Session No. 709

A Critique of the Federal Lockout/Tagout Compliance Directive

Michael T. Taylor, Esq.
Arent Fox LLP
Washington, DC

Introduction

Year after year, the federal Lockout/Tagout ("LOTO") standard, 29 C.F.R. § 1910.147, is one of the top-ten most frequently cited federal Occupational Safety and Health Administration ("OSHA") standards. On September 1, 1989, OSHA issued the LOTO standard as a final rule. On September 11, 1990, OSHA issued a compliance directive for the LOTO standard. On June 20, 2000, OSHA began conducting a look-back review of the LOTO standard pursuant to section 610 of the Regulatory Flexibility Act and section 5 of Executive Order 12866. As a result of the look-back review, on February 11, 2008, OSHA finally issued a new LOTO compliance directive, CPL 02-00-147. The new LOTO compliance directive is over one hundred pages in length and supersedes the 1990 compliance directive. The new LOTO compliance directive instructs OSHA personnel on the agency's interpretations for enforcing the LOTO standard.

This paper critiques key OSHA interpretations in the new LOTO compliance directive. Through these interpretations, OSHA is attempting to broaden the application of the LOTO standard significantly. If left unchallenged, the OSHA interpretations will pose a tremendous economic burden on the regulated community. The regulated community will have to provide more training and lockout/tagout devices to their employees. The regulated community will also lose a significant amount of production time locking or tagging out machines and equipment.

The Scope Provision of the LOTO Standard

Section 1910.147(a)(1)(i) provides the circumstances in which the LOTO standard applies to employers. Section 1910.147(a)(1)(i) states that the LOTO standard applies to employers when employees perform service and/or maintenance activities on machines and equipment in which the unexpected energization or startup of the machines and equipment could cause injury to the employees.

Service and/or Maintenance:

Section 1910.147(b) provides the definition of service and/or maintenance. Section 1910.147(b) defines service and/or maintenance as:

> [w]orkplace activities such as constructing, installing, setting up, adjusting, inspecting, modifying, and maintaining and/or servicing machines or equipment. These activities include lubrication, cleaning or unjamming of machines or equipment and making adjustments or tool changes, where the employee may be

exposed to the unexpected energization or startup of the equipment or release of hazardous energy.

OSHA has taken the view that employees who adjust a product while traversing through a machine or piece of equipment are engaged in service and/or maintenance pursuant to section 1910.147(b). OSHA explains that "[d]ue to changing job responsibilities in the American workplace today, some production employees' (e.g., machine operators, process operators) duties are expanding so that their work tasks may include servicing and/or maintenance activities that are subject to the requirements of the LOTO standard."

OSHA's interpretation is in direct conflict with the plain language in section 1910.147(b). Indeed, section 1910.147(b) sets forth certain activities that constitute service and/or maintenance. According to the plain language of section 1910.147(b), those activities must be performed *on* the machines and equipment in order to constitute service and/or maintenance. For example, section 1910.147(b) states that "adjusting" machines and equipment constitutes service and/or maintenance. If a production employee adjusts a product while traversing through a machine, the production employee has not adjusted the machine. In fact, the production employee has not done anything to the machine. The production employee has simply adjusted the product. Because the production employee has simply adjusted the product, the production employee has engaged in normal production operations rather than servicing and/or maintenance.

The same would be true if the production employee simply removes the product as the product traverses through the machine. For example, in *Ohio Cellular Products Corp.*, 18 BNA OSHC 1203 (No. 97-523, 1997), an employee was fatally injured while removing polyethylene foam from a rotating mold arm. The administrative law judge concluded that the employee did not engage in service and/or maintenance; therefore, the LOTO standard did not apply. The administrative law judge explained that the employee did not make any "changes or adjustments" to the machine. The administrative law judge stated that the employee simply removed the product from the machine.

Unexpected Energization or Startup:

In the new LOTO compliance directive, OSHA contends that there is always a potential for "unexpected" energization or startup when a LOTO device is not affixed to an energy isolation device on a machine or piece of equipment. In other words, OSHA contends that *all* machines and equipment have the potential for "unexpected" energization or startup. This interpretation is in direct conflict, however, with a decision from the federal Occupational Safety and Health Review Commission ("Review Commission) in *General Motors Corp., Delco Chassis Div.*, 17 BNA OSHC 1217 (Nos. 91-2973, 91-3116, 91-3117, 1995); *aff'd.*, 89 F.3rd 313 (6th Cir. 1996). The Review Commission is a federal agency in charge of adjudicating safety and health workplace disputes between OSHA and private industry.

