



Ironworker-Management Progressive Action Cooperative Trust

May 28, 2021

Mr. Tim Fisher, CSP, CHMM, CPEA, CAE, ARM, STS
Director, Standards Development and Technical Services
American Society of Safety Professionals
520 N. Northwest Hwy
Park Ridge, IL 60068
Via email: tfisher@assp.org

Re: Position Statement and Addendum BSR/ASSP Z590.5-201X - Total Worker[®]
Health Programs in the Workplace Standard

Dear Mr. Fisher:

Attached is IMPACT's original position statement as well as an addendum.

We appreciate ASSP's past efforts in developing ANSI standards that help support a safer work environment however we believe ASSP's current efforts related to this standard have not been met with the same level of excellence as past standard development processes.

Based on the information presented, we request that ASSP withdraw their development of the standard until the concerns are adequately addressed.

We look forward to our meeting on June 8, 2021.

Regards,

Steven L. Rank
Executive Director of Safety and Health



Ironworker-Management Progressive Action Cooperative Trust

**IMPACT Position Statement - Original
Total Worker Health Standard Development Concerns
Sent to ASSP on April 12, 2021**



IMPACT Position Statement Submitted to ASSP on April 12, 2021

Total Worker Health Standard Development Concerns

The Ironworker Management Progressive Action Cooperative Trust (IMPACT) comprised of labor and management representatives throughout the country are deeply committed to protecting our members. Our organization has initiated rulemaking and standard development with the Occupational Safety and Health Administration (OSHA), State Approved OSHA Plans and the ANSI A10 Committee for Construction and Demolition Operations.

I was approached to participate on the ASSP Total Worker Health (TWH) Standard Development Committee. At the time I was the only labor-construction person on the initial periodic conference calls. After participating in a few of the initial conference calls and reviewing numerous subjective topics and terms included under the TWH platform, I was immediately concerned for unintended ramifications to the construction industry. I made several calls to construction industry associations and professionals who were unaware of the ASSP Total Worker Health (TWH) Standard currently under development. They too expressed their concerns that the “one size fits all” position would create unintended consequences for the construction industry.

Legal counsel also expressed many concerns pertaining to numerous topics listed under the TWH platform. Questions pertaining to the assumption that the TWH standard was strictly “voluntary” prompted many scenarios that perhaps have not been considered. The inclusion of opioid addiction, mental health and suicide prevention as a TWH function are also issues of great concern. These are serious illnesses that are stand-alone issues that warrant the attention of professionals.

Following is a brief summary of the primary concerns we received from some of the foremost construction industry safety and health professionals throughout the country.

As the standard is now, IMPACT objects to the development of ASSP/ANSI Z590.7 and requests that the construction industry be excluded for the following reasons:

- 1) Our Top Priority – Suicide prevention, mental health, and opioid addiction are taking the lives of our members every day and addressing them is our top priority. We feel that putting these matters under the context of Total Worker Health (TWH) will dilute our efforts and will take much needed resources away from our areas of focus. In addition, aside from these three matters – members continued to get significantly hurt and even killed due to regulated hazards (e.g., falls, struck by, etc.). We believe this standard would take focus and much need resources away from just trying to keep our members from getting killed in the workplace.
- 2) Scope - As it is currently defined in the standard, TWH is very broad, all-encompassing and could include over a hundred different topics. There is a concern that this standard will try and ‘bring things in the back door’ such as Fitness for Duty, Ergonomics and other controversial topics which the construction industry has contested in the past.
- 3) Applicability – Currently, the standard applies to all employers in all industries, with no exceptions or considerations for various industries. The development of the standard does not address the ‘fluid’ nature of the workforce in construction. It would be very

challenging to implement TWH programs for craft employees. A craft worker can be employed with many companies in one year and never be unemployed.

- 4) Voluntary – Although this is being developed as a voluntary consensus standard and ASSP representatives state that employers can choose to participate or not, is not necessarily true for the construction industry. First, project owners and general contractors can choose to include TWH requirements of this standard into bid documents and contracts without fully understanding what it means, or what it was intended to represent. Second, ANSI standards are often used in litigation as alleged best practices. Lastly, this could become the basis of regulations at the state level.

In an article written by Adele Abrams (Law Office of Adele L. Abrams P.C.) she states: “Finally, the implications of voluntary consensus standards in tort litigation and under OSHA’s General Duty Clause also cannot be ignored. Because of the broad application of such standards, they must utilize only sound science and technically feasible engineering practices, lest they impose a duty of care on American business that cannot be reasonably satisfied.”

- 5) Lack of Subject Matter Experts – Many aspects of Total Worker Health relate to human resources and/or employment law. The current TWH Writing Committee that is drafting this standard does not have the expertise in either of the areas. The TWH Writing Committee and Editing Committee must include representatives of the construction and other industries to produce a standard that addresses industry specific needs and concerns.

A WEEKLY PUBLICATION FOR THE OCCUPATIONAL SAFETY AND HEALTH COMMUNITY

- 6) Collective Bargaining Agreements – Some issues of TWH are already addressed in CBAs. The development of this standard may undermine the CBAs already in place and create unintended legal issues.
- 7) Privacy – Most aspects of TWH are personal matters that many people choose not to disclose/discuss with their employer. Although this standard does not endorse having employees do anything they don’t want to, there is the potential for unintended consequences such as favoritism/discrimination.
- 8) Technical Knowledge – Several aspects of TWH are not well understood by most safety professionals or other individuals in companies including but not limited to:
- Psychosocial Factors
 - Accessible and Affordable Health Enhancing Options
 - Inclusive and Universal Design
 - Safety, Health and Affordable Housing Options
 - Organization of Work
 - Adequate breaks
 - Comprehensive Resources
 - Fatigue, Burnout, Loneliness and Stress Prevention
 - Job Quality and Quantity
 - Meaningful and Engaging Work
 - Work Intensification Prevention

- Policies for:
 - Judicious Monitoring of Workers and Biomonitoring Practices
 - Prevention of Stressful Job Monitoring Practices
 - Worker Well-Being Centered
- 9) Qualifications, Certifications and Competency of Employer Representatives Assessing and Implementing TWH Related Matters (including psychosocial risks and well-being) under the TWH Standard

Analyzing and making determinations related to an individual's mental state goes beyond a Certified Safety Professional (CSP) or Certified Industrial Hygienist (CIH) training and competency. Making such determinations of a person's psychosocial behaviors, mental, and emotional well-being requires a professional trained in these specific areas such as a licensed healthcare professional, licensed psychologist or psychiatrist. This area of the TWH program goes well beyond that which an employer or its Human Resources, Safety or Environmental departments have the ability to successfully and safely address in the workplace. Further, it raises much concern in relation to individual privacy rights and personal lifestyle choices when viewed and analyzed in an individual workplace environment under the employer's TWH program.

Appendix A provides a list of example questions for evaluation psychosocial risk factors. It is very likely that most safety professionals would state that they are not competent to evaluate those factors.

