IJCEAS

International Journal of Contemporary Economics and Administrative Sciences
ISSN:1925 – 4423
Volume :1, Issue:2, Year:2011, pp.79-89

Who Makes the Rules? Establishing Occupational Health and Safety Regulations

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Received: March-2011, Accepted: June-2011

Abstract

Appropriate regulations are fundamental to effective protection for occupational health and safety. This paper examines the process by which regulations are written and adopted. Ideally, a body of reliable scientific evidence would point to the need for regulation. A body of health and safety experts can examine the data and prepare regulatory language for implementation by the appropriate body. Normally, a consultative body of experts from management, government, labour and academia oversees this process. Ultimately, senior decision makers determine the regulation to be adopted. Experience with ergonomic regulations in the US and Canada show that this linear process can be interrupted at many points. In the US, no national ergonomic regulations exist after decades of effort offset by political intervention, while in British Columbia the adoption took years to achieve. The parties' health and safety experts are crucial. They must understand the problems of regulation and enjoy the confidence of senior officials in their organizations to offset political opposition.

Keywords: *Health and Safety, Regulations*

JEL Codes: *J8*

1. Introduction

Systems to protect workers from workplace hazards are complex and subject to many influences. In some respects, the process begins with the establishment of appropriate rules for employers and workers--standards for working on or around machinery, structural features to avoid accidents,

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This study was supported by ROWER (Repository of Occupational Well-being Economics Research) project and was presented in the conference named "2nd ROWER Conference on Occupational Health and Safety Economics, in Sinaia, Romania, 27-30 April 2011.

exposure limits to chemicals or other contaminants, etc. A labour inspectorate with appropriate training and authority to ensure standards are followed is essential, including sanctions for violations. Insurance plans for the allocation of costs to employers or public health systems, including rehabilitation for injured workers are important. All of these elements are important and have been examined in many countries. But the starting points are the rules to govern workplace safety, either specific requirements or more general performance standards. Relatively little attention has been given to the process by which safety standards are determined. The ILO Standard and Recommendation on Occupational Health and Safety barely treat this subject at all, for instance. Examination of these procedures sheds light on the challenges that safety professionals and policy makers face when seeking to reduce workplace hazards.

Occupational health and safety frequently is described as an "integrative" issue in the workplace, i.e. one that brings employers and employees together in a common effort to prevent accidents and exposures and return injured workers to productive employment. It is my thesis that occupational health and safety is often a "distributive" issue, one that generates considerable conflict and disagreement between employers and labour groups. Health and safety regulations are not value free (Wilson 1985). The nature and intensity of that conflict depends both on the structures by which health and safety standards are established, as well as the general state of employment relations in the broader society or in industries directly affected by a particular aspect of health and safety.

Ergonomics: Who can be against preventing back aches?

On his first day in office in 2001, US President George W. Bush signed an executive order suspending all new federal regulations as his first official act. This order was aimed at a regulation enacted by the Clinton administration late in 2000 that required employers to take relatively modest steps to prevent musculoskeletal injuries. The regulation required employers to examine work procedures for five common ergonomic risks, e.g. repetitive motions, heaving lifting, use of vibrating or impact tools, etc. They were basically performance-based or process regulations, rather than specific-standards. President Clinton's regulation followed more than a decade of research and negotiations with employers by the National Institute for Occupational Safety and Health (NIOSH), two extensive literature reviews on the subject by the National

Academy of Sciences and high level discussions in the U.S. Congress. After President Bush acted, the Congress passed a "resolution of disapproval, "effectively killing the regulation after the President signed the bill.

The end of the ergonomic regulation was the objective of a vigorous campaign by business associations, including manufacturing, trucking, computer makers, railroads, package delivery companies and the like. Their goal was to prevent the agency responsible for health and safety regulation, the Occupational Safety and Health Administration (OSHA) from enacting ergonomic regulations. Ironically, some industry associations represented companies that had programs to prevent musculoskeletal injuries in their own workplaces. Management groups also successfully challenged the draft regulations in court on the grounds that OSHA could not demonstrate that the economic benefits of the regulations would exceed the costs (Mogensen 2006).

Turning the clock ahead a decade, President Barack Obama promised to enact ergonomic regulations to protect American workers in his presidential campaign. After his election, OSHA proposed in 2010 a very modest regulation that would require employers to keep records of musculoskeletal injuries. OSHA officials declared that this regulation would not lead to stronger actions to reduce such injuries. Even this proposal aroused strong opposition from the business community. In January 2011, responding to complaints by "small business," the Department of Labor cancelled these plans and said that it would set up meetings on the subject with other interested parties only "if requested" (Gruenberg 2011). An OSHA spokesman declared that there were no plans to resurrect ergonomic regulations.

