

# Legal Perspectives on ANSI Z10-2005

*Significant implications for  
SH&E practitioners and employers*

**By Adele L. Abrams**

**T**HE JULY 2005 RELEASE of ANSI Z10-2005, Occupational Health and Safety Management Systems, has significant implications for SH&E practitioners and employers—with equal measures of danger and opportunity. In general, the use of national consensus standards will be of increased importance to this country as the U.S. economy moves toward a more global perspective. National consensus safety and health standards such as ANSI Z10 reflect the opinions of SH&E professionals and end users working at all levels of the public and private sectors in technology development, manufacturing, training and academia.

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

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

The basic elements of the standard address management leadership and employee participation, planning, implementation, evaluation and corrective action and management review. Thus, in many important aspects, ANSI Z10 encompasses the basic tenets that OSHA included in its draft Safety and Health Management Standard, which was later withdrawn from its regulatory agenda. The complete original text of the nonmandatory guidelines is found in the Jan.

26, 1989, *Federal Register*. When OSHA announced a proposed rule in its 1990s regulatory agenda, the agency articulated its intent to have a standard that would include at least the following elements: management leadership; active employee participation; analysis of the worksite to identify serious safety and health hazards; training; and program evaluation.

All of these components are present in ANSI Z10. However, Z10 goes beyond the OSHA draft standard because it also contains provisions that address risk controls, audits, incident/accident investigations, responsibilities and authorities.

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

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

#### **General Duty Clause Violations**

Aside from formal rulemaking,

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ANSI Z10 is a valuable reference. It could also have possible enforcement ramifications under the General Duty Clause (GDC) by federal OSHA. For example, it may be employed to satisfy regulatory requirements of certain state-plan OSHA programs. Several states have enacted laws mandating such programs for some or all employers (for example, Cal/OSHA's standard found at [www.dir.ca.gov/title8/8406.htm](http://www.dir.ca.gov/title8/8406.htm)), so adoption of ANSI Z10 may satisfy the compliance obligations for employers in those jurisdictions. In addition, insurance companies encourage client companies to implement safety and health management programs and, therefore, use of Z10 may generate monetary savings on insurance (both liability and workers' compensation).

One recent example is the recommendation in the 9/11 Commission Report which stated that it "encourage[d] the insurance and credit-rating industries to look closely at a company's compliance with the ANSI standard [on emergency preparedness] in assessing its insurability and creditworthiness" (CRS).

Subpart C of OSHA's construction standards (29 CFR Part 1926) contains specifications for safety and health training and management programs (29 CFR 1926.20 and 1926.21). Aside from these mandatory standards, the GDC [Section 5(a)(1)] outlines every employer's legal obligation to keep its workplace free of recognized hazards that are likely to cause death or serious physical harm to its employees for which a feasible means of abatement exists.

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

By definition, the GDC requirements encompass recognized threats that result in occupational illness or injury. Thus, recognized experts' findings that a series of actions or conditions are required to prevent harm to workers are likely to satisfy the requirement for GDC applicability under the applicable legal tests. Voluntary guidelines, including standards promulgated by ANSI, have been used to support GDC citations and to enunciate an industry "standard of care" even though the consensus standards themselves are not specifically enforceable by the agency.

However, although decisions have varied over the years, in at least one case, the Occupational Safety and Health Review Commission (OSHRC) has stated that OSHA consensus standards taken from private standard-setting organizations "were not intended to be used as mandatory, inflexible legal requirements" (Dun-Par Engd. Form Co.).

MSHA has no rule or clause comparable to OSHA's GDC. To date, neither OSHA nor MSHA has referenced ANSI Z10 in any of its standards, but this remains a future possibility that would enhance

the stature of the standard in agency enforcement actions. Currently, ANSI Z10 is strictly voluntary and does not create any specific duties under the OSH Act. Therefore, an employer's failure to implement the programmatic provisions of this consensus standard—absent from other findings—does not constitute a violation of Section 5(a)(1).

In summary, national consensus standards lack the force and effect of codified rules, which can only be promulgated after notice-and-comment rulemaking under the Administrative Procedures Act (5 USC §551 et seq). Furthermore, as noted by the U.S. Court of Appeals in *B & B Insulation Inc. v. OSHRC, Et. Al.* [583 F.2d 1364, 1367-1368 (5th Cir. 1978)], the law requires only those protective measures that the knowledge and experience of the employer's industry would clearly deem appropriate under the circumstances. However, readers are advised to review *National Realty & Construction Co. Inc. v. OSHRC* [489 F.2d 1257, 1266 (D.C. Cir. 1973)] in which the court stated, "the question is whether a precaution is recognized by safety experts as feasible, not whether the precaution's use has become customary."

#### **A Potential Help with VPP Participation**

Another important potential function of ANSI Z10 concerns OSHA's Voluntary Protection Programs (VPP). For nearly 2 decades, OSHA has approved worksites with exemplary safety and health management programs as participants in its VPP. Thus, for companies that aspire to attain VPP status, adoption of ANSI Z10 may help to jump-start the application process and may foster participation by smaller companies which might otherwise be without adequate guidance on how to design and implement such management systems. Data suggest that VPP companies report injury and illness rates which are sometimes 20% or less than the average for other establishments in their industry.