In *General Motors Corp.*, the Review Commission determined that if there is a potential for "unexpected" energization or startup of a machine or piece of equipment during service or maintenance work, the LOTO standard applies to the employer. If the LOTO standard applies to the employer, the employer is required, among other things, to affix a LOTO device to the energy isolating device on the machine or piece of equipment. The Review Commission concluded that warning devices on a machine or piece of equipment may provide sufficient notice to employees such that any energization or startup of the deactivated or de-energized machine or piece of equipment during service and/or maintenance work would not be "unexpected." If so, the

employer is not required, among other things, to affix a LOTO device to the energy isolating device on the machine or piece of equipment. The Sixth Circuit Court of Appeals affirmed the decision, holding that that the Review Commission's interpretation of section 1910.147(a)(1) is reasonable.

OSHA also contends that "unexpected energization or startup" exists even when the machine or piece of equipment is running at the time of an accident. In support of this contention, OSHA relies on a recent decision from the Review Commission in *Burkes Mechanical*, 21 BNA OSHA 2136 (No. 04-0475, 2007).

In *Burkes Mechanical*, the Review Commission stated:

> *GM-Delco* is easily distinguished from the instant case. The deactivated machines in *GM-Delco* had specific precautions designed to ensure employees had adequate notice to get out of the way before start-up occurred. Id. Unlike those machines, the fuel wood conveyor here was neither deactivated nor "designed and constructed" to eliminate unexpected energization. Rather, without providing notice to nearby workers, the running conveyor could have been stopped and restarted by simply pressing a button, and the accumulation of debris could have caused material to get caught underneath the belt, resulting in a stoppage. Moreover, the BMI laborers cleaning in the bark pit were positioned in such a way that the conveyor could have unexpectedly caught hold of their tools, clothing, or body parts—all types of hazards § 1910.147 was intended to eliminate.

Here, the Review Commission's interpretation of section 1910.147(a)(1) is unreasonable, to say the least. Indeed, the Review Commission's interpretation does not comport with the plain language of the standard. In this regard, section 1910.147(a)(1) states that the LOTO standard applies when, among other things, there is a potential for unexpected energization or startup of machines or equipment. There is no potential for *any*, much less *unexpected*, energization or startup if a machine or piece of equipment is running at the time of an accident. This type of activity is covered under Subpart O. Subpart O contains the machine guarding requirements for the general industry.

Moreover, section 1910.147(a)(1) does not state that machines or equipment must be deactivated or de-energized in order to determine whether there is potential for unexpected energization or startup. Nor can a reasonable inference be made as such from the plain language of the standard. Moreover, in *GM-Delco* the Review Commission did not conclude that section 1910.147(a)(1) requires machines or equipment to be deactivated or de-energized in order to determine whether there is potential for unexpected energization or startup. In that case, the Review Commission simply concluded that warning devices on a machine or piece of equipment may provide sufficient notice to employees such that any energization or startup of the deactivated or de-energized machine or piece of equipment during service and/or maintenance work would not be "unexpected."

The Application Provision of the LOTO Standard

The LOTO standard generally does not apply to an employer when service and/or maintenance work is being performed on machines and equipment during "normal production operations" pursuant to 29 C.F.R. § 1910.147(a)(2)(ii). Section 1910.147(a)(2)(ii) states, in relevant part:

Normal production operations are not covered by this standard (See Subpart O of this Part). Servicing and/or maintenance which take place during normal production operations are covered by this standard only if:

> (A) An employee is required to remove or bypass a guard or other safety device; or
>
> (B) An employee is required to place any part of his or her body into an area on a machine or piece of equipment where work is actually performed upon the material being processed (point of operation) or where an associated danger zone exists during a machine operating cycle.
>
> Note: Exception to paragraph (a)(2)(ii): Minor tool changes and adjustments, and other minor servicing activities, which take place during normal production operations, are not covered by this standard if they are routine, repetitive, and integral to the use of the equipment for production, provided that the work is performed using alternative measures which provide effective protection (See Subpart O of this Part).

Service and/or Maintenance Performed During Normal Production Operations:

In the new LOTO compliance directive, OSHA contends that if a machine or piece of equipment has a guard or guards protecting an employee from being injured while performing service and/or maintenance work during normal production operations, the LOTO standard does not apply to the employer pursuant to the first sentence of section 1910.147(a)(2)(ii). The first sentence of section 1910.147(a)(2)(ii) states: "Normal production operations are not covered by this standard (See Subpart O of this Part)."