The OSH Act permits states to enact their own regulations which meet or exceed the federal standards, an option that 27 states have accepted. Two of the 27 states, California and Washington, enacted regulations on ergonomics, and the Washington standard was overturned in a state-wide referendum in 2004 (http://osha.gov/sltc/ergonomics/state_plans.html).

During this same period, a tripartite committee of safety experts was convened in 1991 in British Columbia by the Workers' Compensation Board, the body in that province that promulgates health and safety regulations for workers in most industries. The Compensation Board had been re-organized with a tri-partite governance structure, one that was applauded by labour and management alike. The regulation review committee was to examine all health and safety regulations for the first time in over a decade. One of the topic

before the committee was ergonomic regulations, a relatively new subject in Canada not previously covered by regulation. A subcommittee produced a set of detailed regulations covering ergonomics in a variety of industries, ranging from construction to offices. There was general consensus on the regulations within the committee, although employer representatives expressed concern about the level of detail. The subcommittee relied primarily on foreign research and experience, especially in Sweden, Australia and the US.

By law, draft regulations must be subject to at least one public hearing before enactment. Because of the importance of the topic, approximately 8 hearings were held in different regions of the province. The hearings produced a fire storm of objections from the employer community, often with presentations staged for local media. Many industries asserted that the proposed regulations would make operations in the province impossible. Arguments that most of the regulations were already in use elsewhere bore little weight.

A stalemate ensued. Labour wanted regulations as soon as possible, and management grew more resistant. Opposition politicians used these differences as issues against the governing social democratic party. Internal discipline within the Board of Governors broke down.

In 1995, the government dismissed all of the Board Governors of the Compensation Board (including myself) and installed a temporary chair to oversee the work of the Compensation Board until a new structure could be installed.

The new administration withdrew the draft ergonomics regulations and sought to produce language more acceptable to management. It reduced the level of prescription. Even the use of the word "ergonomics" was reduced considerably. A lengthy mediation process followed for all topics in the regulations that were contentious. In 1998, ergonomic regulations were introduced with fairly specific language in the "general duty" chapter that regulates all industries. A conservative government elected in 2001 promised to reduce the "regulatory burden" on business. Extensive deletions from the health and safety regulations followed, but the sections on ergonomics survived.

The purpose of these two stories is not to demonstrate that one regulatory system is superior to another, but to illustrate the influence of different actors in the process of establishing regulations. The thesis of this paper is that relations

among the actors in the health and safety communities, as well as labour and management are important determinants of the construction of a regulatory regime.

2. Health and Safety Regulations: Who are the actors?

Most treatments of health and safety programs focus on the implementation of regulations. The contents of regulations seem to arise from a rather mysterious process that is the purview of scientists and engineers. However, the role of the actors is growing more important as our knowledge of occupational disease and workplace health hazards increases.

The first group of actors is the technical experts, scientists, engineers, epidemiologists and the like. These people apply their expertise to demonstrated or potential hazards of the workplace. They are located in many institutions, government agencies, universities, specialized institutes, consulting firms and private laboratories. For example, in a research program administered by the Workers' Compensation Board of British Columbia for a consortium of Canadian health and safety agencies, a group of scientists in Nova Scotia (an Eastern province of Canada) recently received funding to study the risk of radon exposure to workers there. Another study in the same program examined the impact of higher than normal exposures to stress, pesticides, solvents, etc. on the incidence of Parkinson's disease in the work force (WorkSafeBC 2011).

There is a community of scientists who dedicate part or all of their careers to investigating the effects of workplace conditions on the health and safety of workers. NIOSH is responsible for advising OSHA on scientific issues in the US. As part of its mandate, it currently funds 17 university-based research centers. The Health and Safety Executive (HSE) in the UK maintains a Laboratory Research Service to conduct research on occupational and environmental hazards. Other national institutes carry out research. This community, which is very international, produces an impressive body of research on hazards and methods for their reduction.

The second group of actors is the health and safety professionals who populate advisory committees, boards of research centers and occasionally regulatory bodies. They occupy staff positions in employers, unions and government or social service agencies. Occupational health and safety are not central concerns for most labour and business organizations unless the workplace hazards are unusually high. Senior leaders, especially in peak associations, delegate responsibility for these functions to dedicated persons

with a strong interest and knowledge of the subject matter. In many jurisdictions, the more prominent members of this group are accustomed to working together and develop mutual understanding and rapport. They view health and safety regulations as more integrative than distributive and are accustomed to negotiating and reaching compromises necessary to produce acceptable regulations.

