

National Solid Wastes Management Association

Comments on OSHA's Ergonomics Proposal

Submitted to the U.S. Occupational Safety and Health Administration

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**Comments of the National Solid Wastes Management Association
on OSHA's Proposed Ergonomics Standard**

The National Solid Wastes Management Association (NSWMA) hereby submits comments on the Proposed Ergonomics Standard published in the Federal Register on November 23, 1999. NSWMA is part of the Environmental Industry Associations (EIA), a non-profit trade association representing the private sector solid waste industry.

As proposed, the ergonomics rule would cover the solid waste industry. Like construction workers, however, refuse collection workers are exposed to a variety of potential hazards outside their employer's control, in constantly changing conditions. These potential hazards include heat, cold, ice, snow, rain, potholes, parked cars, street traffic, gates and fences, dogs, broken glass and other hazardous waste, and heavy lift loads. Moreover, while construction workers perform work at temporary fixed work sites and have substantial supervisory oversight, the typical solid waste worker is constantly on the move from residence to residence and has very limited supervisory oversight. Even as to those potential hazards within the employer's control, there are innumerable obstacles to abatement in the solid waste industry, including public sector competition (many public sector entities are not covered by OSHA regulations at all), extensive municipal regulations, state laws, competitive pressures, technological infeasibility, economic infeasibility, public health concerns and customer preference.

Thus, the solid waste industry involves a broad range of unique conditions which compels an exemption from OSHA's Proposed Ergonomics Standard. In addition, while NSWMA's members have taken steps to address ergonomic hazards within their control, specific data on exposures, health effects, and the efficacy of available solutions in the solid waste industry is extremely limited. For these reasons, NSWMA hereby seeks an exemption from the ergonomics rule OSHA is currently developing.

Inadequate Time. NSWMA has endeavored, in the discussion that follows, to provide a complete legal, economic, scientific and policy analysis to support this position. Nevertheless, OSHA has provided an unreasonably brief time period for the submission of written comments. While NSWMA appreciates the thirty-day extension granted by the agency, this extension is still inadequate. In addition, this extension was not granted until the very end of the original period, thus depriving the regulated community of the opportunity to plan and carry out a three-month data collection effort. This short deadline has materially affected the scope and depth of NSWMA's comments, and has precluded the collection, analysis, and submission of significant

information which would support its position. NSWMA hereby requests that OSHA extend the period for submission of written comments, data and other information.

I. Introduction

A. NSWMA's Members Collect Most of the Nation's Refuse.

The NSWMA represents private waste service firms operating in all fifty states. NSWMA members collect most of the country's residential and commercial refuse, and operate a majority of its solid waste disposal capacity. These businesses play a critical role in maintaining public health, and work closely with public sector entities such as municipal and county governments.

NSWMA members include refuse haulers, recyclers, landfill and combustion facility operators, hazardous waste transportation, treatment and disposal firms, manufacturers of waste equipment, and others. The industry employs nearly 200,000 workers.^{1/} The vast majority of these workers— roughly three-quarters or more— are involved in refuse collection. The remainder are involved in recycling and other waste processing operations, or in waste disposal (e.g., landfills).

Limited information is available on the average size of solid waste industry employers. In a recent study by the Environmental Research Foundation, however, researchers identified between 585 and 710 private firms in Florida, with between 12,300 and 15,300 employees. (In addition, the study estimated that between 250 and 300 local governments provide solid waste collection, recycling or disposal operations, employing between 7,000 and 8,600 employees.) Based on the study's private sector figures, the median private sector solid waste industry firm in Florida would have roughly twenty-one employees. This estimate appears to be representative of the industry as a whole.

B. State and Local Governments Exercise Substantial Control Over The Solid Waste Industry.

^{1/} Limited data is currently available on industry demographics. Nevertheless, a recent survey by the Environmental Research Foundation concluded that Florida alone has over 20,000 solid waste industry employees.

Solid waste management is a unique industry because of the substantial control exercised by state and municipal governments. These public sector entities heavily regulate the refuse collection process, and provide a significant percentage of waste management services.

***Extensive Regulation.* Because of the important role waste management plays in maintaining public health, the solid waste industry is heavily regulated by state and local governments. Governmental entities in most jurisdictions regulate refuse collection schedules, pickup locations, and container types, for example. In many jurisdictions, municipalities regulate the disposal of bulky materials such as old refrigerators, limit the number of containers per site, and set rates through contracts with private haulers.**

Residential solid waste and recyclables comprise between 55% and 65% of the total municipal solid waste stream, according to the U.S. Environmental Protection Agency. The majority of this refuse is collected through contractual arrangements between private sector haulers and local governments. In addition, a significant percentage is collected through direct contracts between private sector haulers and individual customers (generally referred to as "subscription accounts"). Finally, in many jurisdictions public sector entities provide solid waste management services, often in competition with private sector firms.^{1/}

Residential customers can place their garbage, recyclables and yard waste at the curbside, at the side of their house or at their back door. They can place their garbage, recyclables and yard waste in plastic bags, containers, wheeled carts or bins. In most jurisdictions, they can place as much garbage, recyclables and yard waste as they want in an individual container for each material. The contracting jurisdictions (or in appropriate cases the individual subscriber) determine where the garbage, recyclables and yard waste are placed by residents; what kind(s) of containers will be used; how much garbage, recyclables and yard waste can be put in a container; and how many times a week the garbage, recyclables and yard waste are collected. In a contract with a local government, the solid waste company does not have the authority to direct individual residents to use certain containers or to limit weight loads. Moreover, local regulations typically require refuse collection firms to collect garbage, recyclables and yard waste regardless of weather conditions, except in emergency

^{2/} In most instances, commercial collection is based on contracts between private sector haulers and individual businesses. In some cases, municipalities contract with private sector haulers for commercial collection services.

situations such as hurricanes or heavy snow, during which civil authorities have ordered collection vehicles off of the streets.

Public Sector Competition. Both public and private sector entities collect, store and dispose solid waste, collect and process recyclables, and collect yard waste and operate composting facilities. Private sector firms control approximately 60% of the residential collection market, while public sector entities control approximately 40%.^{3/} In the solid waste industry as a whole, private sector firms account for roughly 75% of solid waste collection, processing and disposal, while municipal service providers account for roughly 25%. In many cities and counties, public sector and private sector operations compete for garbage, recycling and yard waste collection contracts.

Because of the complexity of the solid waste industry (as discussed above), OSHA may lack sufficient familiarity with the industry to be aware of the particular challenges employers face in seeking to protect their workers from work-related injuries and illnesses. In a recent General Duty Clause letter to one NSWMA member, for example, OSHA recommended that the employer install hydraulic cart lifts, mandate the use of carts by residential customers, discontinue pick-up of bulk items, purchase fully automated trucks, and use three-person crews. See Attachment A. In most localities, solid waste industry employers are precluded from taking these steps due to municipal regulations, state laws, competitive pressures, technological infeasibility, economic infeasibility, public health concerns and customer preference. In these comments, NSWMA endeavors to provide OSHA with a better understanding of the nature of the industry and the unique conditions under which industry employers must operate. These conditions compel an industry exemption from the Proposed Ergonomics Standard.

II. OSHA's Basis for Exempting Construction

OSHA proposed to exempt construction, agricultural and maritime employers from its Proposed Ergonomics Standard. 64 Fed. Reg. 65768, 65787-88 (Nov. 23, 1999). The agency asserted that workers in such industries "face significant risk of harm due to exposure to MSD hazards." Nevertheless, OSHA concluded that workers in these industries face "quite different" working conditions that warranted special consideration. *Id.* at 65787. The agency focused specifically on construction in explaining the basis for the exemption.

^{3/} In the commercial collection market, private sector firms account for approximately 95% of the market.

A. Distinguishable Working Conditions

In the Summary and Explanation of the Proposed Ergonomics Standard, OSHA identified numerous aspects of construction work which were distinguishable from general industry work and which warranted special consideration. These included the following:

1. Construction work consists primarily of jobs of short duration.
2. Construction work is performed under a variety of adverse environmental and workplace conditions.
3. Construction work is performed at non-fixed workstations and non-fixed work sites.
4. Construction work is performed at multi-employer work sites.
5. Construction work often involves short-term temporary workers.
6. Many construction workers provide their own tools and equipment.
7. Construction workers are often trained by third parties rather than by the employer.

