



**Occupational
Safety and Health
Administration**

www.osha.gov

OSHA Recordkeeping Handbook

**The Regulation and Related
Interpretations for Recording
and Reporting Occupational
Injuries and Illnesses**



Employers are responsible for providing a safe and healthful workplace for their employees. OSHA's role is to assure the safety and health of America's workers by setting and enforcing standards; providing training, outreach and education; establishing partnerships; and encouraging continual improvement in workplace safety and health. For more information, visit www.osha.gov.

This handbook provides a general overview of a particular topic related to OSHA regulation. It does not alter or determine compliance responsibilities in OSHA standards or the *Occupational Safety and Health Act of 1970*. Because interpretations and enforcement policy may change over time, you should consult current OSHA administrative interpretations and decisions by the Occupational Safety and Health Review Commission and the Courts for additional guidance on OSHA compliance requirements.

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OSHA Recordkeeping Handbook

**The Regulation and Related Interpretations for Recording
and Reporting Occupational Injuries and Illnesses**

**Occupational Safety and Health Administration
U.S. Department of Labor
Directorate of Evaluation and Analysis
Office of Statistical Analysis**

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**Occupational Safety
and Health Administration**

U.S. Department of Labor

www.osha.gov

Introduction

This OSHA Web-based Recordkeeping Handbook is a compendium of existing agency-approved recordkeeping materials, including the regulatory text from the 2001 final rule on Occupational Injury and Illness Recording and Reporting Requirements (“the Recordkeeping rule”) and relevant explanatory excerpts from the preamble to the rule; chapter 5 of the agency’s Recordkeeping Policies and Procedures Manual; Frequently Asked Questions (FAQs); and OSHA letters of interpretation. This Web-based handbook is intended to be a resource for businesses of all sizes, as well as OSHA’s compliance safety and health officers, compliance assistance specialists, and OSHA State-plans. The information in the handbook is accessible by

means of a user-friendly search engine that relies on simple point-and-click technology. The handbook is designed to answer recordkeeping questions raised by employers, employees, and members of the OSHA family who are familiar with the basic requirements of the rule but wish to obtain additional information on specific recordkeeping issues. Users will also find the handbook useful as a research and training tool. The handbook can be accessed through the link below, which directs users to the file. Because the handbook is Web-based, it will be possible to update letters of interpretation and add FAQs to the file quickly as new questions about the rule are raised.

Preface

The Occupational Safety and Health Act of 1970 (OSH Act) requires covered employers to prepare and maintain records of occupational injuries and illnesses. The Occupational Safety and Health Administration (OSHA) in the U.S. Department of Labor is responsible for administering the recordkeeping system established by the Act. The OSH Act and recordkeeping regulations in 29 CFR 1904 and 1952 provide specific recording and reporting requirements which comprise the framework for the nationwide occupational safety and health recording system.

Under this system, it is essential that data recorded by employers be uniform and accurate to assure the consistency and validity of the statistical data which is used by OSHA for many purposes, including inspection targeting, performance measurement under the *Government Performance and Results Act* (GPRA), standards development, resource allocation, Voluntary Protection Program (VPP) eligibility, and "low-hazard" industry exemptions. The data also aid employers, employees and compliance officers in analyzing the safety and health environment at the employer's establishment and is the source of information for the OSHA Data Initiative (ODI) and the Bureau of Labor Statistics' (BLS) Annual Survey.

In January 2001, OSHA issued a final rule revising the § 1904 and § 1952 Occupational Injury and Illness Recording and Reporting Requirements (Recordkeeping) regulations, the first revision since 1978. The goals of the revision were to simplify the system, clarify ongoing concepts, produce more useful information and better utilize modern technology. The new regulation took effect on January 1, 2002. As part of OSHA's extended outreach efforts, the agency also produced a *Recordkeeping Policies and Procedures Manual* (CPL 2-0.135, December 30, 2004), which contained, along with other related information, a variety of Frequently Asked Questions. In addition, in 2002, a detailed Injury and Illness Recordkeeping website was established containing links to helpful resources related to Recordkeeping, including training presentations, applicable *Federal*

Register notices, and OSHA's recordkeeping-related Letters of Interpretation. (See www.osha.gov/recordkeeping/index.html).

This publication brings together relevant information from the Recordkeeping rule, the policies and procedures manual and the website. It is organized by regulatory section and contains the specific final regulatory language, selected excerpts from the relevant OSHA decision analysis contained in the preamble to the final rule, along with recordkeeping-related Frequently Asked Questions and OSHA's enforcement guidance presented in the agency's Letters of Interpretation. The user will find this information useful in understanding the Recordkeeping requirements and will be able to easily locate a variety of specific and necessary information pertaining to each section of the rule.

The information included here deals only with the requirements of the *Occupational Safety and Health Act of 1970* and Parts 1904 and 1952 of Title 29, *Code of Federal Regulations*, for recording and reporting occupational injuries and illnesses. Some employers may be subject to additional recordkeeping and reporting requirements not covered in this document. Many specific OSHA standards and regulations have additional requirements for the maintenance and retention of records for medical surveillance, exposure monitoring, inspections, and other activities and incidents relevant to occupational safety and health, and for the reporting of certain information to employees and to OSHA. For information on these requirements, which are not covered in this publication, employers should refer directly to the OSHA standards or regulations, consult OSHA's website for additional information (www.osha.gov), or contact their OSHA regional office or participating State agency.

For recordkeeping and reporting questions not covered in this publication, employers may contact their OSHA regional office or the participating State agency serving their jurisdiction.

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Recordkeeping Handbook Roadmap

This roadmap will assist readers in locating regulatory language, decision analyses, frequently asked questions and enforcement guidance letters concerning sections 1904 and 1952 of the OSHA Recordkeeping regulations.

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See **1904.2**

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State-Plan State Requirements:

See **1952.4**

Section 1904.0

Purpose

(66 FR 6122, Jan. 19, 2001)

REGULATION: Section 1904.0

Subpart A – Purpose (66 FR 6122, Jan. 19, 2001)

Section 1904.0

The purpose of this rule (Part 1904) is to require employers to record and report work-related fatalities, injuries and illnesses.

Note to Section 1904.0: Recording or reporting a work-related injury, illness, or fatality does not mean that the employer or employee was at fault, that an OSHA rule has been violated, or that the employee is eligible for workers' compensation or other benefits.

PREAMBLE DISCUSSION: Section 1904.0

(66 FR 5933-5935, Jan. 19, 2001)

The following are selected excerpts from the preamble to the Occupational Injury and Illness Recording and Reporting Requirements, the Recordkeeping rule (66 FR 5916, 29 CFR Parts 1904 and 1952). These excerpts represent some of the key discussions related to the final rule (66 FR 6122, 29 CFR Parts 1904 and 1952).

Subpart A. Purpose

The Purpose section of the final rule explains why OSHA is promulgating this rule. The Purpose section contains no regulatory requirements and is intended merely to provide information. A Note to this section informs employers and employees that recording a case on the OSHA recordkeeping forms does not indicate either that the employer or the employee was at fault in the incident or that an OSHA rule has been violated. Recording an injury or illness on the Log also does not, in and of itself, indicate that the case qualifies for workers' compensation or other benefits. Although any specific work-related injury or illness may involve some or all of these factors, the record made of that injury or illness on the OSHA recordkeeping forms only shows three things: (1) that an injury or illness has occurred; (2) that the employer has determined that the case is work-related (using OSHA's definition of that term); and (3) that the case is non-minor, *i.e.*, that it meets one or more of the OSHA injury and illness recording criteria....

Many cases that are recorded in the OSHA system are also compensable under the State workers' compensation system, but many others are not. However, the two systems have different purposes and scopes. The OSHA recordkeeping system is intended to collect, compile and analyze uniform and consistent nationwide data on occupational injuries and illnesses. The workers' compensation system, in contrast, is not designed primarily to generate and collect data but is intended primarily to provide medical coverage and compensation for workers who are killed, injured or made ill at work, and varies in coverage from one State to another....

As a result of these differences between the two systems, recording a case does not mean that the case is compensable, or vice versa. When an injury or illness occurs to an employee, the employer must independently analyze the case in light of both the OSHA recording criteria and the requirements of the State workers' compensation system to determine whether the case is recordable or compensable, or both....

FREQUENTLY ASKED QUESTIONS: Section 1904.0 (OSHA Instruction, CPL 2-0.135, Chap. 5)

Section 1904.0 Purpose

Question 0-1. *Why are employers required to keep records of work-related injuries and illnesses?*

The OSH Act of 1970 requires the Secretary of Labor to produce regulations that require employers to

keep records of occupational deaths, injuries, and illnesses. The records are used for several purposes.

Injury and illness statistics are used by OSHA. OSHA collects data through the OSHA Data Initiative (ODI) to help direct its programs and measure its

own performance. Inspectors also use the data during inspections to help direct their efforts to the hazards that are hurting workers.

The records are also used by employers and employees to implement safety and health programs at individual workplaces. Analysis of the data is a widely recognized method for discovering workplace safety and health problems and for tracking progress in solving those problems.

The records provide the base data for the BLS Annual Survey of Occupational Injuries and Illnesses, the Nation's primary source of occupational injury and illness data.

Question 0-2. *What is the effect of workers' compensation reports on the OSHA records?*

The purpose section of the rule includes a note to make it clear that recording an injury or illness neither affects a person's entitlement to workers' compensation nor proves a violation of an OSHA rule. The rules for compensability under workers' compensation differ from state to state and do not have any effect on whether or not a case needs to be recorded on the OSHA 300 Log. Many cases will be OSHA recordable and compensable under workers' compensation. However, some cases will be compensable but not OSHA recordable, and some cases will be OSHA recordable but not compensable under workers' compensation.

LETTERS OF INTERPRETATION: Section 1904.0

Section 1904.0 Purpose

This section will be developed as letters of interpretation become available.

Section 1904.1

Partial exemption for employers with 10 or fewer employees

(66 FR 6122, Jan. 19, 2001)

REGULATION: Section 1904.1

Subpart B – Scope (66 FR 6122, Jan. 19, 2001)

Note to Subpart B: All employers covered by the Occupational Safety and Health Act (OSH Act) are covered by these Part 1904 regulations. However, most employers do not have to keep OSHA injury and illness records unless OSHA or the Bureau of Labor Statistics (BLS) informs them in writing that they must keep records. For example, employers with 10 or fewer employees and business establishments in certain industry classifications are partially exempt from keeping OSHA injury and illness records.

Section 1904.1 Partial exemption for employers with 10 or fewer employees

(a) Basic requirement.

(1) If your company had ten (10) or fewer employees at all times during the last calendar year, you do not need to keep OSHA injury and illness records unless OSHA or the BLS informs you in writing that you must keep records under Section 1904.41 or Section 1904.42. However, as required by Section 1904.39, all employers covered by the OSH Act must report to OSHA any workplace incident that results in a fatality or the hospitalization of three or more employees.

(2) If your company had more than ten (10) employees at any time during the last calendar year, you must keep OSHA injury and illness records unless your establishment is classified as a partially

exempt industry under Section 1904.2.

(b) Implementation.

(1) *Is the partial exemption for size based on the size of my entire company or on the size of an individual business establishment?*

The partial exemption for size is based on the number of employees in the entire company.

(2) *How do I determine the size of my company to find out if I qualify for the partial exemption for size?*

To determine if you are exempt because of size, you need to determine your company's peak employment during the last calendar year. If you had no more than 10 employees at any time in the last calendar year, your company qualifies for the partial exemption for size.

PREAMBLE DISCUSSION: Section 1904.1

(66 FR 5935-5939, Jan. 19, 2001)

The following are selected excerpts from the preamble to the Occupational Injury and Illness Recording and Reporting Requirements, the Recordkeeping rule (66 FR 5916, 29 CFR Parts 1904 and 1952). These excerpts represent some of the key discussions related to the final rule (66 FR 6122, 29 CFR Parts 1904 and 1952).

Section 1904.1 Partial exemption for employers with 10 or fewer employees

The Size-Based Exemption in the Former Rule

The original OSHA injury and illness recording and reporting rule issued in July 1971 required all employers covered by the OSH Act to maintain injury and illness records. In October 1972, an exemption from most of the recordkeeping requirements was put in place for employers with seven or fewer employees. In 1977, OSHA amended the rule to exempt employers with 10 or fewer employees, and that exemption has continued in effect to this day....

The Size-Based Exemption in the Final Rule

...Under the final rule (and the former rule), an employer in any industry who employed no more than 10 employees at any time during the preceding calendar year is not required to maintain OSHA records of occupational illnesses and injuries during the current year unless requested to do so in writing by OSHA (under Section 1904.41) or the BLS (under Section 1904.42). If an employer employed 11 or more people at a given time during the year, however, that employer is not eligible for the size-based partial exemption....

... [U]nder the 10 or fewer employee partial exemption threshold, more than 80% of employers in OSHA's jurisdiction are exempted from routinely keeping records....

...[T]he final rule clarifies that the 10 or fewer size exemption is applicable only if the employer had fewer than 11 employees at all times during the previous calendar year. Thus, if an employer employs 11 or more people at any given time during that year, the employer is not eligible for the small employer exemption in the following year. This total includes all workers employed by the business. All individuals who are "employees" under the OSH Act are counted in the total; the count includes all full time, part time, temporary, and seasonal employees. For businesses that are sole proprietorships or partnerships, the owners and partners would not be considered employees and would not be counted. Similarly, for family farms, family members are not counted as

employees. However, in a corporation, corporate officers who receive payment for their services are considered employees. [See Section 1904.31, Covered Employees.]

Consistent with the former rule, the final rule applies the size exemption based on the total number of employees in the firm, rather than the number of employees at any particular location or establishment...because the resources available in a given business depend on the size of the firm as a whole, not on the size of individual establishments owned by the firm. In addition, the analysis of injury records should be of value to the firm as a whole, regardless of the size of individual establishments. Further, an exemption based on individual establishments would be difficult to administer, especially in cases where an individual employee, such as a maintenance worker, regularly reports to work at several establishments.

FREQUENTLY ASKED QUESTIONS: Section 1904.1 (OSHA Instruction, CPL 2-0.135, Chap. 5)

Section 1904.1 Partial exemption for employers with 10 or fewer employees

This section will be developed as questions and answers become available.

LETTERS OF INTERPRETATION: Section 1904.1

Section 1904.1 Partial exemption for employers with 10 or fewer employees

This section will be developed as letters of interpretation become available.

Section 1904.2 Partial exemption for establishments in certain industries

(66 FR 6122, Jan. 19, 2001)

REGULATION: Section 1904.2

Subpart B – Scope (66 FR 6122, Jan. 19, 2001)

Section 1904.2 Partial exemption for establishments in certain industries

(a) Basic requirement.

(1) If your business establishment is classified in a specific low hazard retail, service, finance, insurance or real estate industry listed in Appendix A to this Subpart B, you do not need to keep OSHA injury and illness records unless the government asks you to keep the records under Section 1904.41 or Section 1904.42. However, all employers must report to OSHA any workplace incident that results in a fatality or the hospitalization of three or more employees (see Section 1904.39).

(2) If one or more of your company's establishments are classified in a non-exempt industry, you must keep OSHA injury and illness records for all of such establishments unless your company is partially exempted because of size under Section 1904.1.

(b) Implementation.

(1) *Does the partial industry classification exemption apply only to business establishments in the retail, services, finance, insurance or real estate industries (SICs 52-89)?*

Yes, business establishments classified in agriculture; mining; construction; manufacturing; transportation; communication; electric, gas and sanitary services; or wholesale trade are not eligible for the partial industry classification exemption.

(2) *Is the partial industry classification exemption based on the industry classification of my entire com-*

pany or on the classification of individual business establishments operated by my company?