- 10) ASSP Standard Development Process – We believe that ASSP has made several incorrect assumptions including the following:

Notification to the construction industry

ASSP has stated that they have made the appropriate notifications to the construction industry regarding the standard and scope including the following per ASSP:

- The scope was approved by the ASPP Standards Development Committee. There are members from the construction and demolition industry on the committee and there were no objections raised related to the construction and demolition industry.
- The scope was approved by the ASSP Board of Directors. There were members from the construction and demolition industry on the Board and there were no objections raised related to the construction and demolition industry.
- The scope was shared with the ASSP A10 Committee for Construction and Demolition Operations and there were no objections raised related to the construction and demolition industry.
- It has been sent to the ASSP Construction Practice Specialty – there were no objections related to the construction and demolition industry.
- It was published in the ANSI Standards Action requests comment – there were no objections related to the construction and demolition industry.
- It has been announced on social medial sites – there were no objections related to the construction and demolition industry.
- The proposed standard has been announced to the ASSP membership – Aside from the Iron Workers Union, we have had no requests to exclude construction and demolition.

- It is important to note that the proposed standard is based upon the Federal government TWH program. We did review the NIOSH Total Worker Health website also when the scope was created. Construction and demolition are not excluded and working with the construction center is actually listed as a priority.

We strongly disagree that the above-mentioned points constitute agreement from the construction industry regarding the development of this standard and its scope. When these notifications were made, it is highly unlikely that individuals were told what the standard covered including points mentioned in Item #8 above. In speaking with several executives in the construction industry along with members of the National Association of Building Trade Unions – none of them were aware of the standard being developed and the breadth of its scope. The ANSI Essential Requirements states “Notification of standards activity shall be announced in suitable media as appropriate to demonstrate an opportunity for participation by all directly and materially affected persons.” Since the directly and materially affected persons will be all employers, we believe that ASSP has not made adequate notifications (i.e., development, solicitation of writing and editing committee members) to meet this requirement. This lack of notification is underscored by a simple Google search of ‘ASSP Z590.7’ which doesn’t result in any information except a blog post by Dede Montgomery.

We also feel strongly that ASSP has not provided adequate notifications to stakeholders about the development of the standard or solicitation for stakeholders to be on the Writing Committee and on the Editing Committee. ASSP publishes ASSP Weekly, a weekly publication to members, that has not mentioned the need for Writing and Editing committee members and we do not believe that a generic call for volunteers to work on standards is not adequate for stakeholder notification. In addition, ASSP has emailed members for several weeks reminding them to vote for Board of Director candidates. ASSP has not emailed members a specific email about the development of the TWH standard. In fact, it could be perceived that ASSP has hidden the above notifications in other notifications that stakeholders may not tend to look at.

Lack of openness

ANSI Essential Requirements state: “Timely and adequate notice of any action to create, revise, reaffirm, or withdraw a standard, and the established of new consensus body shall be provided to all known directly and materially affected interests. Notice should include a clear and meaningful description of the purpose of the proposed activity and shall identify a readily available source for further information.” We firmly believe that ASSP has not provide adequate notice to all known directly and materially affected interests.

Inaccurate identification of stakeholders

Per the official ANSI Standards Action dated October 30, 2020, ASSP has stated that the stakeholders for the ASSP Z590.7-202x, Management Systems for the Implementation of Total Worker Health Programs in the Workplace is: Occupational safety and health professional implementing such programs in the workplace. In addition, the scope identified in the ANSI notification is: This standard defines requirements for the implementation, enhancement, and ongoing improvement of a management system addressing Total Worker Health Programs® in the Workplace. We believe that ASSP was incorrect in identifying such a narrow population of stakeholders as this standard has numerous stakeholders including all employers. Many TWH topics are human resources

and employment law related – not just occupational safety and health. In addition, the scope published in the ANSI Standards Action fails to state that this standard would apply to all employers in all industries regardless of size.

Lack of coordination/ harmonization

ANSI Essential Requirements states that: “ANSI-Accredited Standards Developers shall make a good-faith effort to resolve potential conflicts and to coordinate standardization activities intended to result in harmonized American National Standards. A “good faith” effort shall require substantial, thorough and comprehensive efforts to harmonize a candidate ANS and existing ANSs. Such efforts shall include, at a minimum, compliance with all relevant sections of these procedures.” The Writing Committee was instructed to use the ANSI Z-10 (OSH Management Standard) as the basis of developing ASSP the TWH standard (Z590.7-202x) which covers safety, health and well-being. A Writing Committee member expressed concern that the TWH standard might replace the ANSI Z-10 standard. The Writing Committee chair responded and said “well, so be it”. We believe that the TWH standard lacks coordination/harmonization with ANSI Z10 and that the TWH standard may replace ANSI Z10.

Lack of dominance

ANSI Essential Requirements states: “The standards development process shall not be dominated by any single interest category, individual or organization. Dominance means a position or exercise of dominant authority, leadership, or influence by reason of supervisor leverage, strength, or representation to the exclusion of fair and equitable consideration of other viewpoints.”

A WEEKLY PUBLICATION FOR THE OCCUPATIONAL SAFETY AND HEALTH COMMUNITY

The TWH Management Standard Writing Committee is comprised of the following individuals:

- Sharon Kemerer - retired, former Director, EHS, Baxter International (chair of Writing Committee)
- Chia-Chia Chang – NIOSH (vice-chair of Writing Committee)
- Bill Shaw – University of Connecticut
- Jack Dennerlein – Northeastern University
- Chris Laszcz-Davis – The Environmental Quality Organization
- Dede Montgomery – Sr. Research Associate, Oregon Worker Health & Safety Center/Oregon Institute of Occupational Health Science
- Kevin Bland – California Ironworkers Employers Council
- Cece Weldon – Ironworkers & Management Progressive Action Cooperative Trust (IMPACT)
- Chris Garrabrant – no affiliation as it relates to the Writing Committee (employed by Zurich as a Risk Engineering Large Loss Analyst)

The current chair and co-chair of the Writing Committee were members of ASSP’s Task Force for TWH. In addition to the chair and co-chair being on the Task Force, three additional members of the Writing Committee were also members of the Task Force. Four new members were added to the Writing Committee (two from labor at the request from a former Task Force member) and two from TWH centers (which receive funding from NIOSH). This can be perceived that ASSP ‘stacked’ the Writing Committee with people that were in a position of bias or were exercising a dominant authority. This position is reinforced by the fact that ASSP did not actively solicit additional Writing

Committee members. When it was brought up that the Writing Committee needed representatives from employers, human resources and employment law – the Writing Committee chair stated they didn't want the group to get too big, and it was already big. The chair also mentioned that it would be easier for her to write it and give it to everyone else to review. Clearly ASSP was on a fast track to develop the TWH standard, at the expense of making sure that there was adequate stakeholder engagement and the proper representation on the Writing Committee. Lastly, the Writing Committee is co-chaired by a member of NIOSH TWH Program – Chia-Chia Chang. NIOSH has a National Total Worker Health Agenda for 2016-2026 which includes:

- Intermediate Goal 4.2: Develop partnerships and collaborations to create the infrastructure and environment for expanding the organizational capacity to adopt TWH policies, programs, and practices in the workplace.
 - Activity/Output Goal 4.2.3: Create a TWH professional organization or align with an existing professional organization to develop standards, accreditation, and evaluation guidelines for TWH professionals to enhance their development and build capacity.

This shows that there is clear dominance in the development of the TWH standard. This is clearly not in the best interest of all industry employers and employees.

Rational for the development of the standard

ASSP has the choice to develop a white paper on TWH or develop a standard. ASSP[®] made that decision knowing that a majority of the members they surveyed didn't know what TWH represented. So, the question becomes why was the choice made to develop a standard on a topic that very few safety professionals know anything about.