OSHA noted that while some of these factors may be present at times in other industries, “they are continuously present in construction.” *Id.*

B. Insufficient Evidence Regarding Ergonomic Solutions

OSHA also explained that construction, agriculture and maritime industries were distinguishable from general industry on the issue of ergonomic solutions. While there was a “very large body” of evidence of effective solutions in general industry, the agency’s experience with and information about these three industries was “relatively limited.” *Id.* Thus, OSHA proposed to delay rulemaking on ergonomic hazards in these three industries to enable the agency “to gather and analyze this evidence.” Specifically, OSHA indicated that it needed to “gather and examine information on the types of ergonomic controls that would work in an industry with a high number of non-fixed workstations.” *Id.*

C. Addressing The Construction Industry Would “Substantially Impede” The Rule-Making.

OSHA’s proposed exemption of construction, agriculture and maritime employers was also based on the agency’s determination that gathering the necessary information “could take considerably more time” and would “seriously delay” the ergonomics rulemaking. In addition, covering these industries “could place substantial additional burdens on an already complex rulemaking” and “could strain OSHA’s limited resources.” *Id.*

III. The Unique Aspects of The Solid Waste Management Industry Compel A Similar Exemption

A. Solid Waste Employers Have Less Control Over Non-Fixed Worksites Than Construction Employers

OSHA’s Proposed Ergonomics Standard would impose substantial hazard prevention and control obligations on general industry employers. These obligations are premised on the idea that these general industry employers operate fixed work sites where they exercise substantial or complete control over working conditions. OSHA proposed to exempt construction employers in part because their workers perform work at non-fixed work sites at which they face adverse conditions beyond the employers’ control. In the waste management industry, the vast majority of workers are employed at non-fixed work “sites” (i.e., the many stops on a collection route), and employers have substantially *less* control over these non-fixed work sites than employers in the construction industry.

Truly “Non-Fixed” Work Sites. Construction industry work sites are more like temporary fixed work sites than non-fixed work sites. Construction employers do exercise significant control over their work sites, even if work at these sites may last only a few weeks or days. For example, construction employers have significant control over the weight loads employees are required to lift on construction sites.

Waste management workers perform their jobs at truly non-fixed work sites. Industry employers have far less control over their working conditions than construction employers. A typical waste management worker spends 6-8 hours per day working a refuse collection route, in addition to time spent traveling and at a refuse transfer station or disposal facility. In the course of one work shift, this employee will perform work at 300-600 “work sites” or households,^{4/} each with varying conditions. The worker’s employer has no control over these many work sites.

^{4/} The number of households covered in a particular shift is determined by numerous factors,

including population density, type of collection truck, and size of crew.

Thus, a substantial majority of refuse workers encounter curbs, stairs, parked cars, blocked access routes, street traffic, spilled refuse, and other problems in the course of a typical work day. In many cases, municipal regulations make the task even more difficult. For example, many municipalities^{4/} prohibit curbside service and require backyard collection. Others institute refuse container pricing which encourages the use of large and/or very heavy containers.

Limited Supervisory Oversight. Construction employers have substantial oversight over their work sites. Construction workers perform work only at one or two work sites in a given day. Construction managers, supervisors and foremen are regularly on the site to identify hazards, direct the abatement of such hazards, and ensure that their workers are performing their jobs safely.

Waste management employers are unable to supervise the vast majority of their workers. Many employers provide occasional spot checks, but they cannot reasonably provide a separate supervisor to accompany each collection crew on its daily route. They cannot identify in advance each of the particular hazards their workers will face on a given shift. Nor can these employers abate these hazards, as they are typically not within the employer's control. Instead, workers operate by themselves or in small groups, and must deal with an extremely broad range of work sites and conditions over the course of each shift.

B. Solid Waste Employers Have Less Control Over Environmental Conditions.

OSHA proposed to exempt the construction industry in part because construction workers are exposed to a variety of adverse environmental conditions, including wind, rain, cold, snow, and heat. The vast majority of waste management employees are exposed to similar conditions during the course of their work.

Waste management employers have significantly less control over these environmental conditions than construction employers. Consider, for example, cold, windy conditions, which OSHA suggests may increase the risk of MSDs under certain circumstances. On most construction sites, employers can and do provide plastic sheeting, portable heaters, or other materials and equipment to improve their employees' working conditions. In contrast, waste

^{5/} For example, the town of Willmar, Minnesota's solid waste ordinance prohibits curbside pickup. See Attachment B.

management employers are unable to address these conditions at all, because their workers are constantly on the move outside of any fixed structures.

Moreover, while construction work is generally halted in poor weather, waste collection work goes on. Municipal regulations, contractual obligations, and public health protection require waste management employers to collect garbage, recyclables and yard waste regardless of weather conditions, except in emergency situations such as hurricanes or heavy snow in which civil authorities have ordered collection vehicles off of the streets.

Even worse, inclement weather makes many weight loads significantly greater. Open containers gather snow, sleet, hail, and rain, and are more difficult to lift. Recyclables are normally stored in open bins and yard waste is often stored in open bags.

C. Solid Waste Employers Make Similar Use of Short-Term Workers.

OSHA proposed to exempt construction employers in part because construction work activities are often performed by temporary workers. Similarly, refuse management jobs involve hard, physical labor and adverse weather conditions, and are not attractive to many workers. In fact, many solid waste workers leave their jobs after a short period of time. As a consequence, solid waste employers face significant difficulties in developing an experienced, fully-trained workforce with the ability to avoid potential job hazards. In addition, solid waste firms have used significant numbers of temporary workers in refuse collection and processing to meet seasonal needs, such as those encountered in the resort areas of Florida during the winter and spring.

The use of temporary workers on a short-term basis compounds the difficulties solid waste industry employers have in controlling the potential hazards workers may encounter in performing their jobs. For example, while these employers may provide extensive training to long-term, full-time workers in hazard identification and proper lifting techniques, such training may have to be substantially abbreviated for one-day or two-day hires.

D. Work in the Solid Waste Industry Must Be Performed Under a Broad Range of Uncontrollable Conditions.

OSHA proposed to exempt construction employers in part because construction work activities are performed under a variety of adverse workplace conditions. The work activities of refuse workers are similarly distinguishable from those of general industry.

Variable Load Weights. Workers in the waste management industry, like construction workers, engage in hard physical labor. True, some general industry workers, such as meat packers and assembly line workers also have physically challenging jobs. But these workers are handling materials of a set or determinable size, shape and weight.^{6/} In fact, in many cases employers running manufacturing operations have substantial if not complete control over the size, shape and weight of the materials being handled.

In contrast, refuse workers must handle a broad range of materials that vary tremendously in size, shape and weight. Often refuse workers will not know how much a trash bag or container weighs until the moment after they pick it up. A trash bag might be filled with styrofoam or cardboard, and weigh very little, or it might be filled with coal ash, computer paper, or other very heavy waste. Waste management employers have little or no control over the size, shape and weight of these materials. Inclement weather for example, can affect load weight, making open containers significantly heavier.

Municipal Regulations Can Increase Potential Hazards. In many cases, municipal regulations and contracts preclude private refuse collection contractors from exercising what little control they might otherwise have over these factors. For example, in many jurisdictions municipalities have set residential collection rates in a way that makes refuse collection more difficult. First, in jurisdictions that charge a flat fee regardless of the amount of garbage, recyclables and yard waste placed out for collection, residents tend to generate more garbage and use either more or larger containers.

Second, in some jurisdictions residents pay by the number of containers they set out for collection. These fee systems, known generally as “volume-based fees,” are advocated by the U.S. Environmental Protection Agency. Residents will often use garbage compactors or even stomp on the garbage with their feet in order to place more garbage into a single container to save money. As a result, these containers are heavier than normal.

Third, in some jurisdictions backyard collection is required. In San Mateo County, California, for example, thirteen municipalities require such collection. In these communities, refuse collection firms must lift 90-gallon wheeled carts over steps, gravel and lawn to reach the

^{6/} Health care workers who handle patients may not know a patient’s weight, but perform work in a fixed workplace where other workers are available to assist them and supervisors have oversight over their activities.

collection truck. Finally, in many older apartment buildings trash chutes are used, and refuse collection workers must empty large containers manually, transfer the waste to pack barrels, and carry it to the truck, often up a staircase from the basement.

A Broad Range of Uncontrollable Hazards. Refuse workers also face substantially greater challenges in performing their work than general industry workers who perform their jobs at fixed work sites. Refuse collection workers must climb and descend stairs, open and close gates, maneuver around parked cars, dodge potholes, broken sidewalks, and other trip hazards, and avoid street traffic, while wheeling carts or carrying trash cans, recycling bins, garbage bags, or other refuse. As discussed above, in many cases municipal regulations impose additional collection burdens, such as prohibiting curbside pickup and requiring backyard collection. In San Francisco, for example, refuse collection workers are often required to enter buildings, climb more than one flight of stairs, and carry garbage and recyclables down the stairs and out to the collection truck.