The partial industry classification exemption applies to individual business establishments. If a company has several business establishments engaged in different classes of business activities, some of the company's establishments may be required to keep records, while others may be exempt.

(3) *How do I determine the Standard Industrial Classification code for my company or for individual establishments?*

You determine your Standard Industrial Classification (SIC) code by using the Standard Industrial Classification Manual, Executive Office of the President, Office of Management and Budget. You may contact your nearest OSHA office or State agency for help in determining your SIC.

Non-Mandatory Appendix A to Subpart B – Partially Exempt Industries

Employers are not required to keep OSHA injury and illness records for any establishment classified in the following Standard Industrial Classification (SIC) codes, unless they are asked in writing to do so by OSHA, the Bureau of Labor Statistics (BLS), or a state agency operating under the authority of OSHA or the BLS. All employers, including those partially exempted by reason of company size or industry classification, must report to OSHA any workplace incident that results in a fatality or the hospitalization of three or more employees (see Section 1904.39).

Appendix A -- Partially Exempt Industries

SIC code	Industry description	SIC code	Industry description
525	Hardware Stores	573	Radio, Television, & Computer Stores
542	Meat and Fish Markets	58	Eating and Drinking Places
544	Candy, Nut, and Confectionery Stores	591	Drug Stores and Proprietary Stores
545	Dairy Products Stores	592	Liquor Stores
546	Retail Bakeries	594	Miscellaneous Shopping Goods Stores
549	Miscellaneous Food Stores	599	Retail Stores, Not Elsewhere Classified
551	New and Used Car Dealers	60	Depository Institutions (banks & savings institutions)
552	Used Car Dealers	61	Nondepository Institutions
554	Gasoline Service Stations	62	Security and Commodity Brokers
557	Motorcycle Dealers	63	Insurance Carriers
56	Apparel and Accessory Stores		

SIC code	Industry description	SIC code	Industry description
64	Insurance Agents, Brokers, & Services	793	Bowling Centers
653	Real Estate Agents and Managers	801	Offices & Clinics Of Doctors Of Medicine
654	Title Abstract Offices	802	Offices and Clinics Of Dentists
67	Holding and Other Investment Offices	803	Offices & Clinics Of Doctors Of Osteopathy
722	Photographic Studios, Portrait	804	Offices & Clinics Of Other Health Practitioners
723	Beauty Shops	807	Medical and Dental Laboratories
724	Barber Shops	809	Health and Allied Services, Not Elsewhere Classified
725	Shoe Repair and Shoeshine Parlors	81	Legal Services
726	Funeral Services and Crematories	82	Educational Services (schools, colleges, universities and libraries)
729	Miscellaneous Personal Services	832	Individual and Family Services
731	Advertising Services	835	Child Day Care Services
732	Credit Reporting and Collection Services	839	Social Services, Not Elsewhere Classified
733	Mailing, Reproduction, & Stenographic Services	841	Museums and Art Galleries
737	Computer and Data Processing Services	86	Membership Organizations
738	Miscellaneous Business Services	87	Engineering, Accounting, Research, Management, and Related Services
764	Reupholstery and Furniture Repair	899	Services, not elsewhere classified
78	Motion Picture		
791	Dance Studios, Schools, and Halls		
792	Producers, Orchestras, Entertainers		

PREAMBLE DISCUSSION: Section 1904.2

(66 FR 5939-5945, Jan. 19, 2001)

The following are selected excerpts from the preamble to the Occupational Injury and Illness Recording and Reporting Requirements, the Recordkeeping rule (66 FR 5916, 29 CFR Parts 1904 and 1952). These excerpts represent some of the key discussions related to the final rule (66 FR 6122, 29 CFR Parts 1904 and 1952).

Section 1904.2 Partial exemption for establishments in certain industries

Section 1904.2 of the final rule partially exempts employers with establishments classified in certain lower-hazard industries. Lower-hazard industries are those Standard Industrial Classification (SIC) code industries within SICs 52-89 that have an average Days Away, Restricted, or Transferred (DART) rate at or below 75% of the national average DART rate.

You determine your Standard Industrial Classification (SIC) code by using the Standard Industrial Classification Manual, Executive Office of the President, Office of Management and Budget. You may contact your nearest OSHA office or State agency for help in determining your SIC.

Employers with establishments in those industry sectors shown in Appendix A are not required routinely to keep OSHA records for their establishments. They must, however, keep records if requested to do so by the Bureau of Labor Statistics in connection with its Annual Survey (section 1904.42) or by OSHA in connection with its Data Initiative (section 1904.41). In addition, all employers covered by the

OSH Act must report a work-related fatality, or an accident that results in the hospitalization of three or more employees, to OSHA within 8 hours (section 1904.39).

In 1982, OSHA exempted establishments in a number of service, finance and retail industries from the duty to regularly maintain the OSHA Log and Incident Report (47 FR 57699 (Dec. 28, 1982)). This industry exemption to the Part 1904 rule was intended to “reduce paperwork burden on employers without compromising worker safety and health.” ...

Although the 1982 **Federal Register** notice discussed the possibility of revising the exempt industry list on a routine basis, the list of partially exempt industries compiled in 1982 has remained unchanged until this revision of the Part 1904 rule....

...[N]on-mandatory Appendix A of the final rule identifies industries for exemption at the 3-digit SIC code level. Although this approach does make the list of exempt industries longer and more detailed, it also targets the exemption more effectively than did the former rule’s list. For example, the final rule

does not exempt firms in many of the more hazardous 3-digit SIC industries that are embedded within lower rate 2-digit SIC industries. It does, however, exempt firms in relatively low-hazard 3-digit SIC industries, even though they are classified in higher hazard 2-digit SIC industries. Where Days Away, Restricted, or Transferred (DART, formerly LWDI) rate calculations exempt all of the 3-digit SIC industries within a given 2-digit industry, the exempt industry list in Appendix A displays only the 2-digit SIC classification. This approach merely provides a shorter, simpler list.

For multi-establishment firms, the industry exemption is based on the SIC code of each establishment, rather than the industrial classification of a firm as a whole. For example, some larger corporations have establishments that engage in different business activities. Where this is the case, each establishment could fall into a different SIC code, based on its business activity. The Standard Industrial Classification manual states that the establishment, rather than the firm, is the appropriate unit for determining the SIC code. Thus, depending on the SIC code of the establishment, one establishment of a firm may be exempt from routine recordkeeping under Part 1904, while another establishment in the same company may not be exempt....

OSHA has evaluated other approaches but has decided that the 3-digit DART rate method is both simpler and more equitable than the former 2-digit method. By exempting lower-hazard industry sectors within SICs 52-89, OSHA hopes both to concentrate its recordkeeping requirements in sectors that will provide the most useful data and to minimize paperwork burden. No exemption method is perfect: any method that exempts broad classes of employers from recordkeeping obligations will exempt some more hazardous workplaces and cover some less hazardous workplaces. OSHA has attempted to minimize both of these problems by using the most current injury and illness statistics available, and by applying them to a more detailed industry level within the retail, financial and service sectors than was formerly the case. OSHA has also limited the scope of the exemptions by using an exemption threshold that is well below the national average, including only those industries that have average DART rates that are at or below 75% of the national average DART rate. The rule also limits the exempt industries to the retail, financial and service

sectors, which are generally less hazardous than the manufacturing industry sector....

The final rule makes clear that, when a “leased” or “temporary” employee is supervised on a day-to-day basis by the using firm, the using firm must enter that employee’s injuries and illnesses on the using firm’s establishment Log and other records. Injuries and illnesses occurring to a given employee should only be recorded once, either by the temporary staffing firm or the using firm, depending on which firm actually supervises the temporary employees on a day-to-day basis. (see the discussion for Section 1904.31, Covered employees, for an in-depth explanation of these requirements.)...

After a review of the recent BLS data, OSHA’s own experience, and the record of this rulemaking, OSHA has decided that it is appropriate to require firms in industries within the SIC 01 through 51 codes to comply with OSHA’s requirements to keep records. Thus, the final rule, like the proposed rule and the rule published in 1982, does not exempt firms with more than 10 employees in the industry divisions of agriculture, mining, construction, manufacturing, wholesale trade, transportation and public utilities (SICs 01-52) from routine recordkeeping.

Although OSHA no longer restricts its inspection targeting schemes to employers in these SICs, these industries have traditionally been, and continue to be, the focus of many of the Agency’s enforcement programs. OSHA believes that it is important for larger employers (*i.e.*, those with more than 10 employees) in these industries to continue to collect and maintain injury and illness records for use by the employer, employees and the government. As noted in the comments there is a wide variation in injury/illness rates among establishments classified in these industries. Further, as a whole, these industries continue to have injury and illness rates that are generally higher than the private sector average and will thus benefit from the information that OSHA-mandated records can provide about safety and health conditions in the workplace. In 1998, the lost workday injury and illness rate for the entire private sector was 3.1. As can be seen in the following table of lost workday injury and illness rates by industry division, all of the covered divisions exceeded 75% of the national average LWDI rate (2.325) for the private sector as a whole, while the exempted industry divisions had substantially lower rates.

Industry Sector	1998 Lost Workday Injury and Illness Rate
Agriculture, forestry and fishing (SIC 01)	3.9
Mining (SIC 10-14)	2.9
Construction (SIC 15-17)	4.0
Manufacturing (SIC 20-39)	4.7
Transportation, communications, electric, gas and sanitary services (SIC 40-49)	4.3
Wholesale trade (SIC 50 & 51)	3.3
Retail trade (SIC 52-59)	2.7
Finance, Insurance & Real Estate (SIC 60-67)	0.7
Services (SIC 70-87)	2.4
(U.S. Department of Labor Press Release USDL 98-494, December 16, 1999)	

...The Agency finds that continuing, and improving on, the Agency's longstanding approach of partially exempting those industries in SIC codes 52-89 that have DART rates, based on 3 years of BLS data, below 75% of the private-sector average strikes the appropriate balance between the need for injury and illness information on the one hand, and the paperwork burdens created by recording obligations, on the other. The BLS Annual Survey will, of course, continue to provide national job-related statistics for all industries and all sizes of businesses. As it has done in the past, the BLS will sample employers in the partially exempt industries and ask each sampled employer to keep OSHA records for one year. In the following year, BLS will collect the records to generate estimates of occupational injury and illness for firms in the partially exempt industries and size classes, and combine those data with data for other industries to generate estimates for the entire U.S. private sector. These procedures ensure the integrity of the national statistics on occupational safety and health.

The list of partially exempted industry sectors in this rule is based on the current (1987) revision of the SIC manual. The Office of Management and Budget (OMB) is charged with maintaining and revising the system of industrial classification that will replace the SIC. The new system is used by U.S. statistical agencies (including the BLS). Under the direction of OMB, the U.S. government has adopted a new, comprehensive system of industrial classification that will replace the SIC. The new system is called the North American Industrial Classification System (NAICS). NAICS will harmonize the U.S. classification system with those of Canada and Mexico and make it easier to compare various economic and labor statistics among the three countries....

Although the NAIC industry classification system has been formally adopted by the United States, the individual U.S. statistical agencies (including the BLS) are still converting their statistical systems to reflect the new codes and have not begun to publish statistics using the new industry classifications. The new system will be phased into the nation's various statistical systems over the next several years. The BLS does not expect to publish the first occupational injury and illness rates under the new system until the reference year 2003. Given the lag time between the end of the year and the publication of the statistics, data for a full three-year period will not be available before December of 2006.

Because data to revise the Part 1904 industry exemption based on the NAIC system will not be available for another five years, OSHA has decided to update the industry exemption list now based on the most recent SIC-based information available from BLS for the years 1996, 1997 and 1998. OSHA will conduct a future rulemaking to update the industry classifications to the NAIC system when BLS publishes injury and illness data that can be used to make appropriate industry-by-industry decisions....

OSHA agrees with those commenters who favored regular updating of the SIC code exemption list. For the list to focus Agency resources most effectively on the most hazardous industries, it must be up-to-date. Industries that are successful in lowering their rates to levels below the exemption threshold should be exempted, while those whose rates rise sufficiently to exceed the criterion should receive additional attention. Unfortunately, the change in industry coding systems from the Standard Industrial Classification (SIC) system to the North American Industry Classification (NAIC) system will require a future rulemaking to shift to that system. Therefore, there is no value in adding an updating mechanism at this time. The automatic updating issue will be addressed in the same future rulemaking that addresses the NAIC system conversion.

Partial Exemptions for Employers Under the Jurisdiction of OSHA-Approved State Occupational Safety and Health Plans

...For those States with OSHA-approved State plans, the state is generally required to adopt Federal OSHA rules, or a State rule that is at least as effective as the Federal OSHA rule. States with approved plans do not need to exempt employers from recordkeeping, either by employer size or by industry classification, as the final Federal OSHA rule does, although they

may choose to do so. For example, States with approved plans may require records from a wider universe of employers than Federal OSHA does. These States cannot exempt more industries or

employers than Federal OSHA does, however, because doing so would result in a State rule that is not as effective as the Federal rule.

FREQUENTLY ASKED QUESTIONS: Section 1904.2 (OSHA Instruction, CPL 2-0.135, Chap. 5)
Section 1904.2 Partial exemption for establishments in certain industries

Question 2-1. How can I get help to find my SIC Code and determine if I'm partially exempt from the recordkeeping rule?

You can access the statistics section of OSHA's internet home page, at <http://www.osha.gov/oshstats/>. Go to the website and choose SIC Manual and follow the directions. If you still cannot determine your SIC code, you can call an OSHA area office, or, if you are in a state with an OSHA-approved state plan, call your State Plan office. See the OSHA Office Directory.

Question 2-2. Do States with OSHA-approved State plans have the same industry exemptions as Federal OSHA?

States with OSHA-approved plans may require employers to keep records for the State, even though those employers are within an industry exempted by the Federal rule.

Question 2-3. Do professional sports teams qualify for the partial industry exemption in section 1904.2?

No. Only those industry classifications listed in Appendix A to Subpart B qualify for the partial industry exemption in section 1904.2. Professional sports teams are classified under Standard Industrial Classification (SIC) code 794, which is not one of the listed exempt classifications.

LETTERS OF INTERPRETATION: Section 1904.2

Section 1904.2 Partial exemption for establishments in certain industries

This section will be developed as letters of interpretation become available.

Section 1904.3

Keeping records for more than one agency

(66 FR 6123, Jan. 19, 2001)

REGULATION: Section 1904.3

Subpart B – Scope (66 FR 6122, Jan. 19, 2001)

Section 1904.3 Keeping records for more than one agency

If you create records to comply with another government agency's injury and illness recordkeeping requirements, OSHA will consider those records as meeting OSHA's Part 1904 recordkeeping requirements if OSHA accepts the other agency's records

under a memorandum of understanding with that agency, or if the other agency's records contain the same information as this Part 1904 requires you to record. You may contact your nearest OSHA office or State agency for help in determining whether your records meet OSHA's requirements.

PREAMBLE DISCUSSION: Section 1904.3

(66 FR 5945, Jan. 19, 2001)

The following are selected excerpts from the preamble to the Occupational Injury and Illness Recording and Reporting Requirements, the Recordkeeping rule (66 FR 5916, 29 CFR Parts 1904 and 1952). These excerpts represent some of the key discussions related to the final rule (66 FR 6122, 29 CFR Parts 1904 and 1952).