ASSP's has stated that the development of a TWH standard is in alignment with the four pillars of their strategic plan as stated below:

- Membership - Bringing an increased awareness of TWH concepts to our members will provide opportunities for member engagement, contribute to the expertise of the membership and support development of members
- Education - TWH provides opportunities to move educational content toward the emerging risks and research identified in the interventions above, establishing the Society as a source of cutting-edge value-added information presented in a manner that is user-friendly to our members
- Standards - expand ASSP's reputation as a thought leader in the management of safety and health, creating additional opportunities for standards development. Work is already being done in the area of psychosocial risk management, identified as an important component of TWH, with ASSP participation in ISO/TC 283
- Value to the Profession - TWH requires collaboration with professionals from other fields, it would increase the opportunities for OSH professionals to demonstrate value

In reality, this comes down to the standard being a source of revenue for ASSP. ASSP could have increased awareness, provided educational content and added value to the profession by developing a white paper – increasing awareness and knowledge on the various aspects of Total Worker Health. Instead, ASSP chose their own best interests and decided to develop a standard and has gone about it in a way to keep it off the radar of directly and materially affected persons.

The ASSP TWH Task Force started drafting the scope, applicability and definitions of the TWH standard and the Task Force was sun set on July 30, 2020. When the Writing Committee was formed, with the first meeting being on August 11, 2020 – the Writing Committee was told by the Writing Committee chair that the content was draft but to ‘leave what was drafted and move forward!’.

ASSP’s announcement in the ANSI Standards Action was on September 6, 2019

ASSP (Safety) (American Society of Safety Professionals)

Contact: Tim Fisher, (847) 768-3411, TFisher@ASSP.org
520 N. Northwest Highway, Park Ridge, IL 60068

New Standard

BSR/ASSP Z590.5-201X, Management Systems for the Implementation of Total Worker Health® Programs in the Workplace (new standard)

Stakeholders: Occupational safety and health professionals implementing such programs in the workplace.

Project Need: Based upon the consensus and approval of the Board of Directors of the American Society of Safety Professionals (ASSP).

This standard defines requirements for the implementation, enhancement, and ongoing improvement of a management system addressing Total Worker Health® Programs in the Workplace.

BSR/ASSP Z590.7-201X, Management Systems for the Implementation of Total Worker Health® Programs in the Workplace (new standard)

Stakeholders: Occupational safety and health professionals implementing such programs in the workplace.

Project Need: Based upon the consensus and approval of the Board of Directors of the American Society of Safety Professionals (ASSP).

This standard defines requirements for the implementation, enhancement, and ongoing improvement of a management system addressing Total Worker Health® Programs in the Workplace.

In the September 6, 2019 ANSI Standards Action, ASSP also requested a Call for Members:

Call for Members (ANS Consensus Bodies)

Directly and materially affected parties who are interested in participating as a member of an ANS consensus body for the standards listed below are requested to contact the sponsoring standards developer directly and in a timely manner.

AAMI (Association for the Advancement of Medical Instrumentation)

Office: 901 N. Glebe Road, Suite 300
Arlington, VA 22203

Contact: Amanda Benedict
Phone: (703) 253-8284
E-mail: abenedict@aami.org

BSR/AAMI ST98-201x, Cleaning validation of health care products - Requirements for development and validation of a cleaning process for medical devices (new standard)

BSR/AAMI/ISO 23500-1-201x, Preparation and quality management of fluids for haemodialysis and related therapies - Part 1: General requirements (identical national adoption of ISO 23500-1 and revision of ANSI/AAMI 23500-2014)

BSR/AAMI/ISO 23500-2-201x, Preparation and quality management of fluids for haemodialysis and related therapies - Part 2: Water treatment equipment for haemodialysis applications and related therapies (identical national adoption of ISO 23500-2 and revision of ANSI/AAMI 2672:2014)

BSR/AAMI/ISO 23500-2-201x, Preparation and quality management of fluids for haemodialysis and related therapies - Part 2: Water treatment equipment for haemodialysis applications and related therapies (identical national adoption of ISO 23500-2 and revision of ANSI/AAMI 23500-2014)

BSR/AAMI/ISO 23500-3-201x, Preparation and quality management of fluids for haemodialysis and related therapies - Part 3: Water for haemodialysis and related therapies (identical national adoption of ISO/DIS 23500-3 and revision of ANSI/AAMI 13959:2014)

BSR/AAMI/ISO 23500-4-201x, Preparation and quality management of fluids for haemodialysis and related therapies - Part 4: Concentrates for haemodialysis and related therapies (identical national adoption of ISO 23500-4 and revision of ANSI/AAMI 13958-2014)

BSR/AAMI/ISO 23500-5-201x, Preparation and quality management of fluids for haemodialysis and related therapies - Part 5: Quality of dialysis fluid for haemodialysis and related therapies (identical national adoption of ISO 23500-5 and revision of ANSI/AAMI 11663-2014)

ASA (ASC S2) (Acoustical Society of America)

Office: 1305 Walt Whitman Road
Suite 300
Melville, NY 11747

Contact: Caryn Mennigke
Phone: (631) 390-0215
E-mail: asastds@acousticalsociety.org

BSR/ASA S2.1-201x/ISO 2041-2018, Mechanical Vibration, Shock and Condition Monitoring - Vocabulary (identical national adoption of ISO 2041:2018 and revision of ANSI/ASA S2.1-2009 (R2014), ISO 2041-2009 (R2014))

ASSP (ASC A10) (American Society of Safety Professionals)

Office: 520 N. Northwest Highway
Park Ridge, IL 60068

Contact: Tim Fisher
Phone: (847) 768-3411
E-mail: TFisher@ASSP.org

BSR/ASSP A10.44-201X, Control of Energy Sources (Lockout/Tagout) for Construction and Demolition Operations (revision of ANSI/ASSP A10.44-2014)

ASSP (Safety) (American Society of Safety Professionals)

Office: 520 N. Northwest Highway
Park Ridge, IL 60068

Contact: Tim Fisher
Phone: (847) 768-3411
E-mail: TFisher@ASSP.org

BSR/ASSP Z590.5-201X, Management Systems for the Implementation of Total Worker Health® Programs in the Workplace (new standard)

BSR/ASSP Z590.7-201X, Management Systems for the Implementation of Total Worker Health® Programs in the Workplace (new standard)

ASSP and the Writing Committee chair were asked several times about a public announcement to get more people involved in the development of the standard. In August 2020, committee members asked for the copy of the communication so they could share it with the networks in hopes of getting more people with more diversity involved in the writing of the standard. ASSP responded by saying the public announcement and call for members was already completed (in ANSI Standards Action September 6, 2019). On September 24, 2020, ASSP suggested to committee members that they not distribute the past notices since ASSP was going to be making future announcements which was expected to be in the next two weeks. The committee members held off on trying to find other people to participate in the process. After a few weeks committee members asked about the announcements being made and there was no update. On November 2, 2020, after months of asking for information so the committee members could forward in on to get others involved, the committee members were given a copy of the ANSI Standards Action listing from October 30, 2020 and told they could distribute it to their networks:

ASSP (Safety) (American Society of Safety Professionals)

520 N. Northwest Hwy, Park Ridge, IL 60068 www.assp.org

Contact: Lauren Bauerschmidt; LBauerschmidt@assp.org

New Standard

BSR/ASSP Z590.7-202x, Management Systems for the Implementation of Total Worker Health® Programs in the Workplace (new standard)

Stakeholders: Occupational safety and health professionals implementing such programs in the workplace.

