

LEGAL PERSPECTIVES - ANSI Z10-2005 Standard Occupational Health and Safety Management Systems

The July 2005 release of the ANSI Z10-2005 standard, *Occupational Health and Safety Management Systems*, has significant implications for safety and health practitioners and employers—with equal measures of danger and opportunity. In general, the utilization of national consensus standards will be of increased importance to this country as the economy of the United States moves towards more of a global perspective. National consensus safety and health standards, such as ANSI Z10, reflect the opinions of safety and health professionals and end-users working at all levels of the public and private sectors in technology development, manufacturing, training and academia.

Adoption of the basic precepts in such standards has many benefits and may protect users of the standard, while furthering the interests of affected businesses. However, the far-reaching implications of such standards in OSHA enforcement actions and in tort litigation also must be recognized. It is also essential to focus on the fact that such standards are voluntary, until such time as they are incorporated by reference into a binding regulation. Even reference to the ANSI Z10 standard in policy documents created by federal or state governments does not convert the nature of the standard from voluntary to mandatory.

The goal of the ANSI Z10 standard is to use recognized management system principles, compatible with quality and environmental management system standards such as the ISO 9000 and ISO 14000 series as well as with principles adopted by the International Labor Organization, to encourage integration of safety into other business management systems. However, at the present time, there is no apparent Z10 certification scheme similar to the international recognition program developed pursuant to the ISO standards.

The basic elements of the standard address management leadership and employee participation, planning, implementation, evaluation and corrective action and management review. Thus, in many important aspects, the Z10 standard encompasses the basic tenets that the Occupational Safety and Health Administration (OSHA) first propounded in its draft Safety and Health Management Standard, which was later withdrawn from its regulatory agenda.¹ However, the Z10 standard goes beyond the OSHA draft standard's requirements because it also contains provisions that address risk controls, audits, incident/accident investigations, responsibilities and authorities.

¹ The complete original text of the nonmandatory guidelines is found in the *Federal Register* 54(18):3094-3916, January 26, 1989. When OSHA announced a proposed rule in its 1990s regulatory agenda, the agency articulated its intent to have a mandatory standard that would include at least the following elements: management leadership of the program; active employee participation in the program; analysis of the worksite to identify serious safety and health hazards of all types; training; and program evaluation. All of these components are present in the ANSI Z10 standard.

It is unlikely that OSHA will resume regulatory activity concerning its withdrawn Safety and Health Management Standard under the current administration. However, if it should proceed in the future, it would be statutorily required to consider adoption of ANSI Z10 to address this issue based upon the requisites of the *National Technology Transfer and Advancement Act (NTTAA)*, 15 USC §272, and the Office of Management and Budget's (OMB) Circular A-119, *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities*.

The OMB Circular (consistent with Section 12(d) of the NTTAA) directs agencies to use voluntary consensus standards in lieu of developing government-unique standards, except when such use would be inconsistent with the law or otherwise impractical. However, under the current OSH Act, only national consensus standards that have been adopted as or incorporated by reference into an OSHA standard pursuant to Section 6 of the OSH Act provide a means of compliance with Section 5(a)(2) of the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq. (“the OSH Act”).² Therefore, at some future time, OSHA could adopt Z10 as a mandatory safety and health standard through notice-and-comment rulemaking.

But aside from formal rulemaking, ANSI Z10 serves as a valuable reference. It could also have possible enforcement ramifications under the General Duty Clause (GDC) by federal OSHA. It may be employed to satisfy regulatory requirements of certain state-plan OSHA programs. A number of states have enacted laws mandating such programs for some or all employers,³ so adoption of ANSI Z10 may satisfy the compliance obligations for employers in those jurisdictions. Insurance companies encourage their client companies to implement safety and health management programs, and therefore use of Z10 may generate monetary savings on insurance (both liability and workers’ compensation).⁴

Subpart C of OSHA’s construction standards, 29 CFR Part 1926, contains specifications for safety and health training and management programs. See 29 CFR 1926.20 and 1926.21. Aside from these mandatory standards, the OSH Act’s General Duty Clause, Section 5(a)(1), outlines every employer's legal obligation to keep its workplace free from recognized hazards that are likely to cause death or

² Specific national consensus standards [e.g., American National Standards (ANSI) standards], which the Secretary of Labor adopted on May 29, 1971, were either used as a source standard and published in Part 1910 as an OSHA standard or explicitly incorporated by reference in an OSHA standard.