#### **Tort Litigation**

In tort litigation, actions arising from workplace accidents, the presence or absence of a recognized and substantive safety and health management program can be critical in controlling financial liability. Consensus standards may be used by plaintiffs' attorneys to demonstrate the appropriate "standard of care," violation of which supports awards for personal injuries. For example, see *Hansen v. Abrasive Engineering & Manufacturing Inc.* [831 P.2d 693 (Ct. App. Ore. 1992)], in which the jury considered an ANSI standard violation in determining liability because it was relevant to the standard of care a manufacturer should be expected to meet, even though it was a voluntary consensus standard. For another example, see *Bowles v. Litton Industries Inc.* [518 So. 1070 (La. Ct. App. 1987)]. Thus, the extent to which OSHA and MSHA reference ANSI Z10 in future publications or rulemaking activities will increase its judicial recognition and create a guideline against which employer programs will be benchmarked.

A national consensus standard that is "known generally" in a particular industry can reasonably be con-

strued as providing the requisite actual or constructive knowledge to support a cause of action in litigation brought by OSHA or private sector third parties. For example, see *U.S. v. B&L Supply Co.* [486 F.Supp. 26 (N.D. Tex. 1980)], in which a recognized hazard was defined as one known after taking into account the standard of knowledge in the industry, and an employer cannot defend a citation by claiming ignorance of the practice/condition or its potential for harm.

In another case, *Titanium Metals Corp. v. Usery* [579 F.2d 536 (9th Cir. 1978)], a GDC citation was affirmed because the national fire code provided substantial evidence that the industry recognized the particular hazard presented. In *Getty Oil Co. v. OSHRC* [530 F.2d 1143 (5th Cir. 1976)] and *Boeing Co., Wichita Div.* [1977-78 CCH OSHD ¶ 22266 (1977)], violations were affirmed where an employer deviated from "standard industry practice" or "industry pressure vessel code" concerning testing of pressure vessels.

In *American Smelting & Refining Co. v. OSHRC* [501 F.2d 504 (8th Cir. 1974)], a GDC citation was affirmed where an employer exposed workers to lead concentrations "greater than an acceptable nationwide standard." In *Bethlehem Steel Corp. v. OSHRC & Marshall* [607 F.2d 871 (3d Cir. 1979)], the company safety officer admitted that an advisory ANSI standard represented industry consensus. And, in *Betten Processing Corp.* [75 OSAHRC 43/E2, 2 BNA OSHC 1724, 1974-75 CCH OSHD P19,481 (No. 2648, 1978)], the judge erred in failing to consider an ANSI standard as evidence of a recognized hazard. Thus, to the extent that industry consensus standards reflect an industry's recognition of a hazard, they are relevant, probative evidence of a recognized hazard in the view of American federal courts.

SH&E professionals have an obligation to keep abreast of the latest knowledge and to include, to the maximum extent feasible, best practices in their safety programs and consultation activities. The fundamental difference between an ordinary suit for negligence and a suit for malpractice lies in the definition of the prevailing standard of care.

If an individual is sued for ordinary negligence, the court will compare his/her behavior to what any reasonable person would have done under the circumstances. However, if an SH&E professional is sued for malpractice, the court will compare his/her behavior to what a reasonable member of the profession would have done (Keeton, et al). Professional standards are much higher and much better documented, and ANSI standards such as Z10 often serve to satisfy the evidentiary burden and to determine the appropriate standard of care. Therefore, knowledge and comprehension of ANSI Z10 may be imputed to SH&E professionals in terms of determining what a "reasonable person" with similar training would be likely to know.

Willful ignorance of the best practices set forth in ANSI Z10 and/or failure to incorporate such preventive measures in the workplace or programs under the SH&E professional's direction or oversight could lead to personal tort liability or professional liability as well. To the extent that an SH&E professional is a

management representative of the employer, the negligence could be imputed under the theory of *respondent superior*. Thus, careful scrutiny and consideration of ANSI Z10's applicability to programs and practices is certainly warranted by all SH&E practitioners.

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

### Prudent Course of Action

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

- Obtain a copy of the standard, review it and its background materials, and discuss it with senior management and legal counsel so that all parties are aware of what is expected. A legal opinion written by corporate counsel would also be a prudent action.
- Write and publish a policy that addresses ANSI Z10 with regard to how it fits in with the organization's current program and the OSH Act.
- Write, implement and document communication structures detailing how information is passed up the communication chain to senior management.
- Conduct thorough assessments to identify significant SH&E exposures and the means used to communicate them to those in a position of authority.
- ANSI Z10 places significant emphasis on accountability by senior management, giving it some correlation with the requirements of the Sarbanes Oxley Act of 2002 (Public Law 107-204). It is important to ensure that SH&E audits are independent and that the results are reported and acted on. Those SH&E practitioners who author/sign those audit reports and who fail to follow up on the recommended actions may be subject to sanctions such as listed under the new law. The point has been made that they now have a duty beyond just informing management.

- Follow the ASSE Code of Conduct.

ANSI Z10-2005 provides SH&E professionals with a significant new tool to enhance existing programs or to help smaller employers create effective programs that also satisfy regulators and insurers, effectuating cost savings and minimizing legal liability. ■

### References

- Congressional Research Service (CRS). "Emergency Management Preparedness Standards: Overview and Options for Congress." RL32520. Washington, DC: CRS, Feb. 4, 2005.
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- Keeton, W.P., et al. *Prosser & Keeton on Torts*. 5th ed. St. Paul, MN: West Publishing, 1984. 185-193.

## Z10 from ASSE

ASSE is offering ANSI/AIHA Z10 to its members for \$58; list price is \$65. To learn more, visit [www.asse.org/fr3388.htm](http://www.asse.org/fr3388.htm) or contact ASSE's Customer Service Dept. at (847) 699-2929.