Project Need: Based upon the consensus and approval of the Board of Directors of the American Society of Safety Professionals (ASSP).

Scope: This standard defines requirements for the implementation, enhancement, and ongoing improvement of a management system addressing Total Worker Health Programs® in the Workplace.

ASSP has met their obligation for notifying the public that they are creating a standard; however, it is clear that ASSP has not and didn't have any intention of communicating to its membership or the rest of the public in a means that was likely to reach them and be understood.



Appendix A – Example Questions to Evaluate Psychosocial Factors

Job Demands

Is work physically demanding?

Is there an imbalance between physical and mental demands of work and employee's capability?

Is there mental workload?

Is there emotional burden?

Is work monotonous?

Do short cyclic activities occur in the workplace?

Are personal performance standards too high?

Are employees socially isolated in the course of their work?

Organization of Work

Is alternation of activity and rest phases insufficient?

Is there lack of work equipment?

Is information on new tasks provided to employees well in advance before changes apply?

Is there lack of information about performed work and working procedures?

Is there too much information, so employees can't remember it all?

Do employees often not know what are their roles and responsibilities?

Can employees influence the methods by which they perform their work tasks?

Do employees usually work in a fast pace?

Are there contradictory requirements on employees?

Is the work specification obscure and incomprehensible?

Is the work unpredictable and defiant to plan?

Are employees in their work often disturbed and bothered?

Is the shift schedule prepared in advance?

Must employees often work at night?

Must employees usually work overtime?

Are working hours fixed?

Do employees experience overload from volume of work?

Do employees usually work under high time pressure?

Is the workload usually very high?

Does rush work occur often in the workplace?

Can employees influence their job description?

Are employees trained for their new work roles?

Orientation and Safety

Is there fear of losing the job?

Is there feedback on work performance of employees?

Is there lack of information on safety in the workplace?

Are employees poorly motivated?

Is there an opportunity for further development and learning?

Is employees' allocation unclear?

Is information on the work tasks unclear?

Do employees meet the qualification requirements for the work carried out?

Creative Space

Is the workplace lacking guard and control mechanisms?

Is there an opportunity for the employees to participate on the management?

Is there a possibility of creating new activities?

Is pace of work imposed on the employees?

Social Climate

Are there signs of discrimination in the workplace?

Is there a bad climate in the company towards superiors?

Does there remain conflicting issues and problems between staff and management unresolved?

Are there interpersonal conflicts or conflicts between groups of employees?

Have employees the opportunity to address problems and conflicts?

Is there a support from colleagues or superiors?

Is there a strong competition among employees?

Is cooperation among different groups of employees weak (e.g. among individual organizational units)?

Is the social climate in the workplace poor?

Do employees experience insufficient appreciation?

Is there bullying and harassment?

Are employees exposed to the risk of violence from the public (verbal abuse, threats, physical attacks)?

 Cal-OSHA Reporter®
A WEEKLY PUBLICATION FOR THE OCCUPATIONAL SAFETY AND HEALTH COMMUNITY



Ironworker-Management Progressive Action Cooperative Trust

**IMPACT Position Statement – Addendum
Total Worker Health Standard Development Concerns
Sent to ASSP on May 28, 2021**



Cal-OSHA Reporter[®]

A WEEKLY PUBLICATION FOR THE OCCUPATIONAL SAFETY AND HEALTH COMMUNITY

IMPACT Total Worker Health Standard Development Concerns – Addendum

May 28, 2021

In addition to the concerns expressed in IMPACT's original position statement, submitted on April 12, 2021, below are additional concerns:

Commercial Terms

ANSI's Essential Requirements Section 3.2 states "Provisions involving business relations between buyer and seller such as guarantees, warranties, and other commercial terms and conditions shall not be included in an American National Standard. The appearance that a standard endorses any particular products, services or companies must be avoided. Therefore, it generally is not acceptable to include manufacturer lists, services provider lists, or similar material in the text of a standard or in an annex (or equivalent)."

As Total Workers Health is a registered trademark of the U.S. Department of Health and Human Services this would be considered a commercial term and is therefore in violation of ANSI's Essential Requirements Section 3.2.

Development Process

The ANSI Standards Action dated September 19, 2019 was the notification of a New Standard BSR/ASSP Z590.5-201x. At the same time this was published, ASSP already had a Total Worker Health Task Force in place (created in July 2018) and an associated subcommittee that was drafting the Scope, Purpose, Application and Definitions – long before the TWH writing committee was established. The Task Force was sunset on July 1, 2020. Then the TWH Management Standard Development held it's kickoff on July 30, 2020. And, attendees on the kickoff call included mostly members of the previously sunset TWH Task Force. It was clear that this group already had an established working relationship.

During the July 30th call, it was made clear that the writing committee had already been established and it was: Sharon Kemerer (Chair), Chia-Chia Chang (Vice Chair), Chris Laszcz-Davis, Dede Montgomery and Chris Garrabrant. Sharon asked if anyone else wanted to be part of it and Kevin Bland and Cece Weldon volunteered to serve. This was clearly not an open and transparent process to allow people the opportunity to join the writing committee. Later, Jack Dennerlein and Bill Shaw were added to the writing committee. On August 11, 2020, the writing committee had their first call together. The Chair stated that the Scope, Purpose, Application and Definitions were already drafted and emphasized that they were draft. The Chair then proceeded to state that we should leave what has been drafted as is and move forward. Multiple requests were made by K. Bland and C. Weldon to review the application of the standard (This standard applies to organizations of all size and types) and to consider excluding construction for various reasons and those requests were not considered.

Subjectivity / Misinterpretation

Total Worker Health is a registered trademark and means something specific. From the NIOSH website:

“Total Worker Health is defined as policies, programs, and practices that integrate protection from the work-related safety and health hazards with promotion of injury and illness-prevention efforts to advance workers well-being.”

The *Total Worker Health* (TWH) approach prioritizes a hazard-free work environment for all workers. It also brings together all aspects of work in integrated interventions that collectively address worker safety, health, and well-being. Traditional occupational safety and health protection programs have primarily concentrated on ensuring that work is safe and that workers are protected from the harms that arise from work itself. TWH builds on this approach through the recognition that work is a social determinant of health. Job-related factors such as wages, work hours, workload, interactions with coworkers and supervisors, and access to paid leave impact the well-being of workers, their families, and their communities. The long-term vision of the TWH program is to protect the safety and health of workers and advance their well-being by creating safer and healthier work.”

ASSP has a different interpretation of what TWH is and stated below for their website:

“What Is Total Worker Health?”

Total Worker Health® (TWH) is a safety management philosophy that blends the policies, programs and practices of a traditional safety management system with promotion of more focused individual injury and illness prevention efforts to advance worker well-being. It is a holistic, organization-wide approach to worker well-being.

Understanding and applying TWH principles can help your organization move from a compliance focus to a risk-based approach to safety management. These principles help you consider not only the physical work environment, but also the physical and mental preparedness of workers to successfully cope with hazards they may encounter. The resources provided here will help you better understand and use TWH to prevent injuries and illnesses in your organization while also improving overall worker well-being.”