³ See, e.g., Cal-OSHA’s standard at <http://www.dir.ca.gov/title8/8406.html>.

⁴ One recent example was the recommendation in the *9/11 Commission Report* stated that it “encourage[d] the insurance and credit-rating industries to look closely at a company’s compliance with the ANSI standard [on emergency preparedness] in assessing its insurability and creditworthiness. *CRS Report to Congress* RL32520, Feb. 4, 2005, at p.CRS 4 (citing the *9/11 Commission Report* at 397-398).

serious physical harm to its employees for which a feasible means of abatement exists.

Citations for violation of the GDC are issued when the four components of this provision are present and when no specific OSHA standard has been promulgated to address the recognized hazard. These four elements are: 1) the employer failed to keep its workplace free of a “hazard,” 2) the hazard was “recognized” either by the cited employer individually or by the employer’s industry generally, 3) the recognized hazard was causing or was likely to cause death or serious physical harm and 4) there was a feasible means available that would eliminate or materially reduce the hazard.

By definition, the GDC requirements of Section 5(a)(1) encompass recognized threats that result in occupational illness or injury. Thus, recognized experts’ findings that a series of actions or conditions are required to prevent harm to workers are likely to satisfy the requirement for GDC applicability under the applicable legal tests. Voluntary guidelines, including standards promulgated by ANSI, have been used to support GDC citations and to enunciate an industry “standard of care” although the consensus standards themselves are not specifically enforceable by the agency. However, although decisions have varied over the years, in at least one case, the Occupational Safety & Health Review Commission (“OSHRC”) has stated that OSHA consensus standards taken from private standard-setting organizations “were not intended to be used as mandatory, inflexible legal requirements.”⁵

The Mine Safety and Health Administration (MSHA) has no comparable general duty clause. To date, neither OSHA nor MSHA have referenced the ANSI Z10 standard in any of their standards, but this remains a future possibility that would enhance the stature of the standard in agency enforcement actions. At the present time, ANSI Z10 is strictly voluntary and does not create any specific duties under the OSH Act. Therefore, an employer’s failure to implement the programmatic provisions of this consensus standard—absent from other findings—does not constitute a violation of Section 5(a)(1).

In summary, national consensus standards lack the force and effect of codified rules, which can only be promulgated after notice-and-comment rulemaking under the Administrative Procedures Act., 5 U.S.C. § 551 et seq. And, as noted by the U.S. Court of Appeals in *B & B Insulation, Inc. v. OSHRC, Et. Al.*, 583 F.2d 1364, 1367-1368 (5th Cir. 1978), the law requires only those protective measures which the knowledge and experience of the employer’s industry would clearly deem

⁵ *Dun-Par Engd. Form Co.*, 12 BNA OSHC 1949, 1954, 1986-87, CCH OSHD ¶ 27,650, p. 36,021 (No. 79-2553, 1986).

appropriate under the circumstances.⁶

Another important potential function of ANSI Z10 concerns OSHA's Voluntary Protection Program (VPP). For over two decades, OSHA has approved worksites with exemplary safety and health management programs as participants in its VPP. Thus, for companies that aspire to attain VPP status, adoption of ANSI Z10 may help to jumpstart the application process and may foster participation by smaller companies that might otherwise be without adequate guidance on how to design and implement such management systems. Data suggest that companies in the VPP have reported injury and illness rates that are sometimes 20% or less than the average for other establishments in their industry.