Section 1904.3 Recordkeeping under the requirements of other Federal agencies

Section 1904.3 of the final rule provides guidance for employers who are subject to the occupational injury and illness recording and reporting requirements of other Federal agencies. Several other Federal agencies have similar requirements, such as the Mine Safety and Health Administration (MSHA), the Department of Energy (DOE), and the Federal Railroad Administration (FRA). The final rule at sec-

tion 1904.3 tells the employer that OSHA will accept these records in place of the employer's Part 1904 records under two circumstances: (1) if OSHA has entered into a memorandum of understanding (MOU) with that agency that specifically accepts the other agency's records, the employer may use them in place of the OSHA records, or (2) if the other agency's records include the same information required by Part 1904, OSHA would consider them an acceptable substitute.

FREQUENTLY ASKED QUESTIONS: Section 1904.3 (OSHA Instruction, CPL 2-0.135, Chap. 5)

Section 1904.3 Keeping records for more than one agency

This section will be developed as questions and answers become available.

LETTERS OF INTERPRETATION: Section 1904.3

Section 1904.3 Keeping records for more than one agency

This section will be developed as letters of interpretation become available.

Section 1904.4 Recording criteria

(66 FR 6123, Jan. 19, 2001)

REGULATION: Section 1904.4

Subpart C – Recordkeeping Forms and Recording Criteria (66 FR 6123, Jan. 19, 2001)

Note to Subpart C: This Subpart describes the work-related injuries and illnesses that an employer must enter into the OSHA records and explains the OSHA forms that employers must use to record work-related fatalities, injuries, and illnesses.

Section 1904.4 Recording criteria

(a) Basic requirement.

Each employer required by this Part to keep records of fatalities, injuries, and illnesses must record each fatality, injury and illness that:

- (1) Is work-related; and
- (2) Is a new case; and
- (3) Meets one or more of the general recording criteria of Section 1904.7 or the application to specific cases of Section 1904.8 through Section 1904.11.

(b) Implementation.

(1) What sections of this rule describe recording criteria for recording work-related injuries and illnesses?

The table below indicates which sections of the rule address each topic.

(i) Determination of work-relatedness. See Section 1904.5.

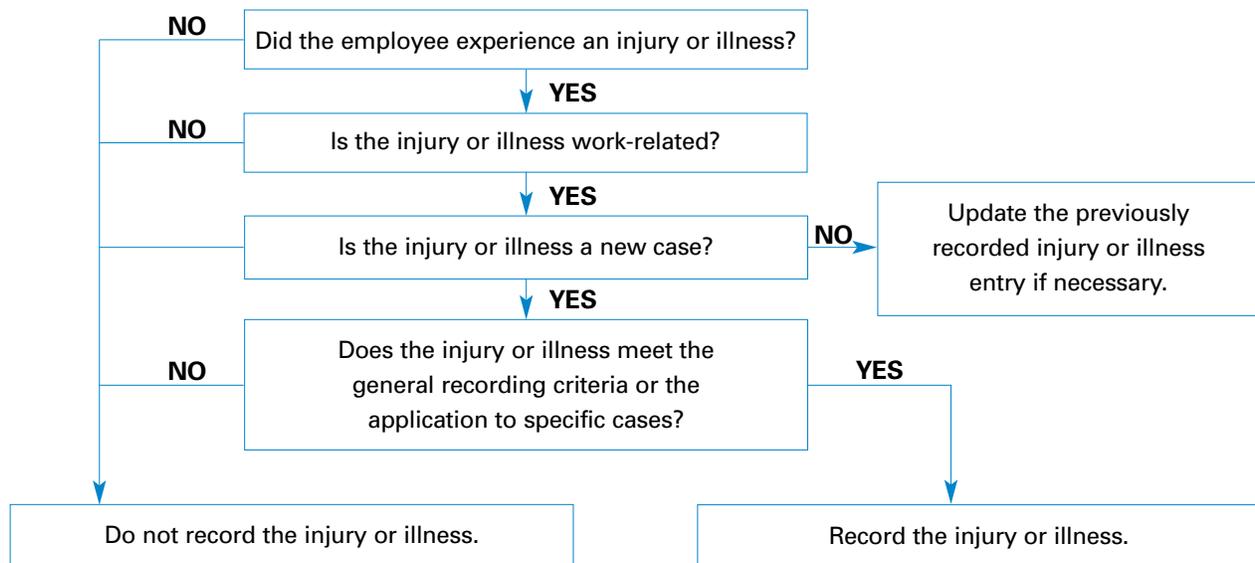
(ii) Determination of a new case. See Section 1904.6.

(iii) General recording criteria. See Section 1904.7.

(iv) Additional criteria. (Needlestick and sharps injury cases, tuberculosis cases, hearing loss cases, medical removal cases, and musculoskeletal disorder cases). See Section 1904.8 through Section 1904.11.

(2) How do I decide whether a particular injury or illness is recordable?

The decision tree for recording work-related injuries and illnesses below shows the steps involved in making this determination.



PREAMBLE DISCUSSION: Section 1904.4

(66 FR 5945-5946, Jan. 19, 2001)

The following are selected excerpts from the preamble to the Occupational Injury and Illness Recording and Reporting Requirements, the Recordkeeping rule (66 FR 5916, 29 CFR Parts 1904 and 1952). These excerpts represent some of the key discussions related to the final rule (66 FR 6122, 29 CFR Parts 1904 and 1952).

Section 1904.4 Recording Criteria

Section 1904.4 of the final rule contains provisions mandating the recording of work-related injuries and illnesses that must be entered on the OSHA 300 (Log) and 301 (Incident Report) forms. It sets out the recording requirements that employers are required to follow in recording cases.

Paragraph 1904.4(a) of the final rule mandates that each employer who is required by OSHA to keep records must record each fatality, injury or illness that is work-related, is a new case and not a continuation of an old case, and meets one or more of the general recording criteria in section 1904.7 or the additional criteria for specific cases found in sections 1904.8 through 1904.11. Paragraph (b) contains provisions implementing this basic requirement.

Paragraph 1904.4(b)(1) contains a table that points employers and their recordkeepers to the various sections of the rule that determine which work-related injuries and illnesses are to be recorded. These

sections lay out the requirements for determining whether an injury or illness is work-related, if it is a new case, and if it meets one or more of the general recording criteria. In addition, the table contains a row addressing the application of these and additional criteria to specific kinds of cases (needlestick and sharps injury cases, tuberculosis cases, hearing loss cases, medical removal cases, and musculoskeletal disorder cases). The table in paragraph 1904.4(b)(1) is intended to guide employers through the recording process and to act as a table of contents to the sections of Subpart C.

Paragraph (b)(2) is a decision tree, or flowchart, that shows the steps involved in determining whether or not a particular injury or illness case must be recorded on the OSHA forms. It essentially reflects the same information as is in the table in paragraph 1904.4(b)(1), except that it presents this information graphically.

FREQUENTLY ASKED QUESTIONS: Section 1904.4 (OSHA Instruction, CPL 2-0.135, Chap. 5)

Section 1904.4 Recording criteria

Question 4-1. *Does an employee report of an injury or illness establish the existence of the injury or illness for recordkeeping purposes?*

No. In determining whether a case is recordable, the employer must first decide whether an injury or illness, as defined by the rule, has occurred. If the employer is uncertain about whether an injury or illness has occurred, the employer may refer the

employee to a physician or other health care professional for evaluation and may consider the health care professional's opinion in determining whether an injury or illness exists. [Note: If a physician or other licensed health care professional diagnoses a significant injury or illness within the meaning of Section 1904.7(b)(7) and the employer determines that the case is work-related, the case must be recorded.]

LETTERS OF INTERPRETATION: Section 1904.4

Section 1904.4 Recording criteria

This section will be developed as letters of interpretation become available.

Section 1904.5

Determination of work-relatedness

(66 FR 6123, Jan. 19, 2001)

REGULATION: Section 1904.5

Subpart C – Recordkeeping Forms and Recording Criteria (66 FR 6123, Jan. 19, 2001)

Note to Subpart C: This Subpart describes the work-related injuries and illnesses that an employer must enter into the OSHA records and explains the OSHA forms that employers must use to record work-related fatalities, injuries, and illnesses.

Section 1904.5 Determination of work-relatedness

(a) Basic requirement.

You must consider an injury or illness to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness. Work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment, unless an exception in Section 1904.5(b)(2) specifically applies.

(b) Implementation.

(1) *What is the “work environment”?*

OSHA defines the work environment as “the estab-

lishment and other locations where one or more employees are working or are present as a condition of their employment. The work environment includes not only physical locations, but also the equipment or materials used by the employee during the course of his or her work.”

(2) *Are there situations where an injury or illness occurs in the work environment and is not considered work-related?*

Yes, an injury or illness occurring in the work environment that falls under one of the following exceptions is not work-related, and therefore is not recordable.

1904.5(b)(2)	You are not required to record injuries and illnesses if ...
(i)	At the time of the injury or illness, the employee was present in the work environment as a member of the general public rather than as an employee.
(ii)	The injury or illness involves signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs outside the work environment.
(iii)	The injury or illness results solely from voluntary participation in a wellness program or in a medical, fitness, or recreational activity such as blood donation, physical examination, flu shot, exercise class, racquetball, or baseball.
(iv)	The injury or illness is solely the result of an employee eating, drinking, or preparing food or drink for personal consumption (whether bought on the employer’s premises or brought in). For example, if the employee is injured by choking on a sandwich while in the employer’s establishment, the case would not be considered work-related. Note: If the employee is made ill by ingesting food contaminated by workplace contaminants (such as lead), or gets food poisoning from food supplied by the employer, the case would be considered work-related.
(v)	The injury or illness is solely the result of an employee doing personal tasks (unrelated to their employment) at the establishment outside of the employee’s assigned working hours.
(vi)	The injury or illness is solely the result of personal grooming, self medication for a non-work-related condition, or is intentionally self-inflicted.
(vii)	The injury or illness is caused by a motor vehicle accident and occurs on a company parking lot or company access road while the employee is commuting to or from work.

(viii)	The illness is the common cold or flu (Note: contagious diseases such as tuberculosis, brucellosis, hepatitis A, or plague are considered work-related if the employee is infected at work).
(ix)	The illness is a mental illness. Mental illness will not be considered work-related unless the employee voluntarily provides the employer with an opinion from a physician or other licensed health care professional with appropriate training and experience (psychiatrist, psychologist, psychiatric nurse practitioner, etc.) stating that the employee has a mental illness that is work-related.

(3) How do I handle a case if it is not obvious whether the precipitating event or exposure occurred in the work environment or occurred away from work?

In these situations, you must evaluate the employee's work duties and environment to decide whether or not one or more events or exposures in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing condition.

(4) How do I know if an event or exposure in the work environment "significantly aggravated" a pre-existing injury or illness?

A preexisting injury or illness has been significantly aggravated, for purposes of OSHA injury and illness recordkeeping, when an event or exposure in the work environment results in any of the following:

- (i) Death, provided that the preexisting injury or illness would likely not have resulted in death but for the occupational event or exposure.
- (ii) Loss of consciousness, provided that the preexisting injury or illness would likely not have resulted in loss of consciousness but for the occupational event or exposure.
- (iii) One or more days away from work, or days of restricted work, or days of job transfer that otherwise would not have occurred but for the occupational event or exposure.

(iv) Medical treatment in a case where no medical treatment was needed for the injury or illness before the workplace event or exposure, or a change in medical treatment was necessitated by the workplace event or exposure.

(5) Which injuries and illnesses are considered pre-existing conditions?

An injury or illness is a preexisting condition if it resulted solely from a non-work-related event or exposure that occurred outside the work environment.

(6) How do I decide whether an injury or illness is work-related if the employee is on travel status at the time the injury or illness occurs?

Injuries and illnesses that occur while an employee is on travel status are work-related if, at the time of the injury or illness, the employee was engaged in work activities "in the interest of the employer." Examples of such activities include travel to and from customer contacts, conducting job tasks, and entertaining or being entertained to transact, discuss, or promote business (work-related entertainment includes only entertainment activities being engaged in at the direction of the employer).

Injuries or illnesses that occur when the employee is on travel status do not have to be recorded if they meet one of the exceptions listed below.

1904.5(b)(6)	If the employee has...	You may use the following to determine if an injury or illness is work-related
(i)	checked into a hotel or motel for one or more days.	When a traveling employee checks into a hotel, motel, or into another temporary residence, he or she establishes a "home away from home." You must evaluate the employee's activities after he or she checks into the hotel, motel, or other temporary residence for their work-relatedness in the same manner as you evaluate the activities of a non-traveling employee. When the employee checks into the temporary residence, he or she is considered to have left the work environment. When the employee begins work each day, he or she re-enters the work environment. If the employee has established a "home away from home" and is reporting to a fixed worksite each day, you also do not consider injuries or illnesses work-related if they occur while the employee is commuting between the temporary residence and the job location.
(ii)	taken a detour for personal reasons.	Injuries or illnesses are not considered work-related if they occur while the employee is on a personal detour from a reasonably direct route of travel (e.g., has taken a side trip for personal reasons).

(b)(7) *How do I decide if a case is work-related when the employee is working at home?*

Injuries and illnesses that occur while an employee is working at home, including work in a home office, will be considered work-related if the injury or illness occurs while the employee is performing work for pay or compensation in the home, and the injury or illness is directly related to the performance of work rather than to the general home environment or setting. For example, if an employee drops a box of work documents and injures his or her foot, the case

is considered work-related. If an employee's fingernail is punctured by a needle from a sewing machine used to perform garment work at home, becomes infected and requires medical treatment, the injury is considered work-related. If an employee is injured because he or she trips on the family dog while rushing to answer a work phone call, the case is not considered work-related. If an employee working at home is electrocuted because of faulty home wiring, the injury is not considered work-related.

PREAMBLE DISCUSSION: Section 1904.5

(66 FR 5946-5962, Jan. 19, 2001)

The following are selected excerpts from the preamble to the Occupational Injury and Illness Recording and Reporting Requirements, the Recordkeeping rule (66 FR 5916, 29 CFR Parts 1904 and 1952). These excerpts represent some of the key discussions related to the final rule (66 FR 6122, 29 CFR Parts 1904 and 1952).

Section 1904.5 Determination of work-relatedness

This section of the final rule sets out the requirements employers must follow in determining whether a given injury or illness is work-related. Paragraph 1904.5(a) states that an injury or illness must be considered work-related if an event or exposure in the work environment caused or contributed to the injury or illness or significantly aggravated a pre-existing injury or illness. It stipulates that, for OSHA recordkeeping purposes, work relationship is presumed for such injuries and illnesses unless an exception listed in paragraph 1904.5(b)(2) specifically applies.

Implementation requirements are set forth in paragraph (b) of the final rule. Paragraph (b)(1) defines “work environment” for recordkeeping purposes and makes clear that the work environment includes the physical locations where employees are working as well as the equipment and materials used by the employee to perform work.

Paragraph (b)(2) lists the exceptions to the presumption of work-relatedness permitted by the final rule; cases meeting the conditions of any of the listed exceptions are not considered work-related and are therefore not recordable in the OSHA recordkeeping system.

Section 8(c)(2) of the OSH Act directs the Secretary to issue regulations requiring employers to record “work-related” injuries and illnesses. It is implicit in this wording that there must be a causal connection between the employment and the injury or illness before the case is recordable. For most types of industrial accidents involving traumatic injuries, such as amputations, fractures, burns and

electrocutions, a causal connection is easily determined because the injury arises from forces, equipment, activities, or conditions inherent in the employment environment. Thus, there is general agreement that when an employee is struck by or caught in moving machinery, or is crushed in a construction cave-in, the case is work-related. It is also accepted that a variety of illnesses are associated with exposure to toxic substances, such as lead and cadmium, used in industrial processes. Accordingly, there is little question that cases of lead or cadmium poisoning are work-related if the employee is exposed to these substances at work.