We see the major differences as:

- ASSP states that TWH is a safety management philosophy whereas NIOSH clearly defines it as “...policies, procedures and practices...”
- NIOSH is focused on work-related hazards whereas ASSP states TWH is “...more focused individual injury and illness prevention...”

It is clear that ASSP has modified the meaning of the Department of Health and Human Services’ Total Worker Health registered trademark.

Canvassing Committee Challenges

Multiple people have attempted to join the canvassing committee and have experienced several challenges including unresponsiveness from ASSP, delayed responses (greater than 3 days) and miscommunication resulting in confusion and the individuals having to follow-up with ASSP multiple times to ensure they were able to join the canvassing committee. Also, applicants to the committee who requested to be on the editing committee were told that it was closed; resulting in people feeling like they could not be part of the process. The term 'editing committee' was used by the Chair of the writing committee who told other writing committee members that we needed to get the word out and get people to join. When individuals would submit their application for the 'editing committee' they were told the committee was closed, resulting in much confusion. An example of how the confusion was created is provided in the May 18, 2020 email below from Sharon Kemerer and John Suter to the TWH Task Force:

May 18, 2020

Greetings,

As the work group preparing for the ANSI/ASSP standard on *Total worker Health*® (TWH), we are compiling a list of potential members for the development of that standard (ANSI/ASSP Z590.7). We anticipate that the development process will take at least 12 to 18 months, and can last more than two years. Work will begin on July 1, 2020, after our task force sunsets.

A **writing group** (steering committee) will be doing most of the work initially, to create an initial draft document. We anticipate that this will be a demanding process and members will be expected to actively attend and contribute to drafting the document.

An **editing group** (review committee) will then work on that draft document to refine and modify it for presentation to the public for comment. The writing group members will also participate in the editing process. The majority, if not all of the meetings will take place virtually.

We would like to know your interest in participating in this process. Please select **one response** from the following options:

- I would like to be a part of the **WRITING GROUP/STEERING COMMITTEE** for the ANSI/ASSP standard on TWH. I understand that this also places me on the Editing Group
- I would like to be part of the **EDITING GROUP/REVIEW COMMITTEE** for the ANSI/ASSP standard on TWH
- I am **not interested** in being part of the development process for the ANSI/ASSP standard on TWH.

PLEASE SEND YOUR RESPONSE TO THIS EMAIL TO ME -- PLEASE DO NOT REPLY ALL.

If you have indicated that you would like to participate in either the writing or editing group, you must also complete the attached ASSP application. The information on the application will allow ASSP to determine if the groups are balanced in terms of member backgrounds and industry sources. The assigned number for the standard is: [ANSI/ASSP - Z590.7](#) **PLEASE SEND YOUR COMPLETED APPLICATION AND A BRIEF RESUME TO LAUREN BAUERSCHMIDT (lbauerschmidt@assp.org)** .

Thank you in advance for your response to this survey. **We hope to see your responses by May 29.**

Sharon Kemerer and John Suter

The delayed responsiveness, lack of response and confusion has deterred people who have wanted to be part of the process and it could be perceived as intentional on ASSP's behalf so they can continue to stack the canvassing committee with individuals

that will undoubtedly support efforts to get the standard approved when it comes time for the canvassing committee to vote.

Insurance

The information provided in this portion of the addendum was provided by a former insurance executive.

After reviewing the NIOSH information and aspects that define Total Worker Health (TWH) programs and our subsequent conversation, I can only offer my opinion on how this can affect the insurance industry and policy holders in the construction industry. From an insurance industry standpoint and particularly an underwriting perspective, I am uncertain of the direction this proposed standard is going.

These documents seem to be a collection of any and all bullet points that may be considered subjective in nature and would be difficult for the insurance industry to underwrite and measure safety and health effectiveness in the workplace. Following are some primary concerns related to insurance coverages, underwriting and claims that should be considered by parties involved in developing a standard using TWH aspects. This brief does not contemplate many other factors that could arise from the implementation of TWH concepts and programs.

As a general overview, insurance coverages and policies are traditionally derived from empirical loss data collected over a long period of time that is used to quantify risks and exposures from a variety of occupations and workplaces. I am not aware of any historical loss data or underwriting criteria that could effectively measure many of the workplace topics listed in the NIOSH document. They seem to be outside the mainstream activities and exposures of common construction risks and traditional underwriting criteria. Particularly the TWH psychosocial factors that I do not fully understand how this can be effectively assessed in the workplace.

As such, the breadth of the TWH list seems to impact and require change to many existing laws, including workers compensation, health insurance, privacy issues, and the lack of professional medical training by job-site safety engineers, just to name a few. Assuming the insurance industry can assess these risks through the underwriting process, some of these impacts and required changes would vary from state to state that are governed by insurance statutes. It could pose difficulties at many levels for mono-line insurance carriers and multi-line insurance carriers that provide interstate endorsements to policy holders.

If the intent for the TWH aspects to apply to all construction sites, issues with construction insurance policies would be required to clearly define where coverage is provided or excluded. This would be problematic to discern given the subjective nature of many TWH aspects that fall outside the traditional construction exposures and underwriting criteria. Assuming the TWH concepts are accepted by the construction industry, I would assume that only professionals in the industry would be responsible for compliance for their ideas, both employer and employee groups, as well as representatives from the construction insurance industry. Some of the TWH aspects could easily be challenged as non-work-related activities and employer responsibilities.

Conversely, some parties could argue they are work related. This presents significant compensability issues for the insurance industry, policy holders and claimants to wrestle with. I have not reviewed any information that addresses this issue.

Many of the terms also seem to be created topics without consistent definition within the construction industry. This, in my opinion would create issues with defining appropriate insurance coverage, quantifying underwriting risks and additional liabilities. Many of the subjective TWH topics would serve to increase the propensity for worker's compensation and general liability claims in the workplace. It is reasonable to assume these types of claims would increase frictional costs that are reflected in standard claim reserving protocols. Subjective claims are typically reserved with higher dollar amounts than objective claims for many reasons based on historical loss data. In the case of TWH claims, I cannot provide insight on how the insurance industry would reserve for many of the TWH concepts.

Ultimately, frictional costs associated to TWH claims would be included in the calculation of the Experience Modification Rating (EMR) resulting in higher insurance premiums to policy holders. On general terms, the EMR is a multiplier number for determining insurance premiums that utilizes the employers certified gross pay role receipts, frequency of claims, severity of claims, legal costs, and open claim reserves. I can only surmise that claims involving many of the subject TWH concepts would result in higher claim reserves.

The NIOSH TWH documents, definitions and terms seems to be a wish list accumulation of topics that will require significant discussion from the construction insurance industry and construction industry representatives. Much of this discussion should consider what is realistic and constructive, and what will add more confusion and expense to construction policy holders. Based on information provided on TWH aspects that would pertain to the construction industry, the current concepts and efforts would be counterproductive, and I am uncertain of the direction this proposed standard is going.

Legal

The information provided in this portion of the addendum was provided Adele Abrams, Esq., CMSP – President, Law Office of Adele L. Abrams PC.