In tort litigation actions arising from workplace accidents, the presence or absence of a recognized and substantive safety and health management program can be critical in controlling financial liability.⁷ Thus, the extent to which OSHA and MSHA reference Z10 in future publications or rulemaking activities will increase its judicial recognition and create a guideline against which employer programs will be benchmarked.⁸

Safety and health professionals also have an obligation to keep abreast of the latest

⁶ But see *National Realty & Construction Co., Inc. v. OSHRC*, 489 F.2d 1257, 1266 (D.C. Cir. 1973) (the court stated: "[t]he question is whether a precaution is recognized by safety experts as feasible, not whether the precaution's use has become customary.").

⁷ Consensus standards may be used by plaintiff's attorneys to demonstrate the appropriate "standard of care" which, when violated, support awards for personal injuries. See, e.g., *Hansen v. Abrasive Engineering & Manufacturing, Inc.*, 831 P.2d 693 (Ct. App. Ore. 1992) (jury considered ANSI standard violation in determining liability because it was relevant to standard of care manufacturer should be expected to meet, even though it was voluntary consensus standard). See also, *Bowles v. Litton Industries, Inc.*, 518 So. 1070 (La.Ct. App. 1987).

⁸ A national consensus standard that is "known generally" in a particular industry can reasonably be construed as providing the requisite actual or constructive knowledge to support a cause of action in litigation brought by OSHA or private sector third parties. See *United States v. B&L Supply Co.*, 486 F.Supp. 26 (N.D.Tex. 1980) (recognized hazard is one known after taking into account standard of knowledge in the industry, and employer cannot defend citation by claiming ignorance of the practice/condition or its potential for harm); *Titanium Metals Corp. v. Usery*, 579 F.2d 536 (9th Cir. 1978) (OSHA General Duty Clause citation was affirmed because the National Fire Code provided substantial evidence that the industry recognized the particular hazard presented); *Getty Oil Co. v. OSHRC*, 530 F.2d 1143 (5th Cir. 1976) and *Boeing Co., Wichita Div.*, 1977-78 CCH OSHD ¶ 22266 (1977) (violations affirmed where employer deviated from "standard industry practice" or "industry pressure vessel code" concerning testing of pressure vessels); *American Smelting & Refining Co. v. OSHRC*, 501 F.2d 504 (8th Cir. 1974) (affirming General Duty Clause citation where employer exposed workers to lead concentrations "greater than an acceptable nationwide standard"); *Bethlehem Steel Corp. v. OSHRC & Marshall*, 607 F.2d 871 (3d Cir. 1979) (company safety officer admitted that advisory ANSI standard represented industry consensus); *Betten Processing Corp.*, 75 OSAHRC 43/E2, 2 BNA OSHC 1724, 1974-75 CCH OSHD P19,481 (No. 2648, 1978) (judge erred in failing to consider ANSI standard as evidence of recognized hazard). This, to the extent industry consensus standards reflect an industry's recognition of a hazard, they are relevant, probative evidence of a recognized hazard in the view of American federal courts.

knowledge and to include “best practices” in their safety programs and consultation activities, to the maximum extent feasible. The fundamental difference between an ordinary suit for negligence and a suit for malpractice lies in the definition of the prevailing standard of care.⁹ Knowledge and comprehension of the ANSI Z10 standard may be imputed to safety professionals, in terms of determining what a “reasonable person” with similar training would be likely to know.

Willful ignorance of the best practices set forth in Z10 and/or failure to incorporate such preventative measures in the workplace or programs under the safety and health professional’s direction or oversight could lead to personal tort liability or professional liability. To the extent that the safety and health professional is a management representative of the employer, the negligence could be imputed under the theory of *respondeat superior*. Thus, careful scrutiny and consideration of ANSI Z10’s applicability to programs and practices is certainly warranted by all safety and health professionals.

