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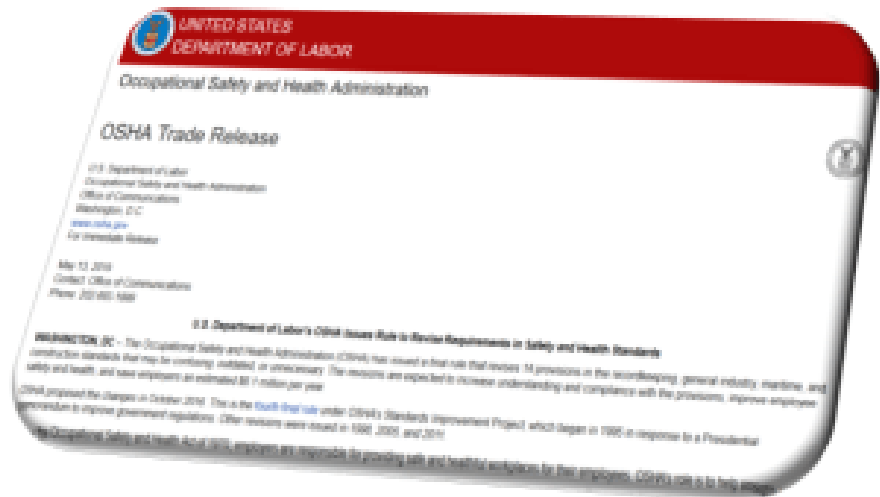
“Unexpected Energization” Still Essential to Require Lockout/Tagout Despite Controversial OSHA Rulemaking

By [Dan C. Deacon](#) and [Eric J. Conn](#)

After years awaiting the fate of OSHA’s controversial proposed change to write the term “unexpected energization” out of its Lockout/Tagout (“LOTO”) standard, [OSHA just announced](#) its new [Final Rule](#) of Phase IV of the Standards Improvement Project (“SIP”). The SIP process was designed to allow OSHA a simplified

rulemaking path to make non-controversial changes to fix minor issues with existing standards. The SIP IV *proposal* included numerous minor adjustments to a variety of existing OSHA standards, but one seemingly major change to the LOTO standard. Specifically, the Obama Administration’s OSHA slipped into SIP IV a controversial proposal to revise the scope provision of the LOTO standard to remove the term “unexpected energization” as a prerequisite for

the requirements of the LOTO standard to kick-in. After an outcry by the regulated community, this proposed change to the LOTO standard was removed from the Final Rule. However, OSHA signaled it will likely re-visit the issue again in a separate LOTO rulemaking.



History of Standards Improvement Project

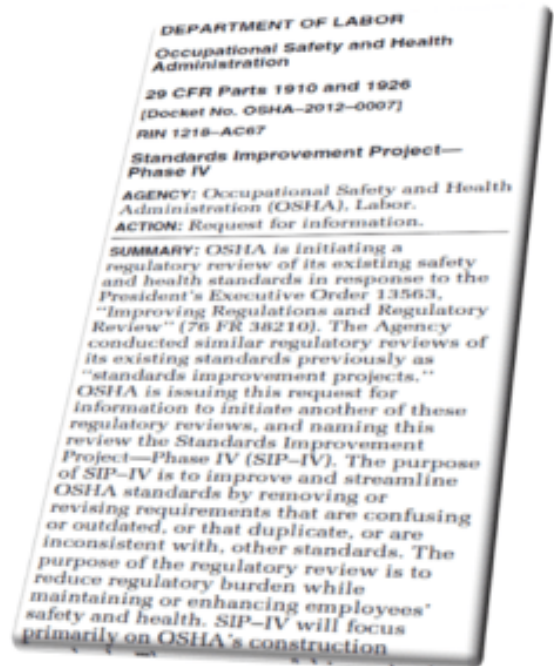
OSHA initiated the “Standards Improvement Project” (SIP) during the Clinton Administration, and there have been a series of four SIP rulemakings since. The Project was intended to allow OSHA to efficiently make non-controversial changes to confusing, outdated, or duplicative elements of OSHA standards and to align standards across industries and make it easier for employers to understand and comply with safety and health

regulations.

For example, SIP II, [70 Fed. Reg. 1111 \(Jan. 5, 2005\)](#) revised employee notification requirements in several chemical-specific general industry standards to clarify industry confusion by allowing employers to provide employees with their exposure monitoring results either individually in writing, or by posting the results in a readily accessible location, or by both. Likewise, SIP III, [76 Fed. Reg. 33590 \(June 8, 2011\)](#), alleviated several burdens on employers, such as aligning OSHA requirements with existing DOT regulations about air cylinder tests on self-contained breathing apparatuses, so as to simplify employers' efforts to comply with both. Additionally, OSHA eliminated several requirements for employers to transmit exposure and medical records to the National Institute for Safety and Health. These changes amounted to a net cost savings for employers of approx. \$43M per year. Indeed, virtually all of the changes made under the SIP project have been welcomed by industry and faced little adverse comment throughout the process.

SIP IV and OSHA's Controversial Change to the LOTO Standard

Under SIP IV, [proposed by the Obama Administration's OSHA in October 2016](#), OSHA detailed 18 updates to modernize or clarify various standards, most of which were non-controversial. However, the agency also added in a provision that seeks to materially alter the application of OSHA's LOTO standard. Specifically, the Obama Administration's OSHA attempted to use SIP to reverse a judicial interpretation of the core term "unexpected energization" that OSHA has disagreed with for years. The Scope/Application section of the LOTO Standard, as originally enacted in 1989, states that it:



"covers the servicing and maintenance of machines and equipment in which the unexpected energization or start-up of the machines or equipment, or release of stored energy, could harm employees." 29 C.F.R. 1910.147(a)(1)(i) (emphasis in the original).