I. Potential Use for OSHA/MSHA Enforcement & Tort Liability

One of the key concerns about the adoption by ANSI of a multi-faceted TWH consensus standard is that this could inadvertently impose binding obligations on employers within the industry classifications covered by the TWH standard. This could create legal exposure for OSHA/MSHA citations and penalties of up to \$136,532 (OSHA) or \$274,175 (MSHA). This also raises the specter of tort liability against employers – and may pose risks to the standards development organization itself.

Tort Liability Considerations

Host employers and general contractors may face tort liability considerations associated with Voluntary Consensus Standards (VCS) – some of which arise from issued

OSHA/MSHA violations, which can be admissible as proof of negligence *per se*. The typical situation arises where a contractor, temporary worker or other non-employee working at a location where a TWH program is required by law or contract claims injury or illness as a result.

The host employer could be held liable in tort, personal injury or wrongful death, for failure to adopt all of the listed elements of an effective TWH program because worker's compensation is not an exclusive remedy in such situation (unlike where a direct employee is harmed by a TWH program gap). See, e.g., *Hansen v. Abrasive Engineering & Manufacturing, Inc.*, 831 P.2d 693 (Ct. App. Ore. 1992) (ANSI consensus standard used to establish industry norms for "best practices" and to define standard of care legally). There is a legal trend toward greater admissibility of VCS in tort cases on the issue of negligence. 58 ALR3d at 154-155, based on the view that consensus standards carry the approval of a significant segment of an industry, and are sufficiently trustworthy to justify an exemption to the hearsay rule.

In addition to legal consequences for the user (or improper implementer) of a VCS, there is also legal exposure for standards development organizations (SDOs). The SDO may be named as a defendant in a tort actions involving the standard's development and content or may end up involved as a third party in a user's related tort case. While many such cases arise under state law in injury or wrongful death cases, there are common legal theories, including:

- Negligent undertaking theory
- Conspiracy/anti-trust
- Fraud
- Negligent misrepresentation
- Product defamation

The tort considerations against SDOs, while guided by state-unique laws, generally follow Section 324A of the Restatement of Torts:

One [SDO] who undertakes gratuitously or for consideration to render services to another [a seller] which he should recognize as necessary for the protection of a third person [complainant] is subject to liability to the third person [complainant] for physical harm resulting from his [SDO's] failure to exercise reasonable care to protect his undertaking, if

- (a) his [SDO] failure to exercise reasonable care increases the risk of harm,
- (b) he [SDO] has undertaken to perform a duty owed by the other [seller] to a third person [complainant], or
- (c) the harm is suffered because of reliance of the other [seller] or the third person [complainant] upon the undertaking [of the SDO].

There have also historically been expensive challenges brought against VCS by stakeholders who felt that they lacked appropriate representation or that the standard did not represent true consensus or otherwise satisfy all of the procedural requirements for standards development.

Incorporation by Reference and OSHA/MSHA Enforcement

In the situation where a VCS is adopted by an enforcement agency through formal rulemaking, this involves “incorporation by reference” and gives that version of the VCS the force of law. However, the text of the incorporated VCS does NOT appear in the Code of Federal Regulations for OSHA/MSHA nor in the proposed rule. This has resulted in legal controversy over access to “the law”, e.g., *Veeck v. Southern Building Code Congress Int'l* (5th Cir 2002). This issue is also under review by the Administrative Conference of the United States¹ and has resulted in some SDOs making non-printable “read only” versions of some standards available on the organization’s website. A companion issue is over 9,500 VCS are enforceable across the federal government, but the versions incorporated may not be freely accessible by the public, or they are so outdated that the standards developers may no longer offer it for sale.²

If a TWH standard is adopted by ANSI and incorporated by federal (or a state plan) OSHA or by MSHA, that version will be “frozen in time” and in the event that modifications are needed, the rule would require reopening. Another issue related to incorporation by reference of a VCS is that the voluntary standard may use advisory language such as “should” or “may” but when the rule is enforced by OSHA/MSHA, it is modified to mandates – “shall” and “must” govern even where mandates were not the original intent of the SDO.

OSHA’s Use of VCS for General Duty Clause Enforcement

As an alternative to incorporating a VCS by reference into a codified standard or regulation, OSHA can look to consensus standards to impute knowledge of appropriate work practices to employers where the agency itself lacks a specific standard, using its “General Duty Clause” (GDC) as a gap-filler.³ There are three methods of imputing such knowledge: actual employer knowledge recognizing a hazard and the need for mitigation (reflected in its own policies and programs, memoranda, and statements); industry recognition (through association or union communications with the employer, presentations at conferences, or involvement in standards organizations developing the pertinent standard); and “common sense” recognition.

The existence of a VCS on point to mitigate a known/recognized hazard, or the employer’s adoption of proactive protection programs in the TWH arena can be used to demonstrate the “feasibility” of controls, which is an element that OSHA has the burden of proving. In the 2019 case, the OSHRC upheld a GDC citation issued against the employer in a workplace violence case and pointed to the company’s own programs and training on workplace violence prevention to show “recognition.” OSHA then held the employer liable for the gaps where the workplace violence programs were not

¹Under the Administrative Procedure Act, 5 USC 552, published regulations must be codified in the Code of Federal Regulations, and material in Federal Register must be “reasonably available” to affected persons.

² As an example, the Mine Safety & Health Administration’s electrical standards for metal and nonmetal mines (30 CFR Part 56 Subpart K) incorporate by reference the National Electrical Safety Code, part 2, entitled “Safety Rules for the Installation and Maintenance of Electric Supply and Communication Lines” (also referred to as National Bureau of Standards Handbook 81, November 1, 1961) and Supplement 2 thereof issued March 1968. MSHA has not reopened its electrical rule since its original promulgation and therefore is limited to enforcing the 1968 version of this critical NFPA consensus standard.

³ MSHA does not have a “general duty clause” in its statute and so is limited to enforcing codified standards and rules, hundreds of which have incorporated by reference outdated consensus standards.

followed in full as the basis to hold the employer legally responsible in a worker's death, even though OSHA itself has not adopted a workplace violence rule. *Secretary of Labor v. Integra Health Management, Inc.*

[https://www.oshrc.gov/assets/1/18/Integra Health Management, Inc. Docket 13-1124 Combined post.pdf?8328](https://www.oshrc.gov/assets/1/18/Integra_Health_Management,_Inc._Docket_13-1124_Combined_post.pdf?8328).

Workplace violence prevention is an element of the NIOSH "word cloud" chart that embraces nearly every on-and-off-duty activity or hazard exposure as within the employer's purview to control. Therefore, if an employer has adopted a TWH programs including workplace violence prevention elements, modeled on an ANSI standard, OSHA can hold that employer liable for failing to implement and maintain all policies, procedures and training necessary for such a program.

Under the GDC (Section 5(a)(1) of the Occupational Safety & Health Act (OSH Act)) and relevant case law applying it, the following elements are necessary to prove a violation of the general duty clause:

- 1) The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;
- 2) The hazard was recognized;
- 3) The hazard was causing or was likely to cause death or serious physical harm; and
- 4) There was a feasible and useful method to correct the hazard.

A general duty citation must involve both the presence of a serious hazard and exposure of the cited employer's own employees. By definition, GDC citations are always serious and cannot be modified to "other than serious" but they can be classified as "willful" or "repeat" and subject to the maximum \$136,532 civil penalty, per affected worker (under the egregious citation policy).