The third group of actors is the agencies charged with promulgating regulations. In general terms, there are two categories of these agencies, quasi-independent bodies and government departments. The former enjoy a degree of autonomy from government that can be significant. The EU-OSHA, for example, is governed by a board with representatives of governments, unions and employers. The Health and Safety Executive in the UK has a similar structure, with representatives of unions, employers and local governments. The regulatory agency in British Columbia, now known as WorkSafeBC has a government-appointed board of directors composed of representatives of employers, workers, rehabilitation professionals and the public. Aside from the labour and employer representatives, board members have been appointed by the provincial government or private parties to other agency board.

More commonly, ministries of labour or other government agencies are responsibility for establishing health and safety regulations. In North America, national or provincial ministries control the issuance of regulations. The British Columbia example I cited earlier is exceptional, and when political pressures became too strong for the government (a pro-labour party), it essentially took the organization under its control with instructions to moderate the conflict.

Since regulations generally have the force of law, it is almost inevitable that government will intervene in their promulgation. However, the relationship between the government and the specialized agency can be crucial. A semi-autonomous health and safety can insulate the rule-making process from overt political pressures.

3. Decision Models

If the theory of health and safety issues as integrative, rather than distributive, issues were correct, the decision path for regulations would be relatively straight forward. Accident data or expert research would identify an existing or potential hazard, followed by discussions among safety professionals. If consensus existed on the need for regulation, a specialized

agency would prepare a draft for review by a government agency or other body with the power to impose regulations. The end point of the process would be a regulation addressing the problem in question, perhaps supplemented by non-binding "guidelines."

As the ergonomics narrative above shows, there are many opportunities for deviations from this ideal path.

Experts may have trouble reaching a consensus in the best of circumstances. Observations with human subjects are often hard to obtain, and epidemiological data are subject to varying interpretations. The interaction between asbestos exposure and smoking as causes of asbestosis is accepted, but not completely understood after years of research, for instance. Apart from the scientific problems, when costs of injuries or diseases are borne at least in part by employers, controversies over causality and allocation of cost are common. If economic criteria are added to purely technical standards, i.e., the cost of imposing a regulation, the possibilities for disagreement increase (Ashford and Caldart 1996). Moreover, not all research is disinterested. The history of development of safety standards for lead in gasoline, tobacco smoke, asbestos, to cite a few examples, demonstrates that corporate interests sponsor research which invariably demonstrates that claims of hazards are exaggerated or simply inaccurate (Dorman 2006). Apart from sponsored research, philosophical differences exist on the proper criteria for establishing regulations, balancing effectiveness and cost to employers or society (Ashford 2004). In addition, data are not always uniform across jurisdictions, so the empirical basis for decisions about the existence or importance of a hazard may be deficient. For instance, there is considerable variation in the identification of occupational skin diseases in Eastern Europe, both among EU members and candidate states (von Hirschberg, et al. 2009).

Assuming that the scientific or technical data are sufficiently clear, the next step normally is consultation with health and safety professionals. Normally, these bodies are tri-partite and well suited to develop draft regulations. These bodies are fairly common. The EU has several, including the Emerging Risks Observatory and several advisory committees. US law requires the National Advisory Committee on Occupational Safety and Health. In the British Columbia example cited above, a "Regulation Review Committee" screened available data and participated in the drafting of regulations.

In general, these bodies function successfully and without open controversy. Members come to know each other and grow accustomed to working collaboratively. They have a shared interest in successful programs to reduce hazards in the workplace. However, harmony does not always equal success. An observer of the HSE in the 1980s admired the sense of mutual respect that members displayed. A tradition of consensus decision making, common such organizations, effectively gave management representatives a veto over any proposed regulation. Perhaps as a result, the Executive produced few new initiatives (Wilson 1986).

In the case of the draft ergonomic regulations in British Columbia cited above, the members of the subcommittee had reached substantial agreement (meaning there were reservations on the management side in particular) on the content of the proposed regulations before they were published for public hearings. As the contents became known broadly, the tone of debate changed radically. One can presume that senior management did not want the regulations for some reasons, and the business community launched a vigorous attack on the draft their representatives had helped to write. The employer health and safety community could not withstand these pressures, and draft ultimately was withdrawn.