On the other hand, a number of injuries and illnesses that occur, or manifest themselves, at work are caused by a combination of occupational factors, such as performing job-related bending and lifting motions, and factors personal to the employee, such as the effects of a pre-existing medical condition. In many such cases, it is likely that occupational factors have played a tangible role in causing the injury or illness, but one that cannot be readily quantified as “significant” or “predominant” in comparison with the personal factors involved.

Injuries and illnesses also occur at work that do not have a clear connection to a specific work activity, condition, or substance that is peculiar to the employment environment. For example, an employee may trip for no apparent reason while walking across a level factory floor; be sexually assaulted by a co-worker; or be injured accidentally as a result of an act of violence perpetrated by one co-worker against a third party. In these and similar cases, the employee's job-related tasks or exposures did not

create or contribute to the risk that such an injury would occur. Instead, a causal connection is established by the fact that the injury would not have occurred but for the conditions and obligations of employment that placed the employee in the position in which he or she was injured or made ill.

The final rule's test for work-relationship and its similarity to the former and proposed rules. -- The final rule requires that employers consider an injury or illness to be "work-related" if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness. Work relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment, unless an exception in Section 1904.5(b)(2) specifically applies.

Under paragraph 1904.5(b)(1), the "work environment" means "the establishment and other locations where one or more employees are working or are present as a condition of their employment. The work environment includes not only physical locations, but also equipment or materials used by the employee during the course of his or her work." ...

Who Makes the Determination?

...OSHA has concluded that requiring employers to rely on a health care professional for the determination of the work-relatedness of occupational injuries and illnesses would be burdensome, impractical, and unnecessary. Small employers, in particular, would be burdened by such a provision. Further, if the professional is not familiar with the injured worker's job duties and work environment, he or she will not have sufficient information to make a decision about the work-relatedness of the case. OSHA also does not agree that health care professional involvement is necessary in the overwhelming majority of cases. Employers have been making work-relatedness determinations for more than 20 years and have performed this responsibility well in that time. This does not mean that employers may not, if they choose, seek the advice of a physician or other licensed health care professional to help them understand the link between workplace factors and injuries and illnesses in particular cases; it simply means that OSHA does not believe that most employers will need to avail themselves of the services of such a professional in most cases.

Accordingly, OSHA has concluded that the determination of work-relatedness is best made by the employer, as it has been in the past. Employers are in the best position to obtain the information, both

from the employee and the workplace, that is necessary to make this determination. Although expert advice may occasionally be sought by employers in particularly complex cases, the final rule provides that the determination of work-relatedness ultimately rests with the employer.

The Final Rule's Exceptions to the Geographic Presumption

Paragraph 1904.5(b)(2) of the final rule contains eight exceptions to the work environment presumption that are intended to exclude from the recordkeeping system those injuries and illnesses that occur or manifest in the work environment, but have been identified by OSHA, based on its years of experience with recordkeeping, as cases that do not provide information useful to the identification of occupational injuries and illnesses and would thus tend to skew national injury and illness statistics. These eight exceptions are the only exceptions to the presumption permitted by the final rule.

(i) Injuries or illnesses will not be considered work-related if, at the time of the injury or illness, the employee was present in the work environment as a member of the general public rather than as an employee.

This exception, which is codified at paragraph 1904.5(b)(2)(i), is based on the fact that no employment relationship is in place at the time an injury or illness of this type occurs. A case exemplifying this exception would occur if an employee of a retail store patronized that store as a customer on a non-work day and was injured in a fall. This exception allows the employer not to record cases that occur outside of the employment relationship when his or her establishment is also a public place and a worker happens to be using the facility as a member of the general public. In these situations, the injury or illness has nothing to do with the employee's work or the employee's status as an employee, and it would therefore be inappropriate for the recordkeeping system to capture the case....

(ii) Injuries or illnesses will not be considered work-related if they involve symptoms that surface at work but result solely from a non-work-related event or exposure that occurs outside the work environment.

OSHA's recordkeeping system is intended only to capture cases that are caused by conditions or exposures arising in the work environment. It is not designed to capture cases that have no relationship with the work environment. For this exception to apply, the work environment cannot have caused,

contributed to, or significantly aggravated the injury or illness. This exception is consistent with the position followed by OSHA for many years and reiterated in the final rule: that any job-related contribution to the injury or illness makes the incident work-related, and its corollary—that any injury or illness to which work makes no actual contribution is not work-related. An example of this type of injury would be a diabetic incident that occurs while an employee is working. Because no event or exposure at work contributed in any way to the diabetic incident, the case is not recordable. This exception allows the employer to exclude cases where an employee's non-work activities are the sole cause of the injury or illness....

(iii) Injuries and illnesses will not be considered work-related if they result solely from voluntary participation in a wellness program or in a medical, fitness, or recreational activity such as blood donation, physical, flu shot, exercise classes, racquetball, or baseball.

This exception allows the employer to exclude certain injury or illness cases that are related to personal medical care, physical fitness activities and voluntary blood donations. The key words here are “solely” and “voluntary.” The work environment cannot have contributed to the injury or illness in any way for this exception to apply, and participation in the wellness, fitness or recreational activities must be voluntary and not a condition of employment.

This exception allows the employer to exclude cases that are related to personal matters of exercise, recreation, medical examinations or participation in blood donation programs when they are voluntary and are not being undertaken as a condition of work. For example, if a clerical worker was injured while performing aerobics in the company gymnasium during his or her lunch hour, the case would not be work-related. On the other hand, if an employee who was assigned to manage the gymnasium was injured while teaching an aerobics class, the injury would be work-related because the employee was working at the time of the injury and the activity was not voluntary. Similarly, if an employee suffered a severe reaction to a flu shot that was administered as part of a voluntary inoculation program, the case would not be considered work-related; however, if an employee suffered a reaction to medications administered to enable the employee to travel overseas on business, or the employee had an illness reaction to a medication administered to treat a work-related injury, the case would be considered work-related....

(iv) Injuries and illnesses will not be considered work-related if they are solely the result of an employee eating, drinking, or preparing food or drink

for personal consumption (whether bought on the premises or brought in).

An example of the application of this exception would be a case where the employee injured himself or herself by choking on a sandwich brought from home but eaten in the employer's establishment; such a case would not be considered work-related under this exception. On the other hand, if the employee was injured by a trip or fall hazard present in the employer's lunchroom, the case would be considered work-related. In addition, a note to the exception makes clear that if an employee becomes ill as a result of ingesting food contaminated by workplace contaminants such as lead, or contracts food poisoning from food items provided by the employer, the case would be considered work-related. As a result, if an employee contracts food poisoning from a sandwich brought from home or purchased in the company cafeteria and must take time off to recover, the case is not considered work related. On the other hand, if an employee contracts food poisoning from a meal provided by the employer at a business meeting or company function and takes time off to recover, the case would be considered work related. Food provided or supplied by the employer does not include food purchased by the employee from the company cafeteria, but does include food purchased by the employer from the company cafeteria for business meetings or other company functions.

(v) Injuries and illnesses will not be considered work-related if they are solely the result of employees doing personal tasks (unrelated to their employment) at the establishment outside of their assigned working hours.

This exception, which responds to inquiries received over the years, allows employers limited flexibility to exclude from the recordkeeping system situations where the employee is using the employer's establishment for purely personal reasons during his or her off-shift time. For example, if an employee were using a meeting room at the employer's establishment outside of his or her assigned working hours to hold a meeting for a civic group to which he or she belonged, and slipped and fell in the hallway, the injury would not be considered work-related. On the other hand, if the employee were at the employer's establishment outside his or her assigned working hours to attend a company business meeting or a company training session, such a slip or fall would be work-related.

(vi) Injuries and illnesses will not be considered work-related if they are solely the result of personal grooming, self-medication for a non-work-related

condition, or are intentionally self-inflicted.

This exception allows the employer to exclude from the Log cases related to personal hygiene, self-administered medications and intentional self-inflicted injuries, such as attempted suicide. For example, a burn injury from a hair dryer used at work to dry the employee's hair would not be work-related. Similarly, a negative reaction to a medication brought from home to treat a non-work condition would not be considered a work-related illness, even though it first manifested at work.

(vii) Injuries will not be considered work-related if they are caused by motor vehicle accidents occurring in company parking lots or on company access roads while employees are commuting to or from work.

This exception allows the employer to exclude cases where an employee is injured in a motor vehicle accident while commuting from work to home or from home to work or while on a personal errand. For example, if an employee was injured in a car accident while arriving at work or while leaving the company's property at the end of the day, or while driving on his or her lunch hour to run an errand, the case would not be considered work-related. On the other hand, if an employee was injured in a car accident while leaving the property to purchase supplies for the employer, the case would be work-related. Some injuries and illnesses that occur in company parking lots are clearly caused by work conditions or activities--e.g., being struck by a car while painting parking space indicators on the pavement of the lot, slipping on ice permitted to accumulate in the lot by the employer--and by their nature point to conditions that could be corrected to improve workplace safety and health.

(viii) Common colds and flu will not be considered work-related.

Paragraph 1904.5(b)(2)(viii) allows the employer to exclude cases of common cold or flu, even if contracted while the employee was at work. However, in the case of other infectious diseases such as tuberculosis, brucellosis, and hepatitis C, employers must evaluate reports of such illnesses for work relationship, just as they would any other type of injury or illness.

(ix) Mental illness will not be considered work-related unless the employee voluntarily provides the employer with an opinion from a physician or other licensed health care professional with appropriate training and experience (psychiatrist, psychologist, psychiatric nurse practitioner, etc.) stating that the employee has a mental illness that is work-related.

Recording work-related mental illnesses involves several unique issues, including the difficulty of

detecting, diagnosing and verifying mental illnesses; and the sensitivity and privacy concerns raised by mental illnesses. Therefore, the final rule requires employers to record only those mental illnesses verified by a health care professional with appropriate training and experience in the treatment of mental illness, such as a psychiatrist, psychologist, or psychiatric nurse practitioner. The employer is under no obligation to seek out information on mental illnesses from its employees, and employers are required to consider mental illness cases only when an employee voluntarily presents the employer with an opinion from the health care professional that the employee has a mental illness and that it is work related. In the event that the employer does not believe the reported mental illness is work-related, the employer may refer the case to a physician or other licensed health care professional for a second opinion. OSHA also emphasizes that work-related mental illnesses, like other illnesses, must be recorded only when they meet the severity criteria outlined in Section 1904.7. In addition, for mental illnesses, the employee's identity must be protected by omitting the employee's name from the OSHA 300 Log and instead entering "privacy concern case" as required by Section 1904.29.

Proposed Exception....The Case Results Solely From Normal Body Movements, not Job-Related Motions or Contribution from the Work Environment.

...OSHA has decided not to include a recordkeeping exception for injuries or illnesses associated with normal body movements in the final rule....Further, the final rule already makes clear that injuries and illnesses that result solely from non-work causes are not considered work-related and therefore are excluded from the Log, and establishes the requirements employers must follow to determine work-relationship for an injury or illness when it is unclear whether the precipitating event occurred in the workplace or elsewhere (see paragraph 1904.5(b)(3)). According to the requirements in that section, the employer must evaluate the employee's work duties and the work environment to decide whether it is more likely than not that events or exposures in the work environment either caused or contributed to the condition or significantly aggravated a pre-existing condition. If so, the case is work-related.

Additional Exceptions Suggested by Commenters but Not Adopted [in the final rule].

...Acts of God:...OSHA has not adopted such an exception because doing so would not be in keeping

with the geographic presumption underpinning this final rule, and would exclude cases that are in fact work-related. For example, if a worker was injured in a flood while at work, the case would be work-related, even though the flood could be considered an act of God. Accordingly, if workplace injuries and illnesses result from these events, they must be entered into the records (for a more detailed discussion of this point, see the Legal Authority section, above).

Phobias... OSHA has not included an exception from recording in the final recordkeeping regulation for phobias or any other type of mental illness. Voluntary participation in a medical activity. OSHA also believes that it would be unreasonable to omit a case of loss of consciousness resulting from the administration of a blood test for lead exposure at work. These tests are necessitated by the employee's exposure to lead at work and are required by OSHA's lead standard (29 CFR 1910.1025). The other scenarios presented by these commenters, involving spiders, snakes, etc., would also be work-related under the geographic presumption.

Illegal activities and horseplay... OSHA has not adopted any of these recommended exceptions in the final recordkeeping rule because excluding these injuries and illnesses would be inconsistent with OSHA's longstanding reliance on the geographic presumption to establish work-relatedness. Furthermore, the Agency believes that many of the working conditions pointed to in these comments involve occupational factors, such as the effectiveness of disciplinary policies and supervision. Thus, recording such incidents may serve to alert both the employer and employees to workplace safety and health issues.

Non-occupational degenerative conditions... such as high blood pressure, arthritis, coronary artery disease, heart attacks, and cancer that can develop regardless of workplace exposure. OSHA has not added such an exception to the rule, but the Agency believes that the fact that the rule expects employers confronted with such cases to make a determination about the extent to which, if at all, work contributed to the observed condition will provide direction about how to determine the work-relatedness of such cases. For example, if work contributes to the illness in some way, then it is work-related and must be evaluated for its recordability. On the other hand, if the case is wholly caused by non-work factors, then it is not work-related and will not be recorded in the OSHA records.

Determining Whether the Precipitating Event or Exposure Occurred in the Work Environment or Elsewhere

Paragraph 1904.5(b)(3) of the final rule provides guidance on applying the geographic presumption when it is not clear whether the event or exposure that precipitated the injury or illness occurred in the work environment or elsewhere. If an employee reports pain and swelling in a joint but cannot say whether the symptoms first arose during work or during recreational activities at home, it may be difficult for the employer to decide whether the case is work-related. The same problem arises when an employee reports symptoms of a contagious disease that affects the public at large, such as a staphylococcus infection ("staph" infection) or Lyme disease, and the workplace is only one possible source of the infection. In these situations, the employer must examine the employee's work duties and environment to determine whether it is more likely than not that one or more events or exposures at work caused or contributed to the condition. If the employer determines that it is unlikely that the precipitating event or exposure occurred in the work environment, the employer would not record the case. In the staph infection example given above, the employer would consider the case work-related, for example, if another employee with whom the newly infected employee had contact at work had been out with a staph infection. In the Lyme disease example, the employer would determine the case to be work-related if, for example, the employee was a groundskeeper with regular exposure to outdoor conditions likely to result in contact with deer ticks.

In applying paragraph 1904.5(b)(3), the question employers must answer is whether the precipitating event or exposure occurred in the work environment. If an event, such as a fall, an awkward motion or lift, an assault, or an instance of horseplay, occurs at work, the geographic presumption applies and the case is work-related unless it otherwise falls within an exception. Thus, if an employee trips while walking across a level factory floor, the resulting injury is considered work-related under the geographic presumption because the precipitating event -- the tripping accident -- occurred in the workplace. The case is work-related even if the employer cannot determine why the employee tripped, or whether any particular workplace hazard caused the accident to occur. However, if the employee reports an injury at work but cannot say whether it resulted from an event that occurred at work or at home, as in the example of the swollen joint, the employer might

determine that the case is not work-related because the employee's work duties were unlikely to have caused, contributed to, or significantly aggravated such an injury.

Significant Workplace Aggravation of a Pre-existing Condition

In paragraph 1904.5(b)(4), the final rule...requires that the amount of aggravation of the injury or illness that work contributes must be "significant," *i.e.*, non-minor, before work-relatedness is established. The preexisting injury or illness must be one caused entirely by non-occupational factors....

OSHA agrees that non-work-related injuries and illnesses should not be recorded on the OSHA Log. To ensure that non-work-related cases are not entered on the Log, paragraph 1904.5(b)(2)(ii) requires employers to consider as non-work-related any injury or illness that "involves signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs outside the work environment."

