary shall, at the same time, publish in the Federal Register a statement of the reasons why the rule as adopted will better effectuate the purposes of this Act than the national consensus standard.” OSHA has ignored this requirement in the proposal and, accordingly, there is no reason to think the agency would comply in any final rule. The current version of ANSI Z244.1 confers greater safety on employees than would the Lockout Standard as OSHA has proposed to revise it, and is also less economically wasteful. It requires employers to “control”—which does not always require lockout—“unexpected” hazardous energy. On this point, we quote Main and Grund, Battle at 77, 79: “In general, the ANSI Z244.1 standard contains many more requirements, information, and guidance on what to do, and how to control potentially hazardous energy,” and is “considerably more enforceable than the current OSHA requirements.” Unlike OSHA’s standard, “ANSI Z244.1 provides readers with guidance on how to isolate equipment and machinery, as well as when and how to devise alternative methods which provide effective protection in lieu of lockout.” *Id.* at 127. “Relying on the procedure of lockout precludes engineering controls that fall higher in the hierarchy of solutions. This makes little sense and needs to be corrected.” *Id.* at 129. “Employers need the flexibility to apply alternative methods such as remote lockout to control, rather than strictly isolate, potentially hazardous energy.” *Id.* at 130. Inasmuch as the proposed amendment would cause § 1910.147 to radically depart from its ANSI precursor, OSH Act § 6(b)(8) requires that OSHA state “the reasons why the rule as adopted will better effectuate the purposes of this Act than the national consensus standard.” We respectfully suggest that, given the improvement in technology, such a statement would not be possible.

* * *

Finally, we are profoundly disappointed in the disingenuous way that OSHA promulgated this proposal by placing it in a “Standards Improvement Project” announcement. OSHA has stated that, “[t]he purpose of Standards Improvement Projects (SIPs) is to remove or revise outdated, duplicative, unnecessary, and inconsistent requirements.” Revoking the word “unexpected” would remove no “requirement.” On the contrary, it would add to the regulatory burden on employers by broadening the lockout requirement in 1910.147 to encompass cases not now covered. By issuing this as part of SIP-IV, OSHA tried to convey that the proposed change was merely technical and of no import to employers covered by this standard. As these comments have shown, that suggestion is wholly unsupportable.

OSHA should proceed no further on this proposal. If it should decide to do so, then we request that a hearing be held on it under OSH Act § 6(b)(3).

Respectfully submitted,



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