This experience illustrates the internal political pressures on labour and management safety staff. The companies, industry associations or unions that appoint and employ them inevitably have broader political agendas, which may or may not include safety. The larger the organization, the more likely that larger political issues will intrude into discussions of occupational health and safety. In the case of the ergonomics debate in the US, for example, computer manufacturers, the peak body representing large manufacturers, the small business lobby formed a coalition to oppose relatively weak ergonomics regulations. Their chief lobbyist is the son of a Justice of the US Supreme Court who wrote an article deriding ergonomics as "junk science," and ultimately was appointed by President Bush to a senior position in the Department of Labor (Mogensen 2006).

In the UK the representatives in the HSE, an independent body combining regulation, education and enforcement, serve long terms and are accustomed to working together. These relationships have become institutionalized. The HSE has staff to review hazards and proposed standards, including EU directives, and prepare recommendations. Members of the HSE reach agreement on draft

regulations which are presented to Cabinet and ultimately to Parliament. Historically, HSE proposals have not been challenged at higher levels in the government (Wilson 1985).

The EU system seems closer to the UK model. The Council of European Communities enacted directive 89/391/EEC. Subsequently, the Council established the European Agency for Safety and Health at Work (EU-OSHA), with its own tripartite board of directors and staff. The Agency is charged with gathering information, promoting health and safety, etc. and providing assistance or recommendations to the Community bodies, member states and interested groups (http://osha.europa.eu/en). The Agency presents recommended regulations to the Commission and the European Parliament.

A crucial element in the rule making process really is the relationship between the advisory committees and the broader labour, industrial and governmental stakeholders. If safety experts can speak for their professional community as well as their sponsors, the creation and amendment of regulations can go smoothly. Priorities of occupational health and safety drive the process rather than broader political issues. Equally, if the sponsoring organizations support their work, it is unlikely that government will overrule expert advice.

The final step in establishing rules is the promulgation of a draft standard by the body with the authority to make binding regulations, usually the ministry of labour. At this point of the process, local or national political pressures and labour-management relations come into play. The Occupational Health and Safety Act in the US deliberately assigned the authority to administer occupational health and safety programs, including the production of standards, to the Department of Labor. While this is the logical department of the US government, the management community regarded this department as closely allied with the trade union movement. This context set the scene for the political battles over regulations, of which the contest over ergonomic regulations summarized above is one example. This political tension drew the US Congress into the establishment of regulations by various means, including authority over the OSHA budget. The battle over ergonomics a decade ago illustrates the complexity of the system. The final element of complexity is the ability of either party, usually employers, to challenge regulations in civil courts on the grounds that they are too costly for the benefits derived (Mogensen 2006). By contrast, the Ministry of Labour in the UK appears to enjoy a better reputation within the business community. In particular, the leading business association participates directly in drafting of regulations and its representatives

in the HSE have enjoyed the confidence of the management organizations (Wilson 1986). It should be noted that the current British government has imposed a 35 per cent cut in the HSE budget by 2014/2015 and announced a review of the health and safety culture in the UK. As an immediate result, the number of workplace inspections will be reduced, but other consequences are not yet clear (Hazards 2010).

During the de-regulation movement in British Columbia in 2001-2003, the semi-autonomous compensation authority reduced the number of regulations by the required one-third through various techniques. However, the heart of the regulatory framework was maintained, including several sections on prevention of musculoskeletal injuries remained intact. In effect, the staff took over the process of de-regulation, and political supervision was either too weak or complicit in the retention the most important regulations.

4. Conclusion

This review of the regulatory process demonstrates that good science is a necessary, but not sufficient, condition for good regulations. Health and safety regulations inevitably involve some restrictions on management control of the workplace. Normally, employers resist such intrusions on their domain, unless the costs of accidents are sufficiently high to justify regulation or a management philosophy that emphasis cooperation and cultivation of a work force. The battles over ergonomics were provoked in part by the broad scope of musculoskeletal injuries, which in turn dictated an extensive regulatory framework, even if the terms were quite general.

Thus, the procedures for formulating regulations are important, perhaps even vital, when a new field is approached. The crucial elements in producing effective regulations appear to be first the production of good science from the technical community, supplemented by a group of practitioners or policy analysts who can translate the conclusions of research into regulations that will command support from employer and labour groups.

Semi-corporatist structures with representation from major stakeholders in the economy appear to be essential. Going back to ergonomics, neither the US nor British Columbia had established formal networks to vet possible regulations and secure support from peak organizations for these initiatives. In the case of the US, the deep-seated hostility of labour and management at senior organizational levels presented a severe barrier to acceptance of new regulatory

topics. This controversy has continued at the state level. In March 2011, a newly-elected governor of Michigan blocked the implementation of any ergonomic regulation. Under such conditions, considerable political will is required to enact regulations on contentious topics, and few national or local governments show enthusiasm for what is admittedly a complex subject.

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