IV. Lack of Data Regarding Effective Solutions Compels Exemption of Solid Waste Management Industry.

A. The Solid Waste Industry Involves Inherently Physical Work Activities.

OSHA has repeatedly recognized that some industries involve work which is inherently physical, and workers may experience MSDs regardless of the hazard prevention and control measures taken by their employers. In the Summary and Explanation of the Proposed Standard, for example, the agency recognized that “in a number of jobs, workplaces, and physical work activities it may not be possible to eliminate MSDs.” 64 Fed. Reg. at 65830. The unique challenges faced by solid waste management workers certainly suggest that this is one such industry.

Waste management work activities are highly dependent on human beings. For example, each collection crew visits hundreds of homes on an average shift, and must adjust to many variations at each location, from the location of the refuse, to fences and gates, to parked cars and street traffic. Similarly, recycling work requires significant sorting activities that can only be performed by workers. Glass and plastic containers are hand sorted by color. Paper is also hand sorted by type of paper; newspapers, boxes, office paper and other grades are individually pulled out of the stream of paper recyclables. In some jurisdictions, these sorting activities take place on the route; in others, they take place at processing facilities.

Moreover, most waste management workers’ jobs involve hard physical labor. As OSHA recognized in the Preamble to the Proposed Standard, in garbage collection jobs

“forceful exertions comprise a significant amount of the employee’s work time.” 64 Fed. Reg. 65782. Lifting, carrying, and similar physical activities are inherent in the work. Lift loads weigh an average of forty to fifty pounds. Employers in the industry cannot eliminate these activities and remain in the business of waste management. Indeed, these activities remain necessary even for automated truck crews. In addition to pushing and pulling wheeled containers to the truck lift, such crews must also collect yard waste, boxes, loose rubbish and other refuse.^{1/}

B. The Solid Waste Industry’s Efforts To Protect Workers

NSWMA members recognize that working conditions in the solid waste industry can cause or contribute to musculoskeletal conditions in certain circumstances.^{1/} As a result, NSWMA’s parent association, Environmental Industry Associations (EIA), has included a chapter on ergonomics in its Manual Of Recommended Safety Practices. *See* Attachment C.

EIA recommends that employers implement ergonomics programs with some of the elements suggested by OSHA in its Proposed Ergonomics Rule, such as worksite analysis, hazard prevention and control, medical management, and training. Nevertheless, imposition of a mandatory regulatory scheme on the industry would create significant compliance problems. These problems would be particularly significant with regard to the worksite analysis and hazard prevention and control obligations proposed by the agency.

While many employers in the solid waste industry have implemented some of the programmatic elements required by OSHA in the Proposed Standard, neither the industry nor anyone else has developed reliable predictive information as to the effectiveness of ergonomics programs. OSHA asserts that these programs have effectuated on average 70% to 80% reductions in MSDs at general industry worksites. 64 Fed. Reg. at 65948. But this conclusion,

^{1/} Twenty-six states have banned the disposal of yard waste, but leaves and grass are often collected separately for compost programs in these and other states.

^{8/} BLS reports that sprains, strains and muscle tears comprise one-third of the lost workday cases in the solid waste industry. D. Drudi, “Job Hazards In The Waste Industry,” *Compensation and Working Conditions* at 22 (Summer 1999).

even if correct, is not probative of the effectiveness of such programs in the solid waste industry, where so many of the potential workplace hazards are out along collection routes, uncontrollable or uncontrolled. Mandating ergonomics programs for the solid waste industry is inappropriate at this time in the absence of reliable predictive information.

Despite their lack of control over most of the potential hazards found in the industry, NSWMA's members are taking significant steps to the extent possible to reduce those potential risks within their control, including the following:

- Providing hazard information and training on such subjects as proper lifting techniques to solid waste industry workers;
- Providing personal protective equipment to assist workers in performing their jobs safely;
- Providing automated or semi-automated collection vehicles where technologically and economically feasible
- Promoting stretching exercises prior to the commencement of work
- Where feasible, imposing weight limit rules on individual lift loads
- Ensuring that compensation practices do not encourage or require workers to perform their work in an unsafe manner (e.g., too quickly)

Limited Hazard Prevention and Control Options. Solid waste management employers have limited options in terms of hazard prevention and control. For example, most jobs involve hard physical labor, so there are typically few or no light duty jobs available for reassignment of workers as a medical management tool. For the same reasons, job rotations are not an option for most workers. In addition, given the absence of direct management supervision over most workers during their shift, it is extremely difficult for supervisors to confirm whether workers are actually using proper lifting techniques on a consistent basis on their collection routes.

As discussed in detail in Section III, solid waste industry employers do not control most of the potential hazards their workers encounter while performing their jobs. Some potential hazards, such as cold and icy conditions, simply cannot be controlled. Other potential hazards, such as trip hazards and staircases, are within the control of others (e.g., residents, building owners, public works departments). Still others, such as container size and weight, are typically either within the discretion of individual residents or predetermined by municipal governments. Efforts to limit refuse container weight by contract have had limited success; even

where individual subscriber contracts impose weight limits, they are often exceeded, and haulers are forced by competitive pressures to refrain from enforcing them.

In sum, solid waste industry employers are subject to many limitations which preclude them from eliminating potential hazards which could cause musculoskeletal conditions. The lack of evidence regarding effective preventive measures further impedes these employers' efforts.

C. Lack of Evidence Regarding Exposures, Health Effects, and Hazard Prevention and Control

OSHA proposed to exempt the construction industry in part because the agency found that there was limited information about effective solutions to MSD hazards. Similarly, neither OSHA nor solid waste industry employers have obtained sufficient information regarding exposures, health effects, or effective solutions in the solid waste industry. In fact, there is no comprehensive study of either the relationship between work and musculoskeletal conditions or the impact of preventive or corrective measures in the solid waste industry.

Little Research. A commentator recently observed that “relatively few research results have been published on the hazards affecting waste industry workers.”^{9/} Similarly, a researcher at the University of Miami conducted some preliminary research in 1999 regarding occupational risks in the solid waste industry in Florida, including a comprehensive literature review.^{10/} The researcher found that “[r]elatively little research has been published on either the

^{9/} D. Drudi, “Job Hazards In The Waste Industry,” *Compensation and Working Conditions* at 19 (Summer 1999).

^{10/} J. Englehardt, *Solid Waste Management Health and Safety Risks*, www.eng.miami.edu/~mswrisk/. The researcher drew some conclusions on injury rates based on a review of Florida workers' compensation data. Because such data is inadequate in numerous respects, NSWMA does not concur with many of his conclusions.

exposures or the possible health effects of the solid waste industry workers.” The researcher also found that “[t]he existing literature has significant methodological flaws.”

The Industry’s Experience With Automation. Some employers in the waste management industry have begun to increase the use of automated and semi-automated collection equipment^{11/} to collect residential garbage, recyclables, and yard waste. In

^{11/} Automation of refuse collection can take two forms. Full automation typically involves the use of hydraulic front-end or side loading hydraulic lifts on collection vehicles, and wheeled refuse containers. Semi-automated operations typically involve traditional refuse trucks with rear-end container lifts.

addition, automated collection equipment is common for commercial routes because commercial customers generally use detachable containers for their refuse and recyclables.^{12/} While automation may reduce some lifting activities, its overall track record with regard to “ergonomic hazards” is uncertain.

For example, in refuse collection, automation can reduce lifting tasks. But automation still leaves substantial manual labor which cannot be eliminated from refuse collection operations. Collection crews using semi-automated trucks (equipped with rear-end container lifts) still require workers to get in and out of the truck frequently, to push and pull containers to the truck, and to lift and carry extra non-containerized refuse to the truck. These activities are significant contributors to musculoskeletal conditions. Even those working on fully automated trucks must still move wheeled containers to an automated truck, and collect yard waste, boxes, loose rubbish and other refuse.

Automation: A Source of New Hazards. Moreover, automation can lead to new forms of workplace hazards. Some refuse collection workers get their arms caught in the lift, while others are hit by carts kicked off the lift by the hydraulic arm. Operating the automated equipment controls can cause or contribute to musculoskeletal conditions as well. In Denver, for example, where the public sector provides fully automated collection in many neighborhoods, a number of automated truck operators have developed repetitive motion injuries as a result of operating the hydraulic lifting equipment. One of these injuries has required surgery.

In the Summary and Explanation to the Proposed Ergonomics Rule, OSHA describes two guiding principles it is using to develop the rule. One of these is to limit the rule to those jobs where “the solutions are well-understood.” 64 Fed. Reg. at 65776. As the researcher quoted above confirmed, the solutions in the solid waste management industry are far from being well-understood.