In OSHA's 2016 Field Operations Manual (FOM)⁴, OSHA discusses enforcement under Section 5(a)(1) of the OSH Act (the GDC) and how to impute knowledge to employers in order to sustain such a citation. OSHA states:

If the relevant industry participated in the committees drafting national consensus standards such as the American National Standards Institute (ANSI), the National Fire Protection Association (NFPA), and other private standard-setting organizations, this can constitute industry recognition. Otherwise, such private standards normally shall be used only as corroborating evidence of recognition. Preambles to these standards that discuss the hazards involved may show hazard recognition as much as, or more than, the actual standards. However, these private standards cannot be enforced as OSHA standards, but they may be used to provide evidence of industry recognition, seriousness of the hazard, or feasibility of abatement methods. [emphasis added]

⁴ OSHA FOM, p. 76, https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-00-160_2.pdf. Note: the Trump administration never issued an update of the FOM, and the 2016 version is the most recent but is marked currently as an archival document. However, OSHA has included this language about imputation of consensus standards in multiple versions of the FOM over the years, and this is also supported by OSHRC case law.

OSHA has had mixed success in worker protection enforcement via the GDC, however, and the agency recently lost significant cases brought to address heat stress in this manner, which has resulted in a congressional call for a formal OSHA rulemaking. Consequently, an ANSI TWH consensus standard could be incorporated by reference into a binding OSHA regulation, perhaps as an element of a future I2P2 rulemaking, a workplace violence standard, or a heat stress prevention rule.

This is not far-fetched. In 2001, ASSE testified before the US House of Representatives' Education and Workforce Committee on the issue of "The Use of Voluntary National Consensus Standards to Enhance Safety and Health in American Workplaces" and stated: "*Governmental agencies such as OSHA, CPSC, and NHTSA should be encouraged to utilize these consensus standards as they provide an efficient and effective alternative to traditional public sector rulemaking.*"

Under Public Law 104-113, "The National Technology Transfer and Advancement Act of 1995," and the implementing OMB Circular A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities," if an applicable voluntary consensus standard exists in an area where the agency seeks to regulate, the agency should use this as the basis for a proposed rule rather than starting from scratch or adopting a differing approach. The OMB Circular requires that "[a]ll federal agencies *must* use voluntary consensus standards in lieu of government-unique standards in their procurement and regulatory activities, except where inconsistent with law or otherwise impractical."

Therefore, if in the future OSHA determined that TWH should be a component of a mandatory regulation or standard, it would be required as a matter of law to first consider for inclusion the ANSI TWH standard. That makes the work of this ANSI committee even more consequential and also makes the omission of key stakeholders from the employment law and construction sectors a fatal flaw.⁵

II. Statutory Construction & Broad-Ranging VCS Definitions

A key canon of statutory construction is *Expressio unius est exclusio alterius* - "the express mention of one thing excludes all others. A companion canon is *Ejusdem Generis*: "Where general words follow the enumeration of particular class of persons or things, the general words will be construed as applying only to things of the nature enumerated." NIOSH's "Issues Relevant to Advancing Worker Well-being Using Total Worker Health® Approaches" is an aspirational "word cloud" of sorts, creating 10 silos for a TWH program with over 75 unique elements in total. While it certainly captured the various nuances of issues tangentially related to worker wellness on-and-off-duty, it is certainly not representative of the average employer workplace wellness program at the present time.

⁵ Under OMB Circular A-119 criteria, a voluntary consensus standards body is defined by the following attributes: (i) Openness, (ii) Balance of interest, (iii) Due process, and (iv) An appeals process. While ANSI standards are presumed to meet these criteria, the development to date of the TWH standard has deviated by omitting representatives from the construction trades and their unions from meaningful participation, and instead is a committee largely dominated by the insurance and consulting sectors.

If the NIOSH document is used as a basis for a VCS that has enforcement potential via OSHA/MSHA or the courts, then omission of any listed elements could be viewed as a negligent deviation from what has been delineated by NIOSH/ASSP/ANSI as essential to an effective program. In addition, also relying upon rules of statutory construction, anything not listed in the VCS would be extraneous and this could limit the flexibility of a program to respond to novel health or wellness challenges in the future.

The critical “issues” identified by NIOSH, upon which the ANSI TWH standard would likely be based, include some already addressed by OSHA/MSHA in a statutory, regulatory or policy context (whistleblower protection, chemicals, sanitation facilities, and technology such as robotics and sensors) as might be considered redundant. However, the TWH program also includes safety and health issues that OSHA does not currently regulate (although some state OSHA programs do):

- Ergonomics (Clinton administration rule rescinded, enforcement limited to GDC at present);
- Workplace Violence Prevention (on OSHA agenda, interfaces with TWH elements of psychosocial factors; safe facilities/elimination of bullying, violence, harassment, and discrimination);
- Heat Stress Prevention (enforced through GDC but rulemaking possible, interfaces with TWH elements of adequate breaks; stress prevention; physical agents).

The vast majority of the NIOSH TWH components are fully outside of the safety and health realm, including such items as:

- Safe, healthy and affordable housing options
- Minimum guaranteed hours and Paid Time Off
- Retirement planning and benefits
- EEOC statutes and FMLA
- Judicious monitoring of employees
- Productive Aging across Lifecourse

Even the silo names reveal that NIOSH may have strayed from its workplace safety and health mission by tackling such issues as “Environmental Supports,” “Community Supports,” “Compensation and Benefits,” “Work Arrangements” and “Workforce Demographics.”

If an ANSI TWH program incorporates the NIOSH approach, this will create a minefield for the occupational safety and health professional to navigate, as much of the content falls within the domain of human resources (HR), rather than the practice of OHS.

TWH Issues for OHS Professionals

One of the key precepts of professional certification organizations’ codes of ethics is that certified practitioners must take care to accept assignments only when qualified by education or experience in the specific technical fields involved. While it is true that many safety professionals must address a broad range of occupational safety and health-related issues in the course of their assigned duties, the TWH concept envisioned in the aspirational NIOSH document contains many elements that are simply outside the professional expertise of most OHS individuals, as they fall primarily within the human resources (HR) practice area.

Larger companies may have a full HR department to handle this segment of a TWH program, but for many employers the burden will fall upon the OHS staff given that the elements are included in an occupational safety and health consensus standard. This presents the risk of the elements not being adequately addressed, and the consequences (legal and otherwise) of such failure would fall squarely upon the safety professional, whose certifications could even be endangered as a result.

Employment Law Pitfalls

The ANSI TWH project appears to lack involvement of any employment law professionals who could assist in determining which of these HR elements should be included in an VCS on this topic, especially one being marketed purportedly as an occupational safety and health standard, and where pitfalls may arise to those users of the VCS who may also lack employment law expertise.