The standard does not define "unexpected energization," but it has been defined through case law. In 1996 in [Reich v. G.M. Delco, 89 F.3d 313](#) (6th Cir. 1996), the U.S. Court of Appeals for the Sixth Circuit ruled that the standard is meant to apply where a service employee is endangered by a machine that can start-up *without the*

employee's foreknowledge. OSHA cited GM after witnessing employees working on three machines that remained connected to their power source throughout servicing operations. However, to service any of the three machines, an employee had to pass through electronically inter-locked gates that immediately deactivated the machines. Once deactivated, an eight to twelve step process had to be followed to restart each of the machines, and this multi-step process would have alerted servicing employees that the machines were about to start up by audible and visual signals.

The Sixth Circuit explained that in the context of the regulation, the use of the word “unexpected” connotes an element of surprise, and there can be no surprise when a machine is designed and constructed so that it cannot re-start without giving a servicing employee notice of what is about to happen. The Sixth Circuit specifically rejected OSHA’s interpretation of unexpected – i.e. energization that is unintended, unanticipated, or unplanned for – noting that such an interpretation renders the word “unexpected” meaningless. Indeed, the Court properly noted that OSHA was reading the term “unexpected” right out of the standard.



Following the *GM Delco* decision, case law has further clarified that energization is not unexpected where:

1. An alarm gives employees clear, audible, timely warning of the machine start-up;
2. The machine is so small or its controls are located such that the servicer would know of attempts to restart it;
- or
3. The equipment is unplugged and the plug is in exclusive control of the servicer.

After more than twenty years of consistent application of the Sixth Circuit precedent, OSHA sought to materially alter the LOTO standard through SIP by eliminating the phrase “unexpected energization” from the standard. In the text of the proposed rule, OSHA stated that it intended the phrase “unexpected energization” to mean any re-energization or startup that occurs before the servicing employee removes the lockout device from the energy isolation device. Ultimately, OSHA was seeking to overturn the Sixth Circuit’s ruling and the historical application of the standard under the guise of the SIP project, which is for minor changes and clarifications.

Despite OSHA’s belief that the *GM Delco* decision misconstrued the “unexpected” language of the LOTO standard by allowing employers to use warnings and delay systems as alternatives to lockout, while at the final OMB approval stage of the rulemaking process, the Trump Administration’s OMB decided to remove this proposed change from SIP IV due to overwhelming opposition OSHA received during the simplified comment

period. In fact, of the 155 comments OSHA received on this issue, all but seven strongly opposed removing the word “unexpected” from the standard.

The decision ultimately to remove the proposed change to the LOTO Standard from the Final Rule does not appear to be OSHA’s last crack at this major policy change. In the Preamble to the SIP IV Final Rule, OSHA explained:



“OSHA continues to believe that the GMC Delco decisions misconstrued the ‘unexpected’ language of the lockout/tagout standard. However, OSHA also acknowledges the overwhelming opposition to this change and agrees with the many comments that cited complications with this issue due to technological advancements. Further, the AFL-CIO included in its comment a proposal of a path OSHA could follow to uphold the rigor of the proposed rule. In light of the information provided by the comments, OSHA is not in a position at this time to make a final decision on this issue. As a result, the agency will not finalize its proposal to remove the word ‘unexpected’ from the control of hazardous energy standard but will further consider this issue in light of the overall standard.”

The Future of Lockout/Tagout

OSHA is currently reviewing the LOTO standard and considering an individual rulemaking to make broader changes in the near future. Consistent with OSHA’s current [regulatory agenda](#), OSHA sent a proposed Request for Information (RFI) to OMB to be sent to industry stakeholder seeking input about the strengths and limitations of new technological advancements, such as computer-based controls of hazardous energy. Computer-based controls have become more prevalent as OEMs modernize their equipment designs, and OSHA has seen an corresponding increase in requests for variances based on the new technology. Allowing more flexibility for newer energy control technology would be a welcome change to the LOTO Standard, but that is also likely to be the sweetener that OSHA pairs with its next attempt to address its concerns about the *GM Delco* interpretation of “unexpected energization.”

UPDATED 5/17/2019: As expected, on May 17, 2019, just a week after killing the attempt to remove “unexpected energization” from the LOTO standard as part of the SIP project, [OSHA announced](#) the next step in a standalone rulemaking process to evaluate potential changes to the Lockout/Tagout standard. That is the RFI discussed just above. However, contrary to our expectations, OSHA did not combine in this RFI the issue of allow more flexibility to utilize newer energy control technology with the controversial issue to write “unexpected energization” out of the standard. Indeed, the RFI does not mention the “unexpected energization” issue at all. That does not mean the issue will not be included in a Notice of Proposed Rulemaking that will likely follow this RFI; i.e., it may be that OSHA did not include it in the RFI because the agency already knows industry’s feelings about that issue from the SIP IV process.



Here is a link to the Federal Register notice about the RFI. Comments must be submitted on or before August 18, 2019. Comments and materials may be submitted electronically at <http://www.regulations.gov>, the Federal e-Rulemaking Portal, or by facsimile or mail.