The Agency also believes that preexisting injury or illness cases that have been aggravated by events or exposures in the work environment represent cases that should be recorded on the Log, because work has clearly worsened the injury or illness. OSHA is concerned, however, that there are some cases where work-related aggravation affects the pre-existing case only in a minor way, *i.e.*, in a way that does not appreciably worsen the preexisting condition, alter its nature, change the extent of the medical treatment, trigger lost time, or require job transfer. Accordingly, the final rule requires that workplace events or exposures must "significantly" aggravate a pre-existing injury or illness case before the case is presumed to be work-related. Paragraph 1904.5(a) states that an injury or illness is considered work-related if "an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness."

Paragraph 1904.5(b)(4) of the final rule defines aggravation as significant if the contribution of the aggravation at work is such that it results in tangible consequences that go beyond those that the worker would have experienced as a result of the preexisting injury or illness alone, absent the aggravating effects of the workplace. Under the final rule, a preexisting injury or illness will be considered to have been significantly aggravated, for the purposes of OSHA injury and illness recordkeeping, when an event or exposure in the work environment results in: (i)

Death, providing that the preexisting injury or illness would likely not have resulted in death but for the occupational event or exposure; (ii) Loss of consciousness, providing that the preexisting injury or illness would likely not have resulted in loss of consciousness but for the occupational event or exposure; (iii) A day or days away from work or of restricted work, or a job transfer that otherwise would not have occurred but for the occupational event or exposure; or (iv) Medical treatment where no medical treatment was needed for the injury or illness before the workplace event or exposure, or a change in the course of medical treatment that was being provided before the workplace event or exposure. OSHA's decision not to require the recording of cases involving only minor aggravation of preexisting conditions is consistent with the Agency's efforts in this rulemaking to require the recording only of non-minor injuries and illnesses; for example, the final rule also no longer requires employers to record minor illnesses on the Log.

Preexisting Conditions

Paragraph 1904.5(b)(5) stipulates that pre-existing conditions, for recordkeeping purposes, are conditions that resulted solely from a non-work-related event or exposure that occurs outside the employer's work environment. Pre-existing conditions also include any injury or illness that the employee experienced while working for another employer.

Off Premises Determinations

...In the final rule, (paragraph 1904.5(b)(1)) the same concept is carried forward in the definition of the work environment, which defines the environment as including the establishment and any other location where one or more employees are working or are present as a condition of their employment.

Thus, when employees are working or conducting other tasks in the interest of their employer but at a location away from the employer's establishment, the work-relatedness of an injury or illness that arises is subject to the same decision making process that would occur if the case had occurred at the establishment itself. The case is work-related if one or more events or exposures in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing condition, as stated in paragraph 1904.5(a). In addition, the exceptions for determining work relationship at paragraph 1904.5(b)(2) and the requirements at paragraph 1904.5(b)(3) apply equally to cases that occur at or away from the establishment.

As an example, the work-environment presumption clearly applies to the case of a delivery driver who experiences an injury to his or her back while loading boxes and transporting them into a building. The worker is engaged in a work activity and the injury resulted from an event—loading/unloading—occurring in the work environment. Similarly, if an employee is injured in an automobile accident while running errands for the company or traveling to make a speech on behalf of the company, the employee is present at the scene as a condition of employment, and any resulting injury would be work-related.

Employees on Travel Status

The final rule continues (at Section 1904.5(b)(6)) OSHA's longstanding practice of treating injuries and illnesses that occur to an employee on travel status as work-related if, at the time of the injury or illness, the employee was engaged in work activities "in the interest of the employer." Examples of such activities include travel to and from customer contacts, conducting job tasks, and entertaining or being entertained if the activity is conducted at the direction of the employer.

The final rule contains three exceptions for travel-status situations. The rule describes situations in which injuries or illnesses sustained by traveling employees are not considered work-related for OSHA recordkeeping purposes and therefore do not have to be recorded on the OSHA 300 Log. First, when a traveling employee checks into a hotel, motel, or other temporary residence, he or she is considered to have established a "home away from home." At this time, the status of the employee is the same as that of an employee working at an establishment who leaves work and is essentially "at home." Injuries and illnesses that occur at home are generally not considered work related. However, just as an employer may sometimes be required to record an injury or illness occurring to an employee working in his or her home, the employer is required to record an injury or illness occurring to an employee who is working in his or her hotel room (see the discussion of working at home, below).

Second, if an employee has established a "home away from home" and is reporting to a fixed work-site each day, the employer does not consider injuries or illnesses work-related if they occur while the employee is commuting between the temporary residence and the job location. These cases are parallel to those involving employees commuting to and from work when they are at their home location, and

do not have to be recorded, just as injuries and illnesses that occur during normal commuting are not required to be recorded.

Third, the employer is not required to consider an injury or illness to be work-related if it occurs while the employee is on a personal detour from the route of business travel. This exception allows the employer to exclude injuries and illnesses that occur when the worker has taken a side trip for personal reasons while on a business trip, such as a vacation or sight-seeing excursion, to visit relatives, or for some other personal purpose....

OSHA has decided not to limit the recording of occupational injuries and illnesses to those cases that are preventable, fall within the employer's control, or are covered by the employer's safety and health program. The issue is not whether the conditions could have, or should have, been prevented or whether they were controllable, but simply whether they are occupational, *i.e.*, are related to work. This is true regardless of whether the employee is injured while on travel or while present at the employer's workplace. An employee who is injured in an automobile accident or killed in an airline crash while traveling for the company has clearly experienced a work-related injury that is rightfully included in the OSHA injury and illness records and the Nation's occupational injury and illness statistics....

...[T]he Agency believes that employees who are engaged in management, sales, customer service and similar jobs must often entertain clients, and that doing so is a business activity that requires the employee to work at the direction of the employer while conducting such tasks. If the employee is injured or becomes ill while engaged in such work, the injury or illness is work-related and should be recorded if it meets one or more of the other criteria (death, medical treatment, etc.). Gastroenteritis, for example...is one type of injury or illness that may occur in this situation, but employees are also injured in accidents while transporting clients to business-related events at the direction of the employer or by other events or exposures arising in the work environment.

On the other hand, not all injuries and illnesses sustained in the course of business-related entertainment are reportable. To be recordable, the entertainment activity must be one that the employee engages in at the direction of the employer. Business-related entertainment activities that are undertaken voluntarily by an employee in the exercise of his or her discretion are not covered by the rule. For example, if an employee attending a profes-

sional conference at the direction of the employer goes out for an evening of entertainment with friends, some of whom happen to be clients or customers, any injury or illness resulting from the entertainment activities would not be recordable. In this case, the employee was socializing after work, not entertaining at the direction of the employer. Similarly, the fact that an employee joins a private club or organization, perhaps to “network” or make business contacts, does not make any injury that occurs there work-related....

...OSHA notes that the recordkeeping regulation does not apply to travel outside the United States because the OSH Act applies only to the confines of the United States (29 U.S.C. Section 652(4)) and not to foreign operations. Therefore, the OSHA recordkeeping regulation does not apply to non-U.S. operations, and injuries or illnesses that may occur to a worker traveling outside the United States need not be recorded on the OSHA 300 Log.

Working at Home

The final rule also includes provisions at Section 1904.5(b)(7) for determining the work-relatedness of injuries and illnesses that may arise when employees are working at home. When an employee is working on company business in his or her home and reports an injury or illness to his or her employer, and the employee’s work activities caused or contributed to the injury or illness, or significantly aggravated a pre-existing injury, the case is considered work-related and must be further evaluated to determine whether it meets the recording criteria. If the injury or illness is related to non-work activities or to the general home environment, the case is not considered work-related.

The final rule includes examples to illustrate how employers are required to record injuries and illnesses occurring at home. If an employee drops a box of work documents and injures his or her foot, the case would be considered work-related. If an employee’s fingernail was punctured and became infected by a needle from a sewing machine used to perform garment work at home, the injury would be considered

work-related. If an employee was injured because he or she tripped on the family dog while rushing to answer a work phone call, the case would not be considered work-related. If an employee working at home is electrocuted because of faulty home wiring, the injury would not be considered work-related....

...Injuries and illnesses occurring while the employee is working for pay or compensation at home should be treated like injuries and illnesses sustained by employees while traveling on business. The relevant question is whether or not the injury or illness is work-related, not whether there is some element of employer control. The mere recording of these injuries and illnesses as work-related cases does not place the employer in the role of insuring the safety of the home environment....

...OSHA has recently issued a compliance directive (CPL 2-0.125)...That document clarifies that OSHA will not conduct inspections of home offices and does not hold employers liable for employees’ home offices. The compliance directive also notes that employers required by the recordkeeping rule to keep records “will continue to be responsible for keeping such records, regardless of whether the injuries occur in the factory, in a home office, or elsewhere, as long as they are work-related, and meet the recordability criteria of 29 CFR Part 1904.”

With more employees working at home under various telecommuting and flexible workplace arrangements, OSHA believes that it is important to record injuries and illnesses attributable to work tasks performed at home. If these cases are not recorded, the Nation’s injury and illness statistics could be skewed. For example, placing such an exclusion in the final rule would make it difficult to determine if a decline in the overall number or rate of occupational injuries and illnesses is attributable to a trend toward working at home or to a change in the Nation’s actual injury and illness experience. Further, excluding these work-related injuries and illnesses from the recordkeeping system could potentially obscure previously unidentified causal connections between events or exposures in the work environment and these incidents.

FREQUENTLY ASKED QUESTIONS: Section 1904.5 (OSHA Instruction, CPL 2-0.135, Chap. 5) **Section 1904.5 Determination of work-relatedness**

Question 5-1. *If a maintenance employee is cleaning the parking lot or an access road and is injured as a result, is the case work-related?*

Yes, the case is work-related because the employee is injured as a result of conducting company business

in the work environment. If the injury meets the general recording criteria of Section 1904.7 (death, days away, etc.), the case must be recorded.

Question 5-2. *Are cases of workplace violence considered work-related under the new Recordkeeping rule?*

The Recordkeeping rule contains no general exception, for purposes of determining work-relationship, for cases involving acts of violence in the work environment. However, some cases involving violent acts might be included within one of the exceptions listed in section 1904.5(b)(2). For example, if an employee arrives at work early to use a company conference room for a civic club meeting and is injured by some violent act, the case would not be work-related under the exception in section 1904.5(b)(2)(v).

Question 5-3. *What activities are considered “personal grooming” for purposes of the exception to the geographic presumption of work-relatedness in section 1904.5(b)(2)(vi)?*

Personal grooming activities are activities directly related to personal hygiene, such as combing and drying hair, brushing teeth, clipping fingernails and the like. Bathing or showering at the workplace when necessary because of an exposure to a substance at work is not within the personal grooming exception in section 1904.5(b)(2)(vi). Thus, if an employee slips and falls while showering at work to remove a contaminant to which he has been exposed at work, and sustains an injury that meets one of the general recording criteria listed in section 1904.7(b)(1), the case is recordable.

Question 5-4. *What are “assigned working hours” for purposes of the exception to the geographic presumption in section 1904.5(b)(2)(v)?*

“Assigned working hours,” for purposes of section 1904.5(b)(2)(v), means those hours the employee is actually expected to work, including overtime.

Question 5-5. *What are “personal tasks” for purposes of the exception to the geographic presumption in section 1904.5(b)(2)(v)?*

“Personal tasks” for purposes of section 1904.5(b)(2)(v) are tasks that are unrelated to the employee’s job. For example, if an employee uses a company break area to work on his child’s science project, he is engaged in a personal task.

Question 5-6. *If an employee stays at work after normal work hours to prepare for the next day’s tasks and is injured, is the case work-related? For example, if an employee stays after work to prepare air-sampling pumps and is injured, is the case work-related?*

A case is work-related any time an event or exposure in the work environment either causes or contributes

to an injury or illness or significantly aggravates a pre-existing injury or illness, unless one of the exceptions in section 1904.5(b)(2) applies. The work environment includes the establishment and other locations where one or more employees are working or are present as a condition of their employment. The case in question would be work-related if the employee was injured as a result of an event or exposure at work, regardless of whether the injury occurred after normal work hours.

Question 5-7. *If an employee voluntarily takes work home and is injured while working at home, is the case recordable?*

No. Injuries and illnesses occurring in the home environment are only considered work-related if the employee is being paid or compensated for working at home and the injury or illness is directly related to the performance of the work rather than to the general home environment.

Question 5-8. *If an employee’s pre-existing medical condition causes an incident which results in a subsequent injury, is the case work-related? For example, if an employee suffers an epileptic seizure, falls, and breaks his arm, is the case covered by the exception in section 1904.5(b)(2)(ii)?*

Neither the seizures nor the broken arm are recordable. Injuries and illnesses that result solely from non-work-related events or exposures are not recordable under the exception in section 1904.5(b)(2)(ii). Epileptic seizures are a symptom of a disease of non-occupational origin, and the fact that they occur at work does not make them work-related. Because epileptic seizures are not work-related, injuries resulting solely from the seizures, such as the broken arm in the case in question, are not recordable.

Question 5-9. *This question involves the following sequence of events: Employee A drives to work, parks her car in the company parking lot and is walking across the lot when she is struck by a car driven by employee B, who is commuting to work. Both employees are seriously injured in the accident. Is either case work-related?*

Neither employee’s injuries are recordable. While the employee parking lot is part of the work environment under section 1904.5, injuries occurring there are not work-related if they meet the exception in section 1904.5(b)(2)(vii). Section 1904.5(b)(2)(vii) excepts injuries caused by motor vehicle accidents occurring on the company parking lot while the employee is

commuting to and from work. In the case in question, both employees' injuries resulted from a motor vehicle accident in the company parking lot while the employees were commuting. Accordingly, the exception applies.

Question 5-10. How does OSHA define a "company parking lot" for purposes of Recordkeeping?

Company parking lots are part of the employer's premises and therefore part of the establishment. These areas are under the control of the employer, *i.e.* those parking areas where the employer can limit access (such as parking lots limited to the employer's employees and visitors). On the other hand, a parking area where the employer does not have control (such as a parking lot outside of a building shared by different employers, or a public parking area like those found at a mall or beneath a multi-employer office building) would not be considered part of the employers establishment (except for the owner of the building or mall), and therefore not a company parking lot for purposes of OSHA recordkeeping.

Question 5-11. An employee experienced an injury or illness in the work environment before they had "clocked in" for the day. Is the case considered work-related even if that employee was not officially "on the clock" for pay purposes?

Yes. For purposes of OSHA recordkeeping, injuries and illnesses occurring in the work environment are considered work-related. Punching in and out with a time clock (or signing in and out) does not affect the outcome for determining work-relatedness. If the employee experienced a work-related injury or illness, and it meets one or more of the general recording criteria under section 1904.7, it must be entered

on the employer's OSHA 300 log.

Question 5-12. Is work-related stress recordable as a mental illness case?

Mental illnesses, such as depression or anxiety disorder, that have work-related stress as a contributing factor, are recordable if the employee voluntarily provides the employer with an opinion from a physician or other licensed health care professional with appropriate training and experience (psychiatrist, psychologist, psychiatric nurse practitioner, etc.) stating that the employee has a mental illness that is work-related, and the case meets one or more of the general recording criteria. See sections 1904.5(b)(2)(ix) and 1904.7.

Question 5-13. If an employee dies or is injured or infected as a result of terrorist attacks, should it be recorded on the OSHA Injury and Illness Log? Should it be reported to OSHA?

Yes, injuries and illnesses that result from a terrorist event or exposure in the work environment are considered work-related for OSHA recordkeeping purposes. OSHA does not provide an exclusion for violence-related injury and illness cases, including injuries and illnesses resulting from terrorist attacks.