D. The Frequent Infeasibility of Automation

^{12/} Commercial establishments use these larger containers because they generate more garbage and must have it removed more quickly than residences (especially businesses such as restaurants and grocery stores that generate putrescible wastes). These containers are lifted mechanically and are collected by trucks that are different from those used to collect residential garbage.

As noted above, waste management firms have made some use of full or partial automation in refuse collection and processing, in appropriate circumstances. For example, in certain suburban communities in the Sunbelt, automation of residential collection routes has occurred because 1) the streets are wide enough to permit operation of automated trucks and 2) public support for automation permits operators to pass along some of the costs. Automation is infeasible in many circumstances, though, either because the available technology cannot get the job done, or because local governments may refuse to incur higher collection costs.

Technological Feasibility. Fully automated collection systems are technologically infeasible in many locations, for a variety of reasons, including the following:

- Older urban areas where streets and alleys are narrow;
- Residential areas where overhead lines are present;
- Areas where trees prevent the operation of automated lift devices;
- Municipalities which require backyard collection and prohibit curbside pickup;
- Cities and towns in which street parking is permitted; and
- Locations such as those in San Francisco where refuse is frequently stored one or more flights of stairs above or below street level.
- Residences at which the occupants refuse to use wheeled carts (NSWMA members estimate that perhaps as many as one in five residential customers on automated routes will not use wheeled carts unless required and enforced by the municipality through fines)

Many of these conditions also limit or preclude the use of semi-automated trucks.

Economic Feasibility. The Proposed Standard would require solid waste industry employers to establish comprehensive, ongoing ergonomics programs, and to implement hazard prevention and control measures. As discussed earlier, these employers lack control, and cannot prevent, many of the potential hazards faced by solid waste workers in the course of performing their duties. In the absence of other prevention and control measures, the Proposed Standard would require these employers to implement automated collection systems. These

systems are comprised of an automated truck with hydraulic lifts, and a wheeled cart for each residential address.

Fully automated refuse collection systems may be economically infeasible for many waste management firms. Automated trucks cost between \$175,000 and \$200,000, roughly \$40,000 more than traditional rear-loaders. Automated trucks have sophisticated hydraulics and other systems which require substantial upkeep and maintenance, costing on average \$500 per month more than a traditional rear-loader. In addition, these sophisticated systems often develop operating problems which necessitate removing them from service for repairs. In order to meet municipal requirements and contractual obligations on a daily basis, an employer implementing an automated collection system must purchase one truck for each route, plus a number of backup trucks. Finally, automated trucks have a shorter service life and last on average two years less than traditional rear-loaders.^{13/}

The Proposed Standard would require solid waste employers to replace thousands of rear-loader trucks with years of serviceable life left in them. For each collection route the employer would face an initial cost of approximately \$175,000 to \$200,000 for an automated truck, plus additional maintenance and repair costs of roughly \$6,000 per year over the life of the truck. The employer would also be required to provide wheeled carts to each residential address. These carts typically cost approximately \$50 each. The average residential route covers between 300 and 600 addresses. Thus, an employer implementing an automated collection system would face initial costs of between \$15,000 and \$30,000 for carts, plus significant repair and replacement costs.

^{13/} In some circumstances, automated trucks can achieve greater productivity in collection. They have significantly less compaction than non-automated trucks, however, necessitating more trips to the transfer station than a rear-loading truck. This trade-off can negate any productivity gain from the use of automated trucks.

Thus, automating a refuse collection system would involve between \$190,000 and \$230,000 per route in start-up costs, plus significant expenditures over the life of the vehicles to maintain and repair the vehicles and the wheeled refuse carts for each residential and commercial address. A company with a modest ten routes, for example, would face total costs of between \$2,250,000 and \$2,700,000, including the cost of two backup trucks.^{14/} Many employers would have great difficulty funding these expenditures and, as described below in Section V- D, would be unable to pass these costs along to municipalities or residential customers. No doubt many of these employers would be forced to shut their doors or would be driven out of the market by public sector or larger, private sector competitors not subject to OSHA regulations.^{15/}

Even when replacing rear-loaders at the end of their service life, employers implementing fully automated systems would face additional costs of between \$55,000 and \$70,000 per route above and beyond the replacement cost of a rear-loader. For an employer with ten routes, these additional costs would amount to between \$630,000 and \$780,000, including two backup trucks. Again, these very substantial costs would be unaffordable for many solid waste firms, and in many cases could not be passed along.

E. Gathering Information on Effective Solutions in the Waste Management Industry Would Seriously Impede OSHA’s Rule-Making.

OSHA proposed to exempt the construction industry in part because the agency concluded that including the industry would substantially impede the rulemaking. Specifically, OSHA indicated that it needed to “gather and examine information on the types of ergonomic controls that would work in an industry with a high number of non-fixed workstations.” *Id.*

Non-fixed work sites raise more significant problems in the solid waste management industry than in the construction industry. As discussed earlier, construction employers’ job sites are really temporary fixed sites: the employer controls hazards to a substantial degree, and supervisors are present to identify and address hazards and to ensure that workers follow safe work practices. Employers in the solid waste management industry have far less control over

^{14/} As discussed above in Section I - A, a recent Florida survey concluded that the average private solid waste firm in that state had approximately 21 employees.

^{15/} Public sector competition is discussed *infra* at Section V - B.

the working conditions and potential hazards at the hundreds of non-fixed “sites” visited by their workers during a typical shift. Thus, identification of hazard prevention and control measures is significantly more difficult in the solid waste management industry.

A researcher at the University of Miami recently completed a literature review of studies involving solid waste workers, finding that very little data existed on the relationship between industry working conditions and musculoskeletal conditions or on effective hazard prevention and control measures.^{16/} The researcher concluded that “[a]dditional research is needed to further characterize the exposures and health effects of solid waste workers.” He specifically recommended “multi-site, controlled retrospective and prospective epidemiologic studies with appropriate exposure and objective health effect measures.” The researcher stated that undertaking the necessary additional research would require “considerable work.” Indeed, studies of the sort needed to analyze exposures, health effects, and prevention and control measures would take several years to design, conduct and analyze.

In the absence of reliable studies of the relationship between industry working conditions and musculoskeletal conditions, or of the efficacy and feasibility of hazard prevention and control measures, OSHA lacks a sufficient basis at present to extend the Proposed Ergonomics Rule to the solid waste management industry. Developing that basis during this rule-making would take several years and would substantially impede the rule-making.

V. The Structure of The Solid Waste Management Industry Compels An Exemption

A. The Proposed Standard Would Dramatically Affect Private Sector Firms’ Ability To Compete With Public Sector Entities.

While private sector firms now collect most of the country’s residential and commercial refuse, in a substantial number of counties and municipalities collection is still performed directly by governmental entities. While state OSHA agencies have jurisdiction over these public sector employers in twenty-three states, Federal OSHA has no such jurisdiction. Thus, in the remaining twenty-seven states,^{17/} Federal OSHA has jurisdiction over private but not public

^{16/} J. Englehardt, *Solid Waste Management Health and Safety Risks*, www.eng.miami.edu/~mswrisk/.

^{17/} These states include Alabama, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Kansas, Louisiana, Maine, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, West Virginia, and Wisconsin.

sector employers. In these states, applying an ergonomics standard only to private sector waste management firms would substantially affect the competitive structure of the waste management industry.

An Insurmountable Competitive Edge. For example, public sector services compete with private sector firms for waste management work in many cities, such as Indianapolis, Phoenix, Clearwater and Lubbock. In these locations, municipalities take bids from private sector firms and then decide if their own public sector waste management services can perform the work at a lower cost. The Proposed Ergonomics Standard would have a dramatic effect on this competitive structure in Federal OSHA states where public sector employers are not subject to Federal OSHA regulation.

In cities such as Clearwater, for example, Federal OSHA's Ergonomics Standard would compel private sector firms to purchase automated or semi-automated trucks costing up to \$200,000 apiece. Implementing an automated system, as discussed earlier, would cost between \$365,000 and \$460,000 per route. In addition, the Proposed Standard would require solid waste companies to incur training, medical management and other costs. Public sector service providers would not be subject to these requirements, and would have a competitive advantage that would be devastating to private firms.

Spurring New Public Entities. This cost differential would also be devastating in other cities located in Federal OSHA states, where private sector firms currently collect refuse and there is presently no public sector competition. If Federal OSHA imposes costs on the private sector firms such as those described above, and these firms seek to pass such costs along to municipalities, these municipalities may well decide to initiate public service to compete with private sector firms or to replace them altogether.