The following chart may be useful in considering the plethora of federal laws (and their state analogs) that interface with wellness and other TWH programs:

Regulation	Definition
HIPAA	Nondiscrimination rules prohibit employers from discriminating against participants based on a health factor
ADA	Prohibits discrimination against individuals with disabilities
GINA	Prohibits discrimination based on genetic information in employment and health insurance
ADEA	Prohibits discrimination against individuals aged 40 and over
Worker’s Compensation	Provides wage replacement and medical benefits to employees who are injured in the course of employment
Off-Duty Conduct	Prohibits employers from disciplining employees for their off-duty conduct

The EEOC rules on employer-sponsored wellness programs have been in flux in recent years and this is one of the “hot topics” in human resources law, with more changes expected during the Biden administration. Some of the unintended consequences of an improperly structured TWH (on the HR side of the ledger) include:

- Claims of age discrimination (if older workers cannot meet strength, speed or other benchmarks, or participate safely in corporate exercise programs – particularly where bonuses or incentive rewards are lost as a result);
- Claims of disability discrimination under the Americans with Disabilities Act⁶;

⁶ Under the federal ADA, employer-based Health Risk Assessments are permitted as long as the workplace wellness plan is voluntary and the results are kept confidential. However, the employer-sponsored financial incentives for participation cannot be so large that the program no longer seems voluntary, and alternative incentive criteria must be available if the financial incentive is based on a specific outcome such as attainment of weight loss (which is not suitable for an employee who is underweight) or participating in a 5K event (for a worker with medical or mobility issues). The EEOC notes that because even disabled persons can participate in properly designed wellness programs, the terms/conditions/benefits cannot be limited to able-bodied employees.

- Invasion of privacy and violation of GINA/HIPAA through inadvertent disclosure to supervisors or co-workers about the worker's protected physical or mental health information, or genetic information;
- Employer liability under state-specific worker's compensation laws for injuries incurred during mandated AND voluntary workplace wellness program activities⁷; and
- Intrusion by the employer into off-duty legal behaviors (another evolving legal area, particularly with respect to cigarette smoking and off-duty use of legal cannabis and alcohol but extending into the worker's diet or even sleep regimen).

The Genetic Information Non-Discrimination Act (GINA) prohibits employers from using financial incentives to complete worker Health Risk Assessments that include personal and family history, and genetic information cannot be used to discriminate in employer-provided health insurance. Employees can voluntarily provide their genetic information to an employer if the request is in writing and signed by employee and the information remains with the proper healthcare professional, but this can be risky if a program is not properly designed and protected information leaks into the workplace. Another complication in this area is that under the Health Insurance Portability and Accountability Act (HIPAA), corporate wellness plan participation must be available to everyone and the employer cannot discriminate based on a health factor for both wellness programs and healthcare coverage, which often become intertwined where a TWH program is present. The ADA does include a safe harbor exception, which protects employers and plan administrators from liability arising out of establishing, sponsoring, observing, or administering a wellness program. But this safe harbor only applies if: 1) the program is part of the terms of a bona fide benefit plan; 2) the program is based on underwriting risks, classifying risks, or administering risks; and 3) the program is based on and not inconsistent with State law and is not used as a subterfuge to evade the purposes of the ADA prohibition. Therefore, such programs must be carefully crafted to avoid losing this legal protection.

There are also prescriptive regulations under HIPAA concerning program eligibility, payment of higher health insurance premiums, provision of financial awards for achievements (unless the reward is given to all participants). If a workplace wellness program includes financial rewards, then the program must meet other statutory *bona fide* wellness program requirements.

⁷ Employers have been held liable for injuries related to wellness programs if the employee's injury:

- occurred on the employer's premises
- promoted the interests of or benefited an employer, or
- served both a business and personal purpose

Examples of where benefits have been awarded include injuries arising from the worker's use of an in-house gym facilities or exercise equipment; injuries during a company-sponsored yoga or exercise program; injuries arising from an off-site corporate gym sponsorship; and injuries where the company offered financial incentives for participating in a 5K run while wearing corporate t-shirts. It is important to note that while OSHA does not currently require recording/reporting of injuries related to voluntary wellness programs, this could be subject to change if the agency has an enforceable TWH program requirement. Finally, if non-employees such as temporary staffers or day laborers, participate in a TWH program and are injured, worker's compensation insurance normally would not cover the expenses and the worker could sue the host employer in tort for negligence, as discussed above.

Further complicating this issue is the fact that in June 2020, the EEOC proposed a rule to further modify the HIPAA and ADA rules relative to workplace wellness programs. The Notice of Proposed Rulemaking (NPRM) was issued in response to a decision by the U.S. District Court for the District of Columbia that vacated a portion of EEOC's previous ADA regulation on the matter, but the rulemaking was not completed at the time of the administration change and its status is unknown as there was no update to the regulatory agenda since November 2020.⁸

The Internal Revenue Service (IRS) also has mandatory provisions applicable to workplace wellness programs. For example, its 2016 guidance stated: coverage provided by a workplace wellness program plus health screenings and other medical care are excludable from the employee's income, but any cash or cash-equivalent rewards and the premium reimbursement are includable in the employee's gross income and are subject to FICA and federal and state withholding rules. Therefore, the TWH program administrator will need to have a working knowledge of current tax provisions, and coordinate with the corporate payroll department.

Finally, unilateral establishment of a TWH program by an employer (absent a regulatory requirement) will likely violate the National Labor Relations Act, Section 8(a)(1), in an organized workplace unless it is first subject to collective bargaining, as many components of a TWH program impact the "terms and conditions" of employment. Even establishment of a "wellness committee" could be considered an employer-dominated labor organization under the *Electromation* theory, unless first negotiated with the employee representatives.

In short, the complexity of this employment and labor law area, as related to TWH programs, is far beyond the professional background of most OHS practitioners and could put undue pressure upon them to work outside their area of expertise, leading to both personal and corporate legal liability.⁹

2020 NPRM proposed that, for most wellness programs, employers may offer no more than a *de minimis* incentive to encourage participation, and must meet other requirements, to comply with the ADA. Certain wellness programs, however, would be permitted to offer the maximum allowed incentive under the 2013 HIPAA regulations.

⁸ The court's issue with the current rule was that while HIPAA, as amended by the Affordable Care Act, allows employers to offer incentives up to 30% of the total cost of health insurance to encourage participation in certain types of wellness programs, the ADA requires that employee participation in a wellness program that includes medical questions and exams be voluntary. In the absence of any ADA statutory definition of "voluntary," the June 2020 NPRM proposed that, for most wellness programs, employers may offer no more than a *de minimis* incentive to encourage participation, and must meet other requirements, to comply with the ADA. Certain wellness programs, however, would be permitted to offer the maximum allowed incentive under the 2013 HIPAA regulations.

⁹ To illustrate, under HIPAA provisions, employers wishing to provide a financial incentive for specific outcomes must establish a bona fide wellness program, under which:

1. The total financial reward cannot exceed 20% of compensation in total rewards, or 50% for smoking cessation,
2. The program must be reasonably designed to promote health and prevent disease,
3. The program must give individuals eligible to participate in the opportunity to qualify for the reward at least once a year,
4. The program must be available to all similarly situated individuals, and

¹ To illustrate, under HIPAA provisions, employers wishing to provide a financial incentive for specific outcomes must establish a bona fide wellness program, under which:

1. The total financial reward cannot exceed 20% of compensation in total rewards, or 50% for smoking cessation,
2. The program must be reasonably designed to promote health and prevent disease,
3. The program must give individuals eligible to participate in the opportunity to qualify for the reward at least once a year,
4. The program must be available to all similarly situated individuals, and
5. The plan must disclose in all materials describing the terms of the program the availability of a reasonable alternative standard.

There were also provisions applicable to wellness programs under the Obama Administration's Affordable Care Act, but the status of those is in flux due to the multiple changes in that law at the state level and as the result of federal legal challenges and amendments.