Within eight (8) hours after the death of any employee from a work-related incident or the in-patient hospitalization of three or more employees as a result of a work-related incident, an employer must orally report the fatality/multiple hospitalization by telephone or in person to the OSHA Area that is nearest to the site of the incident. An employer may also use the OSHA toll-free central telephone number, 1-800-321-OSHA (1-800-321-6742).

SETTLEMENT AGREEMENT: Section 1904.5

Occupational Injury and Illness Recording and Reporting - 66:66943-66944, December 27, 2001

On November 16, 2001, OSHA entered into a settlement agreement with the National Association of Manufacturers (NAM) to resolve NAM's legal challenge to OSHA's revised recordkeeping regulations in 29 CFR Part 1904, Occupational Injury and Illness Recording and Reporting Requirements. As part of the agreement, OSHA agreed to publish a copy of the OSHA-NAM settlement agreement in the Federal Register within 30 days.

B. Section 1904.5(a) states that "[the employer] must consider an injury or illness to be work-related if an

event or exposure in the work environment either caused or contributed to resulting condition or significantly aggravated a pre-existing condition. Work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment * * *" Under this language, a case is presumed work-related if, and only if, an event or exposure in the work environment is a discernable cause of the injury or illness or of a significant aggravation to pre-existing condition. The work event or exposure need only be one of the discernable causes; it need not be the sole or predominant cause. Section 1904.5(b)(2) states that a case is not record-

able if it “involves signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs outside the work environment.” This language is intended as a restatement of the principle expressed in 1904.5(a), described above. Regardless of where signs or symptoms surface, a case is recordable only if a work event or exposure is a discernable cause of the injury or illness or of a significant aggravation to a pre-existing condition. Section 1904.5(b)(3) states that if it is not obvious whether the precipitating event or exposure occurred in the work environment or elsewhere, the employer “must evaluate the employee’s work duties and envi-

ronment to decide whether or not one or more events or exposures in the work environment caused or contributed to the resulting condition or significantly aggravated a pre-existing condition.” This means that the employer must make a determination whether it is more likely than not that work events or exposures were a cause of the injury or illness, or a significant aggravation to a pre-existing condition. If the employer decides the case is not work-related, and OSHA subsequently issues a citation for failure to record, the Government would have the burden of proving that the injury or illness was work-related.

LETTERS OF INTERPRETATION: Section 1904.5

Section 1904.5 Determination of work-relatedness.

OSHA requirements are set by statute, standards and regulations. Letters of interpretation explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. These letters constitute OSHA’s interpretation of the requirements discussed. Note that OSHA enforcement guidance may be affected by changes to OSHA rules. Also, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA’s website at <http://www.osha.gov>.

Letters of Interpretation constitute OSHA’s interpretation only of the requirements discussed and may not be applicable to any situation not delineated within the original correspondence.

Letter of interpretation related to section 1904.5(b)(6) –
Recordability of a fatal traffic accident in a foreign project location.

August 26, 2004

Mr. John A. Dempsey, Jr.
Vice President
PFD International LLC
One Fluor Daniel Drive
Sugarland, TX 77478

Dear Mr. Dempsey:

We in OSHA’s Directorate of Evaluation and Analysis are responding to your letter dated Friday, April 16, 2004 in which you request guidance on the proper recordability classification of a recent motor vehicle fatality that occurred in one of your foreign project locations.

I will assume that you realize that the Occupational Safety and Health Act, and therefore the 29 CFR Part 1904 OSHA Recordkeeping Regulation, apply only within the jurisdictional boundaries of the United States and certain locations listed in Section 4(a), 29 USC §653(a) of the Act.

If the accident had occurred in a location subject to OSHA jurisdiction, the fatality appears, from the facts recounted in your letter, to be recordable. A fatality is work-related, and therefore recordable, if it occurred while the employee was traveling “in the interest of the employer,” such as driving to attend a work meeting, see 29 CFR §1904.5(b)(6). Please note that the employee’s pay status at the time of the accident does not affect the work relatedness of the case. An exception would

apply if the accident occurred while the employee was on a personal detour from a reasonably direct route of travel, see 29 CFR §1904.5(b)(6)(ii). Since you stated that you do not know whether or not the employee took any personal side trip(s) from the normal highway route to the meeting, the exception would not apply.

Thank you for your interest in occupational safety and health. We hope you find this information helpful. OSHA requirements are set by statute, standards, and regulations. Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. This letter constitutes OSHA's interpretation of the requirements discussed. Note that our enforcement guidance may be affected by changes to OSHA rules. In addition, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA's website at <http://www.osha.gov>. If you have any further questions, please contact the Division of Recordkeeping Requirements at 202-693-1702.

Sincerely,

Keith Goddard, Director
Directorate of Evaluation and Analysis

Letter of interpretation related to sections 1904.5, 1904.5(a), 1904.5(b)(2), 1904.6, 1904.6(a), 1904.7 and 1904.31 –
Evaluation of seven scenarios for work-relatedness and recordkeeping requirements.

January 15, 2004

Ms. Leann M. Johnson-Koch
1200 Nineteenth Street, N.W.
Washington, D.C. 20036-2412

Dear Ms. Johnson-Koch:

Thank you for your E-mail to the Occupational Safety and Health Administration (OSHA) regarding the Injury and Illness Recording and Reporting Requirements contained in 29 CFR Part 1904. Your letter was forwarded to my office by Richard Fairfax, Director, Directorate of Enforcement Programs. The Division of Recordkeeping Requirements is responsible for the administration of the OSHA injury and illness recordkeeping system nationwide. Please excuse the delay in responding to your request.

In your letter, you ask OSHA to clarify the following scenarios to ensure accurate and consistent guidance to your members for purposes of OSHA Recordkeeping requirements. I will address your scenarios by first restating each one and then answering it.

Scenario 1:

- An employee reported to work at 7:00 a.m.
- At 12:15 p.m. the employee reported that his toes on his left foot had started swelling and his foot had started hurting.
- The employee wanted to go to a doctor for evaluation.
- On the First Report of Injury, that the employee completed before he went to the doctor, the employee indicated that the cause of the illness was “unknown (feet wet at cooling tower).”
- When answering the doctor's question: “How did injury occur?” the employee answered that the only thing he could think of was that his feet were wet all the previous day due to work in the morning at a cooling tower. The cooling tower water is treated to remove bacteria and then used in process operations in the plant.

- The doctor described the illness/injury as foot edema/cellulitis.
- The doctor also prescribed the injury as an occupational disease, prescribed an antibiotic, and the employee missed one day of work.
- The company sent the employee to a second doctor who said to continue using the antibiotic.
- Neither doctor could state conclusively that the foot edema/cellulitis was or was not due to the employee's feet being wet due to work at the cooling tower.
- Neither doctor is a specialist in skin disorders.
- During an incident review at the site, the employee again said he did not know if his feet being wet all day the previous day caused the injury/illness.
- The employee also stated that he had not worn the personal protective equipment, rubber boots, prescribed for this task.

The company determined that this injury/illness is not work-related (did not occur in the course of or as a result of employment), since neither physician nor the employee can state with certainty that the injury/illness was caused by the employee's feet being wet all day due to work at the cooling tower. Since the injury/illness was determined to not be work-related, then the company deemed the incident non-recordable.

Response: A case is work-related if it is more likely than not that an event or exposure in the work environment was a cause of the injury or illness. The work event or exposure need only be one of the causes; it not need to be the sole or predominant cause. In this case, the fact that neither the physician nor the employee could state with certainty that the employee's edema was caused by working with wet feet is not dispositive. The physician's description of the edema as an "occupational disease," and the employee's statement that working with wet feet was "the only thing he could of" as the cause, indicate that it is more likely than not that working with wet feet was a cause. The case should be recorded on the OSHA 300 Log.

Scenario 2:

An employee must report to work by 8:00 a.m.

- The employee drove into the company parking lot at 7:30 a.m. and parked the car.
- The employee exited the car and proceeded to the office to report to work.
- The parking lot and sidewalks are privately owned by the facility and both are within the property line, but not the controlled access points (i.e., fence, guards).
- The employee stepped onto the sidewalk and slipped on the snow and ice.
- The employee suffered a back injury and missed multiple days of work.

The company believes that the employee was still in the process of the commute to work since the employee had not yet checked in at the office. Since a work task was not being performed, the site personnel deemed the incident not work-related and therefore not recordable.

Response: Company parking lots and sidewalks are part of the employer's establishment for recordkeeping purposes. Here, the employee slipped on an icy sidewalk while walking to the office to report for work. In addition, the event or exposure that occurred does not meet any of the work-related exceptions contained in 1904.5(b)(2). The employee was on the sidewalk because of work; therefore, the case is work-related regardless of the fact that he had not actually checked in.

Scenario 3:

The employee described in Scenario 2 missed 31 days of work due to the back injury.

- On day 31, the doctor provided a release for returning to work.
- The next morning (day 32), when the employee was due to report to work, the employee stated that his back was hurting, and the employee did not report to work.
- The employee scheduled a doctor's appointment, with the same doctor, and visited the doctor on day 33.
- The doctor issued a statement stating that the employee was not able to return to work.

Since the employee was released to return to work, the company does not believe it has to count the intervening two days on the OSHA log.

Response: The employer would have to enter the additional days away from work on the OSHA 300 log based on receiving information from the physician or other licensed health care professional that the employee was unable to work.

Scenario 4:

- An employee reports to work.
- Several hours later, the employee goes outside for a “smoke break.”
- The employee slips on the ice and injures his back.

Since the employee was not performing a task related to the employee’s work, the company has deemed this incident non-work related and therefore not recordable.

Response: Under Section 1904.5(b)(2)(v), an injury or illness is not work-related if it is solely the result of an employee doing personal tasks (unrelated to their employment) at the establishment outside of the employee’s assigned working hours. In order for this exception to apply, the case must meet both of the stated conditions. The exception does not apply here because the injury or illness occurred within normal working hours. Therefore, your case in question is work-related, and if it meets the general recording criteria under Section 1904.7 the case must be recorded.

Scenario 5:

- An employee drives into the company parking lot at 7:30 a.m., exits his car, and proceeds to cross the parking lot to clock-in to work.
- A second employee, also on the way to work, approaches the first employee, and the two individuals get into a physical altercation in the parking lot. The first employee breaks an arm during the altercation.
- The employee goes to the doctor and receives medical treatment for his injury.

The company deems this non-work related, and therefore non-recordable, since the employees had not yet reported to work and a work task was not being performed at the time of the altercation.

Response: The recordkeeping regulation contains no general exception for purposes of determining work-relationship for cases involving acts of violence in the work environment. Company parking lots/access roads are part of the employer’s premises and therefore part of the employer’s establishment. Whether the employee had not clocked in to work does not affect the outcome for determining work-relatedness. The case is recordable on the OSHA log, because the injury meets the general recording criteria contained in Section 1904.7.

Scenario 6:

- An employee injured a knee performing work-related activities in 2001.
- The accident was OSHA recordable and subject to worker’s compensation.
- The employee had arthroscopic knee surgery eleven months later and was released to full duty a month and a half after the arthroscopic surgery.
- The employee had a second knee injury three months after the return to work release (after the first surgery).
- Post-surgery (second surgery), the doctor prescribed Vioxx® as an anti-inflammatory.
- Approximately one and one-half months after the second knee surgery, the employee was given another full release to return to work full duty and returned to work.
- However, the doctor told the employee to continue to take Vioxx® as prescribed (as needed) and to return to the doctor as needed.
- The employee scheduled a follow-up appointment with the doctor.
- The day before the appointment, the employee bumped his knee at work.
- During his scheduled doctor’s appointment (was to be the last follow-up visit) the employee mentioned the latest incident (bumping the knee) to the doctor and showed him where the pain was occurring due to bumping his knee.
- The doctor stated that the employee had an inflamed tendon (Grade 1 lateral collateral ligament sprain) that was not part of the initial surgery (patellar tendonitis).
- The doctor stated in the diagnosis that the original injury that required knee surgery was resolved.
- The doctor told the employee to continue taking Vioxx® for the inflamed tendon.

Since the employee was already taking the medication prescribed (Vioxx®), the site does not believe this is recordable as a second incident.

Response: In the recordkeeping regulation, the employer is required to follow any determination a physician or other licensed health care professional has made about the status of a new case. The inflamed tendon is a new case because the employee had completely recovered from the previous injury and illness and a new event or exposure had occurred in the work environment. Therefore, for purposes of OSHA recordkeeping, the employer would enter the case on the OSHA 300 log as appropriate.

Scenario 7:

- A site hired numerous temporary workers at its plant.
- Three temporary workers were injured.
- They each received injuries that were recordable on the OSHA 300 Log.
- The employees were under the direct supervision of the site.

Is it correct that these injuries were recordable on the site log or should they have been recordable on the temp agency log? What are the criteria related to temporary workers that need to be reviewed to determine which OSHA log is appropriate for recording the injury/illness?

Response: Section 1904.31 states that the employer must record the injuries and illnesses that occur to employees not on its payroll if it supervises them on a day-to-day basis. Day-to-day supervision generally exists when the employer “supervises not only the output, product, or result to be accomplished by the person’s work, but also the details, means, methods, and processes by which the work objective is accomplished.”

Thank you for your interest in occupational safety and health. We hope you find this information helpful. OSHA requirements are set by statute, standards and regulations. Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. This letter constitutes OSHA’s interpretation of the requirements discussed. Note that our enforcement guidance may be affected by changes to OSHA rules. In addition, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA’s website at <http://www.osha.gov>. If you have any further questions, please contact the Division of Recordkeeping Requirements, at 202-693-1702.

Sincerely,

Frank Frodyma
Acting Director

Letter of interpretation related to sections 1904.5(a), 1904.5(b)(4) and 1904.6 –

Determining work-relatedness when the work event or exposure is only one of the discernable causes; not the sole or predominant cause.

January 13, 2004

William K. Principe
Constangy, Brooks & Smith, LLC
Suite 2400
230 Peachtree Street, N.W.
Atlanta, Georgia 30303-1557

Dear Mr. Principe:

Thank you for your comments pertaining to the Occupational Safety and Health Administration’s (OSHA) Injury and Illness Recording and Reporting requirements contained in 29 CFR Part 1904. Please accept my apology for the delay in our response.

Specifically, you ask OSHA to clarify in each scenario you describe; whether the employee who sustains an injury or illness while he or she is engaged in an activity such as walking or bending is considered work-related. As you note, a case is presumed work-related under the recordkeeping rule if an event or exposure in the work environment is a discernable cause of the injury or illness. The work event or exposure need only be one of the discernable causes; it need not be the sole or predominant cause. The preamble to the rule contains a passage that is relevant in determining whether this presumption applies in the scenarios in your letter. The preamble states, in relevant part, as follows:

In applying [the presumption of work-relatedness], the question employers must answer is whether there is an identifiable event or exposure which occurred in the work environment and resulted in the injury or illness. “Thus, if an employee trips while walking across a level factory floor, the resulting injury is considered work-related under the geographic presumption because the precipitating event - the tripping accident - occurred in the workplace. The case is work-related even if the employer cannot determine why the employee tripped, or whether any particular workplace hazard caused the accident to occur.”

In each of the eight scenarios in your letter, the activity engaged in by the employee at the time of the injury (walking, tripping, climbing a staircase, sneezing, bending down) is an “event” which would trigger application of the presumption. In the absence of evidence to overcome the presumption, the injury is work-related. Thus, in the absence of evidence to overcome the presumption, an ankle injury caused by a trip that occurred while the employee was walking down a level seamless hallway at work is work-related, regardless of whether the accident is attributable to a defect in the hall. By the same reasoning, if the activity of walking down a hallway caused the employee’s knee to buckle or to sprain the ankle, the injury is work-related. If an injury or illness did not result from an identifiable event or exposure in the work environment, but only manifested itself during work, the injury is not work-related. For example, if the employee had a non-occupational event or exposure, and there is no evidence of a work-related event or exposure that was a cause of the injury or illness, the injury should not be recorded.