B. Municipalities Exercise Substantial Control Over Working Conditions.

Governmental entities regulate many aspects of the solid waste industry, such as refuse collection schedules, pickup locations, container types, recycling, the disposal of non-containerized materials, the number of containers per site, and collection rates.

These extensive requirements would prevent solid waste industry employers from achieving compliance with OSHA's Proposed Ergonomics Standard. In many cases, the elimination or reduction of potential hazards would require violation of municipal regulations. Curbside collection saves workers from having to carry containers up and down stairs, across yards, and from behind houses, but it is prohibited in many municipalities.^{1/}

^{18/} In addition, even where curbside collection is permitted or required, it may not be possible for

In some locations the applicable regulations may exacerbate potential on-the-job hazards. For example, many municipalities set rates for residential customers which increase with the volume of refuse collected. In such locations, residential customers often use compactors to minimize the volume of their garbage, resulting in heavier loads for refuse collection workers. Similarly, many municipalities charge a flat fee, regardless of the amount of refuse generated. This practice encourages customers to use larger containers, and causes a corresponding increase in the average loads lifted by refuse collection employees.

Other jurisdictions require backyard refuse collection, increasing the distance refuse containers must be transported, and requiring wheeled containers to be carried over grass and gravel or up and down stairs. Many municipalities also require curbside sorting of recyclable materials, which may preclude the use of automated equipment. In sum, heavy municipal and state regulation of the solid waste industry represents a serious impediment to compliance with the Proposed Ergonomics Standard.

C. Many Employers Would Be Unable to Pass Along Costs.

Solid waste industry employers may have substantial difficulty passing along the costs of compliance with OSHA's Proposed Ergonomics Standard. First, the typical contract between a solid waste employer and a municipality lasts between three and seven years. Solid waste industry employers may be unable to pass along significant cost increases which occur in the middle of multi-year contracts. Even when private sector firms have the opportunity to negotiate cost increases, small towns and municipalities may simply be unable to afford the costs associated with implementation of the Proposed Ergonomics Standard.

For example, local governments may be unable to finance the automation of refuse collection services. As described earlier, automated vehicles and wheeled carts would cost between \$190,000 and \$230,000 per route. Small towns and municipalities would be unable to afford these systems, and would not likely be able to raise municipal taxes sufficiently to provide the necessary funding. Similarly, small towns and municipalities would be unable to afford automation of processing facilities to replace manual sorting where practicable.

elderly or disabled residents to get their refuse containers to the curb. Omaha, for example, requires curbside collection but allows disabled residents to place their containers near their back doors.

In such circumstances, private sector refuse collection firms would not be able to pass along the costs of compliance with the Proposed Standard. Industry data from Florida suggest that the average private sector solid waste firm has approximately 21 employees.^{19/} Although a national average is not currently available, this data certainly suggests that the average private sector solid waste industry firm would be unable to remain in operation if faced with these costs.

Moreover, in Washington State and West Virginia, refuse collection rates are set by the state for many communities. Solid waste management firms in these states would be unable to pass along the substantial costs imposed by the Proposed Ergonomics Standard (or by an equivalent state rule, in the case of Washington). These firms would be unable to operate competitively and would be forced to cease operations or seek relief from the state through legislative enactments to raise refuse collection rates.

D. The Proposed Standard Would Impose An Unfunded Mandate.

^{19/} See Section I - A.

In those locations where solid waste industry employers *could* pass along all or part the costs of compliance with OSHA's Proposed Ergonomics Standard, the Standard would impose a substantial, indirect, unfunded mandate on municipal governments. OSHA, however, concluded that its Proposed Ergonomics Standard would not impose an unfunded mandate on local governments under the Unfunded Mandates Reform Act of 1995, 2 U.S.C. § 1501 *et seq.*^{1/}

The agency appears not to have considered how the application of the Proposed Standard to the solid waste industry would impact local governments as required by 2 U.S.C. § 1531. Nor has the agency complied with the various provisions of 2 U.S.C. §§ 1532-1535, which are designed to ensure 1) participation of local governments in the regulatory process, and 2) special consideration of the impact of federal unfunded mandates on such governments.

The National Conference of Mayors intends to submit comments addressing these unfunded mandates. NSWMA supports and hereby adopts such comments.

VI. OSHA's Proposal Would Not Advance Worker Protection In The Solid Waste Management Industry.

A. OSHA's Proposal Represents A Substantial Departure From The Agency's Stated Objectives.

In the Preamble to the Proposed Ergonomics Standard, OSHA sets forth its objectives. The Proposed Standard, however, departs markedly from these objectives. As a result, the Proposed Standard would impose substantial costs and regulatory burdens on covered employers based on minor, short-term worker discomforts.

^{20/} 64 Fed. Reg. at 66054.

Severe Problems. The agency states that it intends to limit the scope of the Standard to “those areas where 1) the problems are severe, and 2) the solutions are well-understood.” 64 Fed. Reg. at 65776.^{1/} Yet the Proposed Standard would apply to virtually *any general industry work site* at which *one worker* experiences a work-related sign or symptom of a musculoskeletal disorder, such as back pain, redness in a joint, aching, or tingling. OSHA admits in the Preamble that “the scope of the Proposed Standard potentially encompasses all workplaces within general industry.” 64 Fed. Reg. at 65985. OSHA further estimates that the Proposed Standard would cover nearly two million firms in the first year alone.^{1/} Rather than *limiting* the standard to the most serious problems, OSHA has greatly *expanded* it to cover nearly every work site.

Actual Injuries. When it published the Proposed Standard, OSHA claimed that it was “using actual injuries to trigger the requirements of the standard.” But in reality, redness, aches and pains, tingling and numbness would trigger comprehensive ergonomics programs under the Proposed Standard. These conditions are not injuries, nor are they musculoskeletal disorders. They are simply *signs and symptoms* of a *potential* disorder. OSHA repeatedly and consistently mischaracterizes these signs and symptoms as “covered MSDs”, as though they were disorders in themselves, and does so *hundreds of times* throughout the Preamble. On page 65788, for example, OSHA states that the Proposed Standard covers only jobs in which employees “experience a musculoskeletal disorder”. This page includes eleven other mischaracterizations that the Proposed Standard is triggered by “MSDs” or “covered MSDs”.^{1/}

^{21/} See also page 66035 (“The proposed standard should focus on operations where the risk of MSDs is the greatest and solutions are known”).

^{22/} 64 Fed. Reg. at 65994 (the Proposed Standard would cover 373,000 firms with manufacturing operations, 976,000 firms with manual handling operations, and 600,000 general industry firms at which one worker experiences a sign or symptom of an MSD).

^{23/} See also page 65986 (general industry employers “would not be required to take any action until an MSD has occurred”).

Proportionality. In the Preamble to the Proposed Standard, OSHA indicates that the proposal is intended to impose obligations that are proportional to the extent of the problem at a particular workplace: “The scope of the proposed standard is tiered in a way that matches the extent of the ergonomics program required to the extent of the risk in different establishments.” 64 Fed. Reg. at 65985; see also page 66035 (proposal should include “a tiered approach that does not require employers whose establishments do not have problem jobs to implement a full program”). Most programs triggered by the proposal, however, will be triggered by short-term, incidental discomfort, by work-related aches and pains that can be treated quickly and do not recur. OSHA acknowledges, in fact, that the “vast majority” of recordable MSDs result in no lost work time at all. 64 Fed. Reg. at 65855. In short, the Proposed Standard would require solid waste industry firms to implement costly, comprehensive ergonomics programs even if they are completely unnecessary.

The relationship between MSDs and work is a highly complex issue. Many extremely difficult questions of causation remain unanswered. For many conditions, effective preventive measures have yet to be identified. If OSHA is to attempt to develop a regulation in this very complex area, it must adhere to the principles the agency has set forth. Should OSHA wish to proceed with this rule-making, the agency must withdraw the current Proposed Standard and develop an alternative more consistent with its own principles as described above.

B. The Trigger Would Impose Substantial Obligations Based On Short-Lived Employee Discomforts.

OSHA is using MSD “signs or symptoms” (under its broad definition of a “recordable” MSD) to force many employers to undertake costly, broad-scale hazard prevention and control efforts in response to minor problems. The recordability test was designed as an extremely wide net to allow effective early identification of potential MSDs, not as a threshold for substantial new mandates.

The Proposed Standard would require a comprehensive program if two employees experience swelling, redness or another MSD sign over a three-year period. Similarly, a full program would be required if, within a three-year period, two workers experience numbness, tingling or another MSD symptom coupled with sick leave, a job transfer or medical treatment. In many cases the signs or symptoms would disappear in *a few hours*, but these employers would have to maintain their ergonomics programs for *at least three years*.