Finally, ANSI Z10 has possible value in constructing settlement agreements or consent orders with federal OSHA, state-plan OSHA agencies and MSHA. Often employers who have systemic safety problems will be encouraged or required, as a condition of abatement or settlement, to design and implement programs that will address management failures in a cohesive manner. The scope and function of Z10 would likely satisfy the enforcement goals of prevention of future safety issues while encouraging penalty reductions to offset the costs of program implementation. There is the strong potential of the standard being included in settlement proceedings for occupational safety and health citations.

SH&E professionals should be encouraged to take the following actions:

- Obtain a copy of this standard, review the standard and the background materials about it, and discuss it with senior management and legal counsel so that all parties are aware of what is expected. A legal opinion written by corporate counsel would also be a prudent action to take.
- Write and publish a policy addressing Z10 in regard to how it fits in with the organization’s current program and the U.S. Occupational Safety and Health Act.

⁹ W.P. Keeton, D.B. Dobbs, R.E. Keeton, & D.G. Owen, *Prosser & Keeton on Torts*, West Publishing, Fifth Edition (Hornbook Series, pp. 185-193). If an individual is sued for ordinary negligence, the court will compare his/her behavior to what any reasonable person would have done under the circumstances. However, if a safety and health professional is sued for malpractice, the court will compare his/her behavior to what a reasonable member of the profession would have done. Professional standards are much higher and much better documented and often ANSI standards such as Z10 serve to satisfy the evidentiary burden and to determine the appropriate standard of care.

- Write, implement, and document communication structures detailing how information is passed up the communication chain to senior management.
- Conduct thorough assessments to identify significant SH&E exposures and the means used to communicate them to those in a position of authority.
- The Z10 Standard places significant emphasis on accountability by senior management. There is some correlation with the requirements of Sarbanes Oxley Act of 2002 Public Law 107-204. It is important to ensure that SH&E audits are independent and that the results are reported and acted upon. Those ES&H practitioners who author/sign those audit reports and who fail to follow-up on the recommended actions may be subject to sanctions such as listed under the new law. The point has been made that they now have a duty that goes beyond just informing management.
- Follow the ASSE Code of Conduct.

In summary, ANSI Z10 provides safety and health professionals with a significant new tool to help enhance existing program design or to help smaller employers create a program that can protect workers while at the same time satisfying regulatory entities and insurers, effectuating cost savings and minimizing legal liability.

Adele Abrams - Biography

Adele L. Abrams is an attorney, safety professional and trained mediator who represents employers and contractors nationwide in OSHA and MSHA litigation, and in worker's compensation and other employment matters. She also provides safety, health and environmental training and consultation services to both small and large businesses. She is president of the Law Office of Adele L. Abrams P.C. in Beltsville, MD.

Ms. Abrams is a Certified Mine Safety Professional, Registered Environmental Attorney, a U.S. Department of Labor approved trainer (OSHA and MSHA), a professional member of the American Society of Safety Engineers' Mining and Construction Practice Specialties, and serves on the ASTM E34 and D22 Committees. Her firm is also an associate member of the Industrial Minerals Association – North America and the National Stone, Sand & Gravel Association.

Ms. Abrams is a regular columnist for numerous magazines on legal, employment, mine and occupational safety/health issues, including *Rock Products* and *MetalMag*. She is co-author of several books related to mining, construction and occupational safety and health.

Ms. Abrams is a member of the Maryland and DC Bars, the U.S. District Courts of Maryland and DC, the U.S. Court of Appeals, DC Circuit, and the United States Supreme Court. She is a court-approved mediator in Maryland. She is a graduate of the George Washington University's National Law Center, did her graduate work at American University, and earned her B.S. in Journalism from the University of Maryland, College Park.

For more information, contact her at safetylawyer@aol.com or call (301) 595-3520. The Law Office of Adele L. Abrams' website is www.safety-law.com.