This author agrees with the OSHA's conclusion that the LOTO standard does not apply to the employer, but for different reasoning. In this regard, if a machine or piece of equipment has a guard or guards protecting an employee from being injured while performing service and/or maintenance work, whether or not that work is being performed during "normal production operations," there is no potential for unexpected energization or startup of the machine or piece of equipment to injure the employee. Because there is no potential for unexpected energization or startup of the machine or piece of equipment to injure the employee, the LOTO standard does not apply to the employer pursuant to section 1910.147(a)(1), not section 1910.147(a)(2)(ii). Section 1910.147(a)(1) states, in relevant part, that the LOTO standard applies only when the unexpected energization or startup machines or equipment "could cause injury" to employees.

OSHA also contends that if employees who perform service and/or maintenance work during normal production operations "[r]emove or bypass machine guards or other safety devices, (2) [p]lace any part of their bodies in or near a machine's point of operation; or (3) [p]lace any part of their bodies in a danger zone associated with machine operations," the LOTO applies to the employer pursuant to section 1910.147(a)(2)(ii)(A) and (B). As such, the employer is required, among other things, to affix a LOTO device to the energy isolating device on the machine or piece of equipment.

This author disagrees with OSHA's interpretation of section 1910.147(a)(2)(ii)(A) and (B). In this regard, OSHA disregards critical language in section 1910.147(a)(2)(ii)(A) and (B). Indeed, section 1910.147(a)(2)(ii)(A) and (B) specifically state that these types of dangerous activities must be "required." If an employer does not "require" an employee to engage in these

dangerous activities during normal production operations, the LOTO standard does not apply. As such, the employer is not required, among other things, to affix a LOTO device to the energy isolating device on the machine or piece of equipment.

OSHA also contends that the LOTO standard does not apply to an employer if the employer can demonstrate that it meets all of the elements of the "minor servicing exception" in section 1910.147(a)(2)(ii). OSHA explains that in order for an employer to meet its burden of proving the minor servicing exception, the employer must demonstrate that (1) minor servicing activities take place during normal production operations, (2) the minor servicing activities are routine, repetitive, and integral to the use of the machine or piece of equipment, and that (3) the work is being performed using alternative measures providing effective protection (see Subpart O of this Part).

When considering OSHA's interpretation of the first sentence in section 1910.147(a)(2)(ii), OSHA's interpretation of the "minor servicing exception" in section 1910.147(a)(2)(ii) is perplexing. As noted above, OSHA stated in the new LOTO compliance directive that if a machine or piece of equipment has a guard or guards protecting an employee from being injured while performing service and/or maintenance work during normal production operations, the LOTO standard does not apply to the employer pursuant to the first sentence of section 1910.147(a)(2)(ii). This would be true whether an employee is engaged in "major" or "minor" servicing and/or maintenance activities. Because most employers rely on traditional guarding devices to protect employees from hazards during servicing and/or maintenance activities, OSHA's interpretation of the first sentence in section 1910.147(a)(2)(ii) essentially renders the "minor servicing exception" of limited value to the regulated community.

An employer can always, of course, rely on an alternative measure other than a traditional guarding device in order to meet the "minor servicing exception." This would include things such as interlocks, presence sensing devices, and extension tools. By relying on an alternative measure other than a traditional guarding device, an employer will be faced with the esoteric question, however, of whether their employees are engaged in "minor" or "major" servicing and/or maintenance activities. During enforcement litigation, an employer has the burden of proving that their employees were engaged in "minor" servicing and/or maintenance activities in order to rely successfully on the minor servicing exception. From an enforcement litigation standpoint, an employer is in a better position by simply guarding the potential hazards that may arise during service and/or maintenance activities.

This author recognizes, however, that there may be situations in which an employee is required to remove a traditional guard to perform service and/or maintenance activities. Under these circumstances, employers are forced to rely on an alternative measure other than a traditional guarding device, such as an extension tool in order to avoid locking out the machine or piece of equipment. When relying on an alternative measure other than a traditional guarding device, employers must be prepared to show that employees are engaged in minor servicing activities in order to avoid locking or tagging out the machines or equipment.

Conclusion

Through these interpretations, OSHA is attempting to broaden the application of the LOTO standard significantly. If left unchallenged, the OSHA interpretations will pose a tremendous economic burden on the regulated community. The regulated community will have to provide

more training and lockout/tagout devices to their employees. The regulated community will also lose a significant amount of production time locking or tagging out machines and equipment.