Thus, for example, an employer that proactively seeks to prevent MSDs by transferring workers to light duty jobs at the first hint of an MSD sign or symptom would be required to

implement a comprehensive program anyway as a result of such responsible prevention efforts. Alternatively, if one worker reported back pain for a few hours while at work, took muscle relaxers and never had any recurrence, the employer would be required to implement a “quick-fix” (which could entail substantial cost and disruption of operations) or a comprehensive program.

For Most Triggering Events, There Would Be No Material Impairment of Workers’ Health. OSHA acknowledges that it must demonstrate that the Proposed Standard addresses a “material impairment” of workers’ health. 64 Fed. Reg. at 65774; *see also* 29 U.S.C. § 655(b)(5). The agency has failed to meet this burden.

While the Proposed Standard would cover some serious musculoskeletal disorders, short-lived discomforts would comprise most of the triggering events under the rule’s provisions. Indeed, OSHA acknowledges that “the vast majority of MSDs . . . do not involve days away from work.” 64 Fed. Reg. at 65855.

Occasional back pain, wrist discomfort or redness would be the typical recordable conditions which would necessitate employer action. As discussed above, these conditions are not injuries, illnesses or disorders in themselves, but mere signs or symptoms of potential disorders. These conditions clearly do not rise to the level of a material impairment of health. Yet in response to the occurrence of such conditions, employers would be required to implement comprehensive ergonomics programs, and could be required to redesign work processes, activities, stations and equipment, and change the pace of work or productivity.

Particularly Troubling Implications for the Solid Waste Industry. The Proposed Standard’s trigger would cause substantial problems in the solid waste management industry. As discussed above, most of the industry’s workers engage in hard physical labor inherent in the nature of their jobs. At the end of the day, they are tired, and often sore. These symptoms go away with rest, nourishment and sleep, but they would nevertheless trigger comprehensive program obligations under the standard.

Moreover, the trigger is so low that solid waste industry workers in processing facilities and even office settings would likely have to be included in the program. Most people experience back pain or soreness, for example, and under the agency’s very broad definition of work-relatedness working conditions would almost always contribute to at least some minimal extent. The screening provision would exclude some incidental MSDs (e.g. if a worker tripped on the stairs), but many signs and symptoms of musculoskeletal conditions would still trigger full-blown programs.

The Proposed Standard is far from the most cost-effective alternative which would achieve the same level of protection. In essence, the trigger would cause countless employers to provide comprehensive ergonomics programs to cover whole job classifications simply because two workers experience minor, short-term discomfort (which qualifies in one way or another as a recordable MSD) within a three-year period. Nor are the requirements of the Proposed Standard “reasonably necessary and appropriate”, as the agency alleges, given the trigger.

C. Small Business Owners Cannot Solve Complex Medical Causation Issues In A Quarter Of An Hour.

OSHA would require employers to make frequent decisions as to whether MSD signs or symptoms experienced by their workers are “work-related.” To make such decisions, employers would have to identify all factors contributing significantly to the sign or symptom in question, and determine whether working conditions have contributed to it. Based on this determination, OSHA would require employers to determine whether and to what extent the Proposed Ergonomics Standard applies to them, and to assess appropriate hazard prevention and control measures.

The agency chose not to offer employers any guidance in the Proposed Standard as to how they should determine work-relatedness. As a general rule, the agency takes the position that an injury is work-related if working conditions contributed to it, even if other non-work factors also contributed.

OSHA acknowledges that making a work-relatedness determination is often highly complex. MSDs depend on a broad range of factors such as each individual’s reparative capacity, genetic factors, acquired characteristics, work techniques and skill level. MSDs also depend, OSHA explains, on organizational and social factors. 64 Fed. Reg. at 65927. The agency states that “MSD genesis represents a complex combination (and possibly interaction) of exposures to work and non-work risk factors modified by the individual’s ability to tolerate physical job stress.” 64 Fed. Reg. at 65866.

In addition, although many studies have linked working conditions to MSDs, many questions remain unanswered, such as the role of stress. Back injuries, for example, are extremely common among working Americans but, in many cases, tracing the causes of such injuries is all but impossible. Most life activities contribute in one way or another to wear and tear on the human body.

Not surprisingly, medical professionals are often unable to pinpoint the causes of back pain and other MSDs, but OSHA expects small business owners to be able to do just that.

Even worse, OSHA estimates that making a work-relatedness determination will take an employer an average of just *fifteen minutes*. 64 Fed. Reg. at 66037. In truth, employers will have great difficulty fulfilling their obligations under the draft to determine the work-relatedness of MSDs at all, let alone in fifteen minutes. In the solid waste industry, where a typical employer runs a small refuse collection business with twenty or thirty employees and a few trucks, employers lack the training, expertise, resources and time to make the complex bio-mechanical and multi-factoral assessments described above.

D. The Proposal Would Require Solid Waste Industry Employers to Exhaust All Feasible Hazard Prevention and Control Measures Regardless of Their Effectiveness.

OSHA acknowledges that MSD hazards are inherent in many jobs, and that employers may not be able to eliminate MSDs from some jobs. *See, e.g.*, 64 Fed. Reg. at 66002 (“some MSDs will continue to occur in jobs that have already been fixed”). Nevertheless, in such situations employers would be required to implement *every single feasible solution* even if there is no evidence that such solutions will materially reduce MSD hazards. This requirement will have significant consequences in the waste management industry.

OSHA Doesn't Say “When.” Under the Proposed Standard’s hazard prevention and control requirement, employers must take unspecified remedial measures that “materially reduce” MSD hazards. This provision allows employers to determine the solutions most appropriate to the problems in their workplaces, but how will an employer know that it has sufficiently controlled MSD hazards? Even in the absence of continued MSDs, OSHA could conclude that an employer’s remedial approach was insufficient. As written, this provision would leave both employers and OSHA inspectors uncertain as to when an employer has taken sufficient remedial steps to meet its obligations.

Employers operating in more than one state are likely to face inconsistent enforcement by OSHA inspectors in different jurisdictions. They could also face repeat violations for failing to implement remedial measures in one state that OSHA compelled in another state, even if the employer made good faith efforts in both locations, and even if the remedies appropriate for one setting were not appropriate for the other.

Exhausting All Feasible Controls Regardless of the Return on the Investment. Moreover, if MSD signs and symptoms continue to occur, even on a sporadic basis, an employer must continue to implement additional abatement measures indefinitely, even if such measures have little impact in reducing MSD hazards. This obligation would be triggered very frequently in the solid waste industry, given the frequency with which workers normally

experience short-term discomfort, aches and pains. This obligation would cease only when an employer has exhausted all feasible controls.

The agency's impossibly burdensome definition of technological feasibility would make compliance with this requirement virtually impossible. OSHA asserts that a hazard control methodology is technologically feasible *even if it is not currently available*. Thus, OSHA could issue citations and civil penalties to a small solid waste industry employer for failing to implement non-existent equipment that "*can be developed by improving existing technologies*" or that is "*on the horizon of technological development.*" 64 Fed. Reg. at 65823.

E. The Proposal's Medical Management Provisions Would Preclude Employers From Determining Work-Relatedness.

The Proposed Standard would require employers to consult with health care professionals regarding musculoskeletal conditions experienced by their workers, but would not permit employers to question their conclusion. Thus, for example, a health care professional could require an employer to comply with work restrictions based on reports of subjective symptoms, placing the burden on the employer to identify the actual causes of the employee's sign or symptom.

Even more troubling is the provision that would preclude a health care professional from disclosing to the employer the non-work factors which may have contributed to an MSD or MSD sign or symptom. *See* § 1910.932; 64 Fed. Reg. at 65844. Without knowing what non-work factors contributed, and how much they contributed, to the employee's condition, an employer would be unable to make an informed determination as to work-relatedness. Similarly, the employer would be unable to identify appropriate hazard prevention and control measures without this knowledge. How is an employer to determine whether the individual employee had a preexisting injury and whether such measures are necessary at all? The Proposed Standard's confidentiality provision is ill-conceived and would preclude employers from complying with many obligations imposed by other provisions.

OSHA would also require employers to obtain a written medical opinion. Many health care providers are reluctant to provide written opinions, either because they are too busy seeing patients or because they are concerned about the potential liability implications. At best, a written evaluation might be obtained some time after the evaluation. Employers would not be in a position to require health care professionals to provide evaluations in writing.