You also ask whether the determination of work-relationship would be affected by the existence of a pre-existing condition, whether work-related or non-work-related, affecting the same body part that is injured. Under the rule, a pre-existing condition is an injury or illness resulting solely from a non-work-related event or exposure. If an employee’s pre-existing condition is worsened as a result of an event or exposure at work, the case is not work-related unless the work event or exposure “significantly aggravated” the preexisting condition (i.e., the case meets the recording criteria contained in Section 1904.5(b)(4). If the employee with a pre-existing work-related injury to a body part suffers a subsequent work-related injury of the same type to the same body part, the subsequent injury is recordable (assuming the general recording criteria are met) if it is a “new case” as discussed in Section 1904.6.

Thank you for your interest in occupational safety and health. We hope you find this information helpful. OSHA requirements are set by statute, standards and regulations. Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. This letter constitutes OSHA’s interpretation of the requirements discussed. Note that our enforcement guidance may be affected by changes to OSHA rules. In addition, from time to time we update our guidance in response to new information. To keep appraised of such developments, you can consult OSHA’s website at <http://www.osha.gov>. If you have any further questions, please contact the Division of Recordkeeping Requirements, at 202-693-1702.

Sincerely,

Frank Frodyma
Acting Director
Directorate of Evaluation and Analysis

Letter of interpretation related to section 1904.5(b)(2) –
Clarification of Recordkeeping's work-related exception.

July 22, 2003

Jeff Romine, CSP, CPEA
Safety Manager
Shaw Industries, Inc.
Mail Drop 021-01
PO Drawer 2128
Dalton, GA 30722-2128

Dear Mr. Romine:

Thank you for your May 9, 2003 letter to the Occupational Safety and Health Administration (OSHA) regarding the Injury and Illness Recording and Reporting requirements contained in 29 CFR Part 1904.

Specifically, you ask OSHA to clarify the work-related exception specified at 1904.5(b)(2)(v) in which an injury or illness is solely the result of an employee doing personal tasks (unrelated to their employment) at the establishment outside of the employee's assigned working hours. You indicate an employee experienced an injury in the work environment during his or her assigned working hours, but feel the task was unrelated to the employee's job, therefore would not be considered work-related. In order to correctly apply the work-related exception 1904.5(b)(2)(v), the case must meet both of the following conditions. The case must involve first, personal tasks at the establishment and second, must have occurred outside of the employee's assigned working hours. The nature of the activity in which the employee is engaged in at the time of the event or exposure, the degree of employer control over the employee's activity, the preventability of the incident, or the concept of fault do not affect the determination of work-relationship. For purposes of OSHA recordkeeping, the case did not meet the entire criteria under section 1904.5(b)(2)(v).

Thank you for your interest in occupational safety and health. We hope you find this information helpful. OSHA requirements are set by statute, standards, and regulations. Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. This letter constitutes OSHA's interpretation of the requirements discussed. Note that our enforcement guidance may be affected by changes to OSHA rules. Also, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA's website at <http://www.osha.gov>. If you have any further questions, please contact the Division of Recordkeeping Requirements at 202-693-1702.

Sincerely,

John L. Henshaw
Assistant Secretary

Letters of interpretation related to sections 1904.5(a), 1904.5(b) and 1904.5(b)(3) –
Clarification on determining if an injury or illness is work-related and the recordability of the administration of oxygen.

November 19, 2002

Baruch Fellner, Esq.
Gibson, Dunn & Crutcher LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5306

Re: December 12, 2001 Recordkeeping Training

Dear Mr. Fellner:

This is in response to your letter to Joseph Woodward dated January 15, 2002 regarding OSHA's December 12, 2001 recordkeeping training broadcast. Your letter has been referred to me for response because it involves interpretation of the new recordkeeping rule. Your letter questions the accuracy of the on-the-air responses given to two questions phoned in during the broadcast and expresses concern that certain interpretations of the recordkeeping rule reflected in the settlement agreement in the **NAM v. Chao** litigation have not been explicitly incorporated into OSHA's training and outreach materials. After reviewing the transcript of the broadcast and the content of the other web-based training materials, I agree that it would be useful to supplement or clarify some information provided, as discussed below.

First, during the broadcast, a caller asked the following question: "If an employee is simply walking down a hallway and let's say that there is no pre-existing injury and they simply just pull a muscle in their leg while they're walking down, is that considered work related?" One of the OSHA panelists answered:

You know, what we have is we have a presumption of work relationship if it occurs from an event or exposure within the work environment. So, this person is walking down the hall and, if there is no event or exposure that led to the condition, then I don't think that presumption would apply. Do you agree with that, Jim?

The second OSHA panelist responded: "It sounds like a work-related case to me. I mean, it sounds like the person was injured while they were in the work environment and, yeah, I would consider that a work-related case."

As the differing responses given by the panelists may suggest, the question as posed provides too little information about the factual context of the injury to make a conclusive determination about causation. We therefore believe that the most helpful way to clarify the response is to set forth the principles that should be followed in determining whether an injury is work-related. Under the recordkeeping rule, an injury or illness is presumed work-related if (and only if) an event or exposure in the work environment is a discernable cause of the injury or illness or a significant aggravation to a pre-existing condition. The work event or exposure need only be one of the discernable causes; it need not be the sole or predominant cause (§29 CFR 1904.5(a); Compliance Directive Chapter 2, Sec. IC). As a corollary, the rule recognizes that a case is not recordable if it involves signs or symptoms that surface at work but result solely from a non-work-related event or activity that occurs outside the work environment (§29 CFR 1904.5(b); Compliance Directive Chapter 2, Sec. IC). The rule also provides guidance for situations in which it is not clear which of these categories an injury falls into. If it is not obvious whether the precipitating event occurred in the work environment or elsewhere, the employer is to evaluate the employee's work duties and environment and make a determination whether it is more likely than not that work events or exposures were a cause of the injury or illness or of a significant aggravation of a pre-existing condition (§29 CFR 1904.5(b)(3)). The employer may consult a health care professional for assistance in making this determination if it wishes.

These principles should be applied to the question posed. If it is obvious in context that walking or some other work event or exposure was a cause of the injury, the case is work-related. If it is obvious work events or exposures were not a cause, but rather symptoms surfaced at work but resulted solely from non-work-related activities, the case is not work-related. If it is unclear, the employer should evaluate the employee's work duties and environment and determine whether it is more likely than not that work events or exposures were a cause. OSHA will post a clarification of its answer to this question on its web page.

Second, later in the broadcast, a caller asked the following question: "If oxygen is given by emergency response personnel on the way to the hospital, is that considered to be OSHA recordable, if he does not have any medical treatment at the hospital?" The OSHA panelist answered, "Under the new rule, oxygen is considered medical treatment. So, **if the person has an injury or illness**, you know, if they're exhibiting some signs of difficulty and they're given oxygen, then that's now considered medical treatment (emphasis added)."

Contrary to your reading, I do not understand the question to assume that no injury or illness requiring medical treatment was present; rather, the question is whether the administration of oxygen is medical treatment that makes a case recordable. The question and answer, reasonably read together, indicate that a case is recordable if an employee with a work-related injury or illness is given oxygen in an ambulance on the way to the hospital, even though no further medical treatment is provided at the hospital. I believe that this information is accurate as it stands. However, to avoid any possibility of confusion, I have recommended that the training given to compliance officers emphasize that employees must have sustained an injury or illness, as defined by the recordkeeping rule, before the administration of oxygen, or any other medical treatment, makes the case recordable.

Finally, I have discussed your general comments about the training materials with other responsible officials in the agency. OSHA agrees it would be helpful to include references to the compliance directive. It is appropriate that interpretive language in the settlement agreement be reflected in the Agency's training materials, such as the Power Point slides, where such incorporation would be relevant and useful.

The Associate Solicitor for Occupational Safety and Health has reviewed this letter and agrees that the Agency's position is consistent with the settlement agreement in *NAM v. Chao*.

The Office of Training and Education is reviewing the recordkeeping training and outreach materials and will make all necessary revisions as soon as possible.

Thank you for bringing this matter to the Agency's attention. I hope I addressed all of your issues and concerns.

Sincerely,

Frank Frodyma, Acting Director
OSHA Directorate of Evaluation and Analysis

November 19, 2002

Joseph Woodward, Esq.
Associate Solicitor for the Occupational Safety and Health Administration
Department of Labor
Office of the Solicitor
200 Constitution Avenue, NW, Room S-4004
Washington, DC 20210

Re: December 12, 2001 OSHA Recordkeeping Training

While we very much appreciate the proactive efforts being made by the agency to provide training as it implements the new rule, I am writing on behalf of NAM to express my concern that the Department of Labor's keynote training presentation regarding the new recordkeeping rule, its December 12, 2001 satellite "webcast," contained information inconsistent with our settlement agreement and omitted information central to that agreement.

First, as you know, an injury or illness is not presumed to be work-related unless "*an event or exposure* in the work environment is a *discernable cause* of the injury or illness or of a significant aggravation to a pre-existing condition." *See, inter alia*, Settlement Agreement section 2(B) (emphasis added). The Settlement Agreement restates this important principle: "*Regardless of where signs or symptoms surface*, a case is recordable only if a work event or exposure is a discernible cause of the injury or illness or of a significant aggravation to a pre-existing condition." *Id.* (emphasis added). In other words, it is not the location where signs or symptoms surface, it is the discernible work-related event that defines causation and triggers recordation. In response to a question regarding a pulled muscle that occurred in the workplace, but with which no identifiable work-related event or exposure could be identified, the representative from OSHA's Office of Statistics correctly noted that "if there is no event or exposure that led to the condition, I don't think that presumption [of work-relatedness] would apply." Transcript at pp. 44-45.* Another authoritative OSHA spokesperson, however, disagreed with his colleague and stated, "It sounds like a work related case to me. It sounds like the person was injured *while they were in the work environment* and, yeah, I would consider that a work related case." *Id.* at p. 45 (emphasis added). I am concerned that this response and OSHA's training materials impart an erroneous view of the so-called geographic presumption. Unfortunate events which occur to an individual while he is at work and engaged in normal life functions, such as walking over an even surface and pulling a muscle, should not be presumed to be work-related simply because they occur at work. Absent some other identifiable work-related event or exposure in the work environment, such a conclusion clearly conflicts with the "discernable cause" rule to which OSHA agreed in the settlement. Any training to the contrary ignores the agreement's imposition on the Secretary of Labor the burden of proof regarding work-relatedness and is contrary to its substantive provisions.

Second, our settlement agreement clearly specifies that the existence of an injury or illness is a threshold inquiry and that, even where, for example, oxygen is administered, *in the context of workplace exposure to a toxic substance*, if an injury or illness did not occur, the case remains non-recordable. *See* Settlement Agreement at sections 2(E), (F); accord Transcript at p. 86 (discussing non-recordability of precautionary administration of antibiotics). In response to a question relating to this specific issue, which assumed the prophylactic administration of oxygen *without any toxic exposure or medical treatment*, however, OSHA's spokesperson replied that, "Under the new rule, oxygen is considered medical treatment. So if the person has an injury or illness ... if *they're exhibiting some signs of difficulty* and they're given oxygen, then that's now considered medical treatment." Transcript at p. 46 (emphasis added).

* The transcript of the training session is available at http://www.vodium.com/vs_data/transcript/labor8NG8Y91T.txt.

The problem with the response is two-fold: (1) It ignores the question's assumption that no injury or illness requiring medical treatment was present and (2) it equates "some sign of difficulty" with an illness or injury. As you know, the settlement expressly states that an employee must exhibit symptoms of an injury or illness in order for the administration of oxygen to constitute recordable medical treatment. Settlement Agreement at section 2(F). "Some signs of difficulty," particularly in the absence of any medical treatment, would not necessarily constitute "symptoms of an injury or illness." For example; a professional football player who leaves the field winded and who takes a breath of oxygen might be experiencing "some signs of difficulty" but might not be suffering from "symptoms of an injury or illness." Thus, the answer to the question as posed should have clearly been that the administration of oxygen, absent other medical treatment or related injury or illness, is not recordable. Without further clarification, I am concerned that the OSHA reply might have led participants to conclude that almost all administrations of oxygen are presumptively recordable cases.

Third, I am generally concerned that OSHA's training materials (including the satellite presentation and the materials contained on OSHA's web site) completely omit any reference to a number of significant interpretations in the settlement agreement. For example, neither the satellite training nor the Power Point "Comprehensive Presentation" on OSHA's web site address the preventive transfer issue, an important clarification contained in our settlement agreement. See Settlement Agreement at section 2(C). I respectfully suggest that this issue should be discussed in order to provide full context for any understanding of restricted work. The training materials also fail to discuss the "discernable cause" concept, and the "more likely than not" analysis employed when causation is unclear. Instead, the materials leave the regulated community with the misimpression that unless "symptoms arising in [the] work environment are *solely due to [a] non-work-related event or exposure*," they are otherwise recordable. See Comprehensive Presentation at Slide 16 (emphasis added); *see also id.* at Slide 13 (restating geographic presumption without clarification from settlement agreement). Appropriate clarification would have resolved the confusion attendant to the first issue described above. Additionally, the discussion of hearing loss causation at pages 63 to 64 of the satellite training transcript would have been an appropriate point at which to apply these principles.

Finally, we believe that future training should identify the compliance directive, which incorporates the settlement agreement, as an important source of clarification for recordkeeping questions. For example, at pages 77, 78, 90 and 91, the trainers identified a number of sources of information, but did not mention the compliance directive.

Our principal concern is that if these issues are not presented clearly during OSHA's primary training sessions, they will not be executed properly by OSHA's field staff. OSHA's compliance officers will provide advice and issue citations based upon an erroneous understanding of these critical issues, and the principles embodied in the compliance directive will not be consistently and correctly applied throughout the nation.

Thank you for your consideration of my thoughts. I appreciate the opportunity to engage in a constructive dialogue as employees, employers and OSHA work together to implement the new rule.

Sincerely,

Baruch A. Fellner

cc: The Honorable John Henshaw
The Honorable Christopher Spear
Mr. Tevi Troy

Letter of interpretation related to sections 1904.5(a), 1904.5(b)(3) and 1904.5(b)(4) –
OSHA's no-fault recordkeeping system requires recording work-related injuries and illnesses, regardless of the level of employer control or non-control involved.

February 6, 2002

Beth Nelson
State of Wyoming
Department of Employment
Cheyenne Business Center
1510 East Pershing Blvd.
Cheyenne, Wyoming 82002

Dear Ms. Nelson:

This is in response to your letter dated August 14, 2002. Thank you for your comments pertaining to the Occupational Safety and Health Administration's (OSHA) Injury and Illness Recording and Reporting Requirements contained in 29 CFR Part 1904.

OSHA revised its injury and illness recordkeeping requirements under the following rulemaking procedures. On February 2, 1996, the agency published a notice of proposed rulemaking (NPRM) requesting public comment on the proposed revision to the recordkeeping requirements. OSHA received more than 450 comments and held six days of public meetings. OSHA analyzed all information from the public meetings and developed its final rule based upon that analysis. On January 19, 2001, OSHA published its final rule.