F. OSHA Exceeded Its Authority By Proposing To Supersede Workers' Compensation, the FMLA, and the ADA.

Section 4(b)(4) of the Occupational Safety and Health Act provides that “[n]othing in this Act shall be construed to supersede or in any manner affect any workmen’s compensation law.”⁵ Yet section 1910.933 of the Proposed Ergonomics Standard would do just that, by requiring employers to pay disabled workers 90% or 100% of their full salary and benefits for up to six months, substantially more than state workers’ compensation systems would provide.⁴ This “work restriction protection” (WRP) clearly exceeds OSHA’s standard-setting authority.

Indeed, OSHA’s intent to supersede workers’ compensation systems is clear. The agency states its belief “that existing State workers’ compensation systems are not sufficient to encourage employees to report MSDs early and to cure this under-reporting.” 64 Fed. Reg. 65852.

Workers’ Compensation Provides An Exclusive Remedy. Workers’ compensation systems are designed to provide compensation to workers for on-the-job injuries without expensive and lengthy litigation. Under these systems, the employer and the worker both forfeit certain rights. Employers forfeit any defenses they may have to liability for on-the-job injuries, but save litigation costs; workers receive a recovery for such injuries without having to prove liability, but do not recover as much as they might through litigation.

This careful balancing works only because employers are assured that as a quid pro quo for a no-fault system, they will not be subject to further liability. To preserve this principle, all state workers’ compensation laws specify that workers’ compensation is the exclusive means by which an employee can receive compensation for a work-related injury from his or her employer. OSHA’s WRP provision violates every one of these laws and undermines the basis of every workers’ compensation system.

Moreover, workers’ compensation payments are purposefully set as a percentage of an employee’s normal compensation, to ensure that the employee has motivation to return to work as quickly as possible. OSHA’s proposed work restriction protection provision would eliminate the incentive to return to work, and create instead an incentive to stay home.

^{24/} Most state workers’ compensation systems replace two-thirds of an injured worker’s lost wages. These payments are not subject to taxation.

OSHA's WRP Provision Creates An Entirely New Remedial Scheme. OSHA takes the position that the Proposed Standard's work restriction protection provision does not supersede workers' compensation systems because it does not preempt such systems. True, the proposed WRP provision "would not require States to change the percentage of lost wages [they] will replace." 64 Fed. Reg. 65853. But it *would* create a new monetary remedy for on-the-job injuries, alter the percentage of wages employers are required to provide to injured workers, eliminate the waiting period, reduce the causation threshold for compensability, eliminate any consideration of the degree of physical impairment, and award substantially higher monetary remedies for musculoskeletal conditions than for other work-related injuries. All of these issues are within the exclusive province of workers' compensation systems. If this is not "superseding" workers' compensation laws, the term has no meaning. OSHA's WRP provision would completely destroy the balance these systems are designed to achieve, in which employers forego defenses to liability and workers forego an opportunity to recover additional wages and damages.

The Lead Standard Litigation Is Distinguishable, And Was Wrongly Decided. The court of appeals' decision in the Lead Standard litigation^{25/} is distinguishable from the instant issue. The Lead Standard arguably did not supersede workers' compensation systems because it protected workers from occupational exposures, not occupational injuries. Here, work restriction protections would be used where workers suffer lost or restricted work time injuries. As OSHA states, "MSDs have been recognized as compensable under virtually all state workers' compensation plans." 64 Fed. Reg. at 65984. Moreover, that decision is inconsistent with the plain language of the Occupational Safety and Health Act, and contrary to public policy and common sense. The court's interpretation of section 4(b)(4) would render that section inoperable.

No Evidence That WRP Will Increase Reporting Of Bona Fide MSDs. OSHA states that the Proposed Standard's work restriction protections are necessary to encourage workers to report signs and symptoms of MSDs to their employers. 64 Fed. Reg. at 65791, 65846, 65849. The agency claims that this provision is "a critical component" of the proposal, despite the fact that the "vast majority" of MSDs involve *no* lost work time. 64 Fed. Reg. at 65855. OSHA has offered no evidence, let alone

^{25/} *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1236 (D.C. Cir. 1980).

substantial evidence, that there is a “chilling effect” on reporting which results from low workers’ compensation wage replacement rates, or that the Proposed Standard’s work restriction protections would reverse any such effect. Indeed, OSHA concluded that the Proposed Standard would have *no effect* on MSD reporting rates.^{1/}

At the same time, OSHA acknowledges that the work restriction provisions could be abused by some workers. 64 Fed. Reg. at 65851. The agency points out that an employer can require a health care professional to render an opinion. But such professionals will have difficulty identifying causation in many cases, and will be reluctant to question an employee’s symptoms. The agency fails to address this serious concern regarding the potential for abuse of the work restriction provision.

WRP Would Have A Substantial Cost Impact On Solid Waste Industry Employers. Compliance with OSHA’s WRP provision would be particularly burdensome for solid waste industry employers. The great majority of their workers perform hard, physical labor, and are tired and often sore at the end of the day. OSHA set the threshold for work restriction protection extremely low, and set the causation threshold extremely low as well. Thus, even a worker with a preexisting condition would qualify for six months’ paid leave if his or her work activities contribute to or exacerbate the condition in any respect. OSHA’s WRP provision would encourage many solid waste industry workers to seek time off at full or near-full pay, by persuading a health care professional that their reported symptoms are real.

In sum, OSHA’s statutory responsibilities include developing and enforcing occupational safety and health standards to protect workers from on-the-job injuries and illnesses. Workers’ compensation systems, in contrast, are designed to provide an exclusive remedy to workers for harm that occurs as a result of work-related activities. By creating an entirely new remedial scheme for on-the-job injuries, OSHA’s WRP provision invades the province of workers’ compensation systems, violates section 4(b)(4) of the Occupational Safety and Health Act, and exceeds OSHA’s statutory authority.

^{26/} OSHA concluded that any increase in reporting resulting from the Proposed Standard’s work restriction protection provision would be offset by other provisions of the Proposed Standard which, in the agency’s view, would discourage reporting. 64 Fed. Reg. at 66001.

Superseding the FMLA. Congress enacted the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 *et seq.*, as a careful balancing of two competing interests: employers' interest in tailoring their employment policies to fit the particular needs of their business, and workers' interest in being permitted to take family and medical leave in appropriate situations without jeopardizing their jobs. It took years of Congress grappling with this issue for its members to find an appropriate balance, and ultimately Congress chose to provide leave under certain circumstances but not to require employers to pay for it. By mandating employer-paid leave for workers experiencing signs and symptoms of MSDs, OSHA would wipe out that careful balancing and create a new employee entitlement Congress specifically considered and rejected in the course of deliberating over the FMLA.

Superseding the ADA. Similarly, in enacting the Americans With Disabilities Act, 29 U.S.C. § 706 *et seq.*, Congress sought to balance the employment rights of disabled Americans with employers' business needs. Again, Congress considered the issue for several years, and ultimately concluded that employers should be required to make *reasonable accommodation* to permit a disabled worker to perform a job for which the individual is otherwise qualified, but that employers should not be subject to an undue hardship. 42 U.S.C. § 12102(10). In the Proposed Ergonomics Standard, however, OSHA would compel employers to comply with *any* work restrictions recommended by a health care professional, *regardless* of whether they would represent a reasonable accommodation of the affected worker. *See* § 1910.933. The Proposed Standard would also mandate continued employment for up to six months (at 90% of the employee's previous wage and benefit levels) of employees who can no longer perform their jobs and for whom no reasonable accommodation can be made. OSHA's proposal would eliminate the balance Congress carefully struck in enacting the ADA, and impose an alternative scheme that is well outside the agency's authority.

G. The Grandfather Clause Would Benefit Few Employers.

OSHA included a "grandfather clause" in the Proposed Standard in an effort to recognize that many employers have already implemented successful ergonomics programs. Nevertheless, to qualify for this clause an employer must be prepared to demonstrate that its program includes every core element required by the Proposed Standard, and that for each core element its program complies with the basic obligation set forth in the Proposed Standard. In essence, the grandfather clause would require employers to demonstrate virtually full compliance with the Proposed Standard in order to be relieved from full compliance. Few employers will benefit from this provision.

H. Employee Involvement and the NLRA

Section 1910.913 of OSHA's Proposed Ergonomics Standard would require covered employers to set up ergonomics programs which would include employee involvement. The employee involvement mechanisms OSHA envisions may lead many employers to run afoul of the National Labor Relations Act (NLRA), 29 U.S.C. §151 *et seq.*, in complying with OSHA's Ergonomics Standard.

Section 8(a)(2) of the NLRA makes it an unfair labor practice for an employer to "dominate or interfere with" a labor organization. In turn, Section 2(5) of the NLRA defines "labor organization" to include any organization in which employees participate and which exists for the purpose of "dealing with" an employer regarding wages, hours or the terms and conditions of employment. Together, these provisions impose a broad limitation on employers' ability to establish and support employee involvement mechanisms to address workplace safety and health issues. This limitation is particularly problematic in non-union workplaces.^{1/}

Numerous Employee Involvement Mechanisms Have Been Deemed To Violate The NLRA. The National Labor Relations Board issued two decisions in the early 1990s which shed light on this issue. In *Electromation, Inc.*, 309 NLRB 990 (1992), the Board found that a non-union employer's "action committees" constituted labor organizations because they had been set up to allow workers to talk back and forth with management in a bilateral process about pay scales and other issues. The Board also held that the employer had unlawfully dominated the committees by unilaterally setting them up, determining their functions, and by retaining the unilateral right to terminate them.

The following year, in *E.I. du Pont de Nemours & Co.*, 311 NLRB 893 (1993), the Board struck down safety and health committees at an organized workplace, for similar reasons. The employer had unilaterally established the employee committees to make proposals on safety and health issues, and retained unilateral power to decide the committees' structure and functions, to select employee "representatives," and to terminate the committees. The Board required the employer to disband the committees, finding that they reflected a bilateral process improperly dominated by the employer. The Board also found that the same employer's safety conferences were lawful "communications devices," in large part because the participating employees were acting on their own behalf and not as representatives of other workers.

Earlier this year, in *EFCO Corp.*, 327 NLRB No. 71, 160 LRRM 1049, the NLRB offered a more detailed analysis of how employers may lawfully interact with their employees

^{27/} In unionized workplaces, employers can avoid section 8(a)(2) problems by working with the employees' exclusive bargaining agent to establish employee involvement mechanisms.

over safety and health issues. In *EFCO*, the employer established a safety and health committee, and selected the employee participants from among a group of volunteers. The employer defined the committee's functions, and determined the agenda.

The Board determined that the committee was a "labor organization" under the NLRA because it engaged in a bilateral process with the employer. In support of this finding, the NLRB observed that the committee was charged with "reviewing safety rules and policies, developing safety incentive programs, and, most significantly, making proposals to management about such policies and programs." The Board noted, however, that an employer would not create a "labor organization" for purposes of the NLRA simply by delegating safety duties to a group of workers. Thus, for example, assigning workers duties such as the reporting and correction of safety problems, the imparting of safety information, or the planning of educational programs would not establish a "labor organization" and could not be held to violate Section 8(a)(2) of the NLRA. Having found that the employer's safety and health committee was a "labor organization" under the NLRA, the Board then concluded that the employer had dominated the committee in violation of Section 8(a)(2) by unilaterally determining its structure, functions, agenda and duration.

The Ergonomics Proposal Would Require A Bilateral Process. In the Preamble, OSHA states that the Proposed Standard's employee involvement provisions would require an employer to provide "a regular, two-way exchange of information in which employees receive information about the employer's ergonomics program and its progress, and the employer receives information about MSDs that is of concern to the employees." 64 Fed. Reg. at 65798.

This would effectively compel employers to undertake just the kind of bilateral process the NLRB struck down in the *Electromation*, *DuPont* and *EFCO* decisions.

I. The Proposed Standard Raises Substantial Enforcement Issues.

OSHA has included a great many provisions in the Proposed Standard which are apparently designed to make the provisions flexible enough to be practically applied in a broad range of worksites of different sizes, levels of complexity, and degrees of risk. NSWMA appreciates the agency's recognition of the fact that application of one set of regulatory norms to a vastly disparate universe of workplaces poses innumerable implementation problems. Nevertheless, rather than improving the Proposed Standard's "flexibility", in many cases these terms and provisions simply create ambiguity.

Employers Will Struggle To Understand Their Obligations. Employers will have difficulty making work-relatedness determinations. They will have difficulty applying the agency's screening provision for "incidental" musculoskeletal conditions. They will have

difficulty determining how much management leadership and employee involvement are enough. They will have difficulty making technological and economic feasibility assessments, particularly given the extraordinarily broad definitions given these terms by OSHA. They will have difficulty knowing how many remedial measures they must employ to be in compliance. There are many more regulatory compliance decisions employers will struggle with.

OSHA Staff Will Struggle To Enforce The Rule. OSHA's staff of inspectors will struggle with these terms and provisions as well. Only a handful have any real expertise in the practical application of ergonomics in the workplace. In the absence of such expertise, they are likely to enforce these terms and provisions very differently. They may derive some benefit from compliance directives the agency typically issues following the promulgation of a final rule to provide guidance on how to enforce it. The solid waste industry's many small business owners, however, will not have the benefit of these unpublished directives.

OSHA Lacks Familiarity With The Solid Waste Industry. As discussed in previous sections of these comments, working conditions in the solid waste industry compel special consideration in any regulatory scheme designed to address ergonomic hazards. OSHA may lack sufficient familiarity with the industry to be aware of the particular challenges employers face in seeking to protect their workers from musculoskeletal disorders. As mentioned previously, OSHA recently sent a General Duty Clause letter to one NSWMA member, addressing ergonomic hazards. OSHA recommended that the employer install hydraulic cart lifts, mandate the use of carts by residential customers, discontinue pick-up of bulk items, purchase fully automated trucks, and use three-person crews. *See Attachment A.* In most localities, solid waste industry employers are precluded from taking these steps due to municipal regulations, state laws, competitive pressures, technological infeasibility, economic infeasibility, public health concerns and customer preference. This letter suggests that OSHA lacks sufficient familiarity with the limitations faced by solid waste industry employers to enforce an ergonomics standard in this industry.

J. Small Businesses Would Have Difficulty Implementing The Proposed Standard and Would Face Prohibitive Costs.

The agency states in the Preamble to the Proposed Standard that "most large companies, who employ the majority of the workforce, already have these programs." 64 Fed. Reg. 65769. Thus, OSHA's Proposed Ergonomics Standard is intended primarily as a means by which to compel small employers to implement ergonomics programs. The ergonomics program proposed by OSHA, however, is modeled on programs in large manufacturing facilities, and would be both extremely costly and very difficult for small firms to implement.

Implementation Difficulties. OSHA estimates that the Proposed Standard will apply to 1.3 million small business owners. The vast majority of them lack safety and health expertise, and will have extreme difficulty deciphering this complex, often confusing proposal. It took OSHA years to develop the rule, and more than 300 pages of the Federal Register to explain it. Small business owners will struggle to define such terms as “MSD,” “manual handling” and “feasible,” and to conduct job hazard analyses; ultimately, they will be hard-pressed to identify and comprehend their obligations under the rule’s provisions.

OSHA Underestimated Industry Compliance Costs. OSHA seriously underestimated the costs of compliance for employers. For example, OSHA appears to have concluded that employers would have to hire a consultant only in rare circumstances. Yet the agency would require that every covered employer’s job hazard analysis and control responsibilities be carried out by “person(s) who have received training in the process of analyzing and controlling MSD hazards.” 64 Fed. Reg. 65805.

In the solid waste industry, data from a recent Florida study suggests that the average employer in that state has roughly twenty-one employees.^{1/} The average small business owner lacks the training OSHA would require, and would have to hire a consultant to perform such functions or train them as required. Large firms, with far more routes and affected employees, would face far more substantial costs.

OSHA estimates that the Proposed Standard will cost employers \$4.2 billion per year. 64 Fed. Reg. at 66003. This figure is based on OSHA’s conclusion that “fixing” problem jobs would cost an average of \$150 per job. In the solid waste industry, costs would run much higher, as the Proposed Standard would require automation of refuse collection. As discussed earlier, fully automated collection systems (automated truck and carts) cost between \$190,000 and \$230,000 per route, plus additional maintenance costs roughly \$6,000 per year higher than similar costs for non-automated trucks. Even those employers planning to replace non-automated trucks at the end of their service life would face additional costs of between \$55,000 and \$70,000 per route. In many cases industry employers would be unable to pass these costs along to municipalities or residents.

Even under OSHA’s own estimates, in nearly half of all covered industrial sectors the costs of the Proposed Standard to small employers

^{28/} See discussion at Section I - A. It is unclear whether the estimates for Florida can be extrapolated for a national estimate.

would exceed 5% of profits. 64 Fed. Reg. at 66019. In the solid waste industry, rates are frequently controlled by municipal governments and public sector service providers would not be subject to Federal OSHA's Ergonomics Standard. Small employers would have serious difficulty passing on compliance costs, and the Standard would have a substantial impact on the industry's competitive structure.

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