Specifically, you ask OSHA to reconsider requiring employers to record and report work-related fatalities, injuries and illnesses incurred due to no fault of the employer or employee. You also provide an example of a case that illustrates your concerns. We are assuming that the auto accident in your example meets OSHA's definition of work-relatedness. In the final rule, OSHA notes that many circumstances that lead to a recordable work-related injury or illness are "beyond the employer's control." Nevertheless, because such an injury or illness was caused, contributed to, or significantly aggravated by an event or exposure at work, it must be recorded on the OSHA form (assuming that it meets one or more of the recording criteria and does not qualify for an exception to the geographic presumption). This approach is consistent with the no-fault recordkeeping system OSHA has historically adopted, which includes work-related injuries and illnesses, regardless of the level of employer control or non-control involved. The concept of fault has never been a consideration in any recordkeeping system of the U.S. Department of Labor. Both the Note to Subpart A of the final rule and the new OSHA Form 300 expressly state that recording a case does not indicate fault, negligence, or compensability. In addition, OSHA recognizes that injury and illness rates do not necessarily indicate a lack of interest in safety and health or success or failure per se. OSHA feels it is to the benefit of all parties to go beyond the numbers and look at an employer's safety and health program.

I hope that you find this information useful. Thank you for your interest in occupational safety and health and OSHA. If you have any further questions, please contact the Division of Recordkeeping Requirements, at 202-693-1702.

Sincerely,

John L. Henshaw

cc: Adam Finkel, Regional Administrator
Steve Foster, Wyoming OSHA Program Manager

Section 1904.6 Determination of new cases

(66 FR 6123, Jan. 19, 2001)

REGULATION: Section 1904.6

Subpart C – Recordkeeping forms and recording criteria (66 FR 6123, Jan. 19, 2001)

Note to Subpart C: This Subpart describes the work-related injuries and illnesses that an employer must enter into the OSHA records and explains the OSHA forms that employers must use to record work-related fatalities, injuries, and illnesses.

Section 1904.6 Determination of new cases

(a) Basic requirement.

You must consider an injury or illness to be a “new case” if:

- (1) The employee has not previously experienced a recorded injury or illness of the same type that affects the same part of the body, or
- (2) The employee previously experienced a recorded injury or illness of the same type that affected the same part of the body but had recovered completely (all signs and symptoms had disappeared) from the previous injury or illness and an event or exposure in the work environment caused the signs or symptoms to reappear.

(b) Implementation.

(1) When an employee experiences the signs or symptoms of a chronic work-related illness, do I need to consider each recurrence of signs or symptoms to be a new case?

No, for occupational illnesses where the signs or symptoms may recur or continue in the absence of an exposure in the workplace, the case must only be recorded once. Examples may include occupational cancer, asbestosis, byssinosis and silicosis.

(2) When an employee experiences the signs or symptoms of an injury or illness as a result of an event or exposure in the workplace, such as an episode of occupational asthma, must I treat the episode as a new case?

Yes, because the episode or recurrence was caused by an event or exposure in the workplace, the incident must be treated as a new case.

(3) May I rely on a physician or other licensed health care professional to determine whether a case is a new case or a recurrence of an old case?

You are not required to seek the advice of a physician or other licensed health care professional. However, if you do seek such advice, you must follow the physician or other licensed health care professional’s recommendation about whether the case is a new case or a recurrence. If you receive recommendations from two or more physicians or other licensed health care professionals, you must make a decision as to which recommendation is the most authoritative (best documented, best reasoned, or most authoritative), and record the case based upon that recommendation.

PREAMBLE DISCUSSION: Section 1904.6

(66 FR 5962-5967, Jan. 19, 2001)

The following are selected excerpts from the preamble to the Occupational Injury and Illness Recording and Reporting Requirements, the Recordkeeping rule (66 FR 5916, 29 CFR Parts 1904 and 1952). These excerpts represent some of the key discussions related to the final rule (66 FR 6122, 29 CFR Parts 1904 and 1952).

Section 1904.6 Determination of new cases

Employers may occasionally have difficulty in determining whether new signs or symptoms are due to a new event or exposure in the workplace or whether they are the continuation of an existing work-related injury or illness. Most occupational injury and illness cases are fairly discrete events, *i.e.*, events in which

an injury or acute illness occurs, is treated, and then resolves completely. For example, a worker may suffer a cut, bruise, or rash from a clearly recognized event in the workplace, receive treatment, and recover fully within a few weeks. At some future time, the worker may suffer another cut, bruise or rash from another workplace event. In such cases, it is clear

that the two injuries or illnesses are unrelated events, and that each represents an injury or illness that must be separately evaluated for its recordability.

However, it is sometimes difficult to determine whether signs or symptoms are due to a new event or exposure, or are a continuance of an injury or illness that has already been recorded. This is an important distinction, because a new injury or illness requires the employer to make a new entry on the OSHA 300 Log, while a continuation of an old recorded case requires, at most, an updating of the original entry.

The basic requirement at Section 1904.6(a) states that the employer must consider an injury or illness a new case to be evaluated for recordability if (1) the employee has not previously experienced a recorded injury or illness of the same type that affects the same part of the body, or (2) the employee previously experienced a recorded injury or illness of the same type that affected the same part of the body but had recovered completely (all signs and symptoms of the previous injury or illness had disappeared) and an event or exposure in the work environment caused the injury or illness, or its signs or symptoms, to reappear.

Section 1904.6(b)(1) addresses chronic work-related cases that have already been recorded once and distinguishes between those conditions that will progress even in the absence of workplace exposure and those that are triggered by events in the workplace. There are some conditions that will progress even in the absence of further exposure, such as some occupational cancers, advanced asbestosis, tuberculosis disease, advanced byssinosis, advanced silicosis, etc. These conditions are chronic; once the disease is contracted it may never be cured or completely resolved, and therefore the case is never “closed” under the OSHA recordkeeping system, even though the signs and symptoms of the condition may alternate between remission and active disease.

However, there are other chronic work-related illness conditions, such as occupational asthma, reactive airways dysfunction syndrome (RADs), and sensitization (contact) dermatitis, that recur if the ill individual is exposed to the agent (or agents, in the case of cross-reactivities or RADs) that triggers the illness again. It is typical, but not always the case, for individuals with these conditions to be symptom-free if exposure to the sensitizing or precipitating agent does not occur.

The final rule provides, at paragraph (b)(1), that the employer is not required to record as a new case

a previously recorded case of chronic work-related illness where the signs or symptoms have recurred or continued in the absence of exposure in the workplace. This paragraph recognizes that there are occupational illnesses that may be diagnosed at some stage of the disease and may then progress without regard to workplace events or exposures. Such diseases, in other words, will progress without further workplace exposure to the toxic substance(s) that caused the disease. Examples of such chronic work-related diseases are silicosis, tuberculosis, and asbestosis. With these conditions, the ill worker will show signs (such as a positive TB skin test, a positive chest roentgenogram, etc.) at every medical examination, and may experience symptomatic bouts as the disease progresses.

Paragraph 1904.6(b)(2) recognizes that many chronic occupational illnesses, however, such as occupational asthma, RADs, and contact dermatitis, are triggered by exposures in the workplace. The difference between these conditions and those addressed in paragraph 1904.6(b)(1) is that in these cases exposure triggers the recurrence of symptoms and signs, while in the chronic cases covered in the previous paragraph, the symptoms and signs recur even in the absence of exposure in the workplace.

Paragraph 1904.6(b)(3) addresses how to record a case for which the employer requests a physician or other licensed health care professional (HCP) to make a new case/continuation of an old case determination. Paragraph (b)(3) makes clear that employers are to follow the guidance provided by the HCP for OSHA recordkeeping purposes. In cases where two or more HCPs make conflicting or differing recommendations, the employer is required to base his or her decision about recordation based on the most authoritative (best documented, best reasoned, or most persuasive) evidence or recommendation.

OSHA has historically recognized that it is generally an easier matter to differentiate between old and new cases that involve injuries than those involving illnesses: the *Guidelines* stated that “the aggravation of a previous injury almost always results from some new incident involving the employee * * * [w]hen work-related, these new incidents should be recorded as new cases on the OSHA forms, assuming they meet the criteria for recordability * * *”. However, the *Guidelines* also stated that “certain illnesses, such as silicosis, may have prolonged effects which recur over time. The recurrence of these symptoms should not be recorded as a new case on the OSHA forms. * * * Some occupational illnesses, such as certain dermatitis or respiratory conditions, may recur as the

result of new exposures to sensitizing agents, and should be recorded as new cases.” ...

...In the final rule, OSHA has decided against the proposed approach of determining case resolution based on a certain number of days during which the injured or ill employee did not lose time, receive treatment, have signs or symptoms, or be restricted to light duty. OSHA agrees with those commenters who argued that the proposed approach was too prescriptive and did not allow for the variations that naturally exist from one injury and illness case to the next. Further, the record contains no convincing evidence to support a set number of days as appropriate. OSHA thus agrees with those commenters who pointed out that adoption of a fixed time interval would result in the overrecording of some injury and illness cases and the underrecording of others, and thus would impair the quality of the records.

Further, OSHA did not intend to create an “injury free” time zone during which an injury or illness would not be considered a new case, regardless of cause, as . . . suggested. Instead, OSHA proposed that a case be considered a new case if *either* condition applied: the case resulted from a new event or exposure or 45 days had elapsed without signs, symptoms, or medical treatment, restricted work, or days away from work. There are clearly cases where an event or exposure in the workplace would be cause for recording a new case. A new injury may manifest the same signs and symptoms as the previous injury but still be a new injury and not a continuation of the old case if, for example, an employee sustains a fall and fractures his or her wrist, and four months later falls again and fractures the wrist in the same place. This occurrence is not a continuation of the fracture but rather a new injury whose recordability must be evaluated. The final rule’s approach to recurrence/new case determinations avoids this and other recording problems because it includes no day count limit and relies on one of the basic principles of the recordkeeping system, *i.e.*, that injuries or illnesses arising from events or exposures in the workplace must be evaluated for recordability.

In response to those commenters who raised issues about inconsistency between the OSHA system and workers’ compensation, OSHA notes that there is no reason for the two systems, which serve different purposes (recording injuries and illnesses for national statistical purposes and indemnifying workers for job-related injuries and illnesses) to use the same definitions. Accordingly, the final rule does not rely on workers’ compensation determinations to identify injuries or illness cases that are to be consid-

ered new cases for recordkeeping purposes....

...OSHA has not included any provisions in the final rule that require an employer to rely on a physician or other licensed health care professional or that tell a physician or other licensed health care professional how to treat an injured or ill worker, or when to begin or end such treatment. In the final rule OSHA does require the employer to follow any determination a physician or other licensed health care professional has made about the status of a new case. That is, if such a professional has determined that a case is a new case, the employer must record it as such. If the professional determines that the case is a recurrence, rather than a new case, the employer is not to record it a second time. In addition, the rule does not require the employee, or the employer, to obtain permission from the physician or other licensed health care professional before the employee can return to work. OSHA believes that the employer is capable of, and often in the best position to, make return-to-work decisions....

...“A recurrence of a previous work-related injury or illness should only be considered a new case when the injury or illness has completely healed. Severe muscle and nerve damage can take many weeks or months to properly heal.” The final rule takes such differences into account, as follows. If the previous injury or illness has not healed (signs and symptoms have not resolved), then the case cannot be considered resolved. The employer may make this determination or may rely on the recommendation of a physician or other licensed health care professional when doing so. Clearly, if the injured or ill employee is still exhibiting signs or symptoms of the previous injury or illness, the malady has not healed, and a new case does not have to be recorded. Similarly, if work activities aggravate a previously recorded case, there is no need to consider recording it again (although there may be a need to update the case information if the aggravation causes a more severe outcome than the original case, such as days away from work)....

Because the OSHA system is intended to measure the incidence of occupational injury and illness, each individual injury or illness should be recorded only once in the system. However, an employee can experience the same type of injury or illness more than once. For example, if a worker cuts a finger on a machine in March, and is then unfortunate enough to cut the same finger again in October, this worker has clearly experienced two separate occupational injuries, each of which must be evaluated for its recordability. In other cases, this evaluation is not as simple. For example, a worker who performs forceful

manual handling injures his or her back in 1998, resulting in days away from work, and the case is entered into the records. In 1999 this worker has another episode of severe work-related back pain and must once again take time off for treatment and recuperation. The question is whether or not the new symptoms, back pain, are continuing symptoms of the old injury, or whether they represent a new injury that should be evaluated for its recordability as a new case. The answer in this case lies in an analysis of whether or not the injured or ill worker has recovered fully between episodes, and whether or not the back pain is the result of a second event or exposure in the workplace, *e.g.*, continued manual handling. If the worker has not fully recovered and no new event or exposure has occurred in the workplace, the case is considered a continuation of the previous injury or illness and is not recordable....

...The term “new case” tends to suggest to some that the case is totally original, when in fact new cases for OSHA recordkeeping purposes include three categories of cases; (1) totally new cases where the employee has never suffered similar signs or symptoms while in the employ of that employer, (2) cases where the employee has a preexisting condition that is significantly aggravated by activities at work and the significant aggravation reaches the level requiring recordation, and (3) previously recorded conditions that have healed (all symptoms and signs have resolved) and then have subsequently been triggered by events or exposures at work.

Both new injuries and recurrences must be evaluated for their work-relatedness and then for whether they meet one or more of the recording criteria; when these criteria are met, the case must be recorded. If the case is a continuation of a previously recorded case but does not meet the “new case” criteria, the employer may have to update the OSHA 300 Log entry if the original case continues to progress, *i.e.*, if the status of the case worsens. For example, consider a case where an employee has injured his or her back lifting a heavy object, the injury resulted in medical treatment, and the case was recorded as a case without restricted work or days away. If the injury does not heal and the employer subsequently decides to assign the worker to restricted work activity, the employer is required by the final rule to change the case classification and to track the number of days of restricted work. If the case is a previous work-related injury that did not meet the recording criteria and thus was not recorded, future developments in the case may require it to be recorded. For example, an employee may suffer

an ankle sprain tripping on a step. The employee is sent to a health care professional, who does not recommend medical treatment or restrictions, so the case is not recorded at that time. If the injury does not heal, however, and a subsequent visit to a physician results in medical treatment, the case must then be recorded....

OSHA and employers and employees need data on recurring cases because recurrence is an important indicator of severity over the long term. Just as the number of days away is a useful indicator of health and safety risk at a particular establishment, so is the total number of injury and illness events and of exposures resulting in health consequences that occur in an establishment or industry. Further, any realistic assessment of occupational safety and health conditions should reflect the fact that some but not all injuries and illnesses have long-term consequences.

...In other words, a safety and health analysis should give less weight to an injury or illness that has a clear and relatively quick recovery without impairment of any kind and an injury or illness that is chronic in nature or one that involves recurring episodes that are retriggered by workplace events or exposures.

Ignoring the fact that an occupational injury or illness is a recurrence occasioned by an event or exposure in the workplace would result in an underestimate of the true extent of occupational injury and illness and deprive employers, employees, and safety and health professionals of essential information of use in illness prevention. The other extreme, requiring employers to record on-going signs or symptoms repeatedly, even in the absence of an event or exposure in the workplace, would result in overstating the extent of illness. In terms of the recordkeeping system, deciding how most appropriately to handle new cases requires a balanced approach that minimizes both overrecording and underrecording. OSHA has dealt with this problem in the final rule by carefully defining the circumstances under which a chronic and previously recorded injury or illness must be considered closed and defining the circumstances under which a recurrence is to be considered a new case and then evaluated to determine whether it meets one or more of the recordability criteria....

...The final rule uses one set of criteria for determining whether any injury or illness, including a musculoskeletal disorder, is to be treated as a new case or as the continuation of an “old” injury or illness. First, if the employee has never had a recorded injury or illness of the same type and affecting the

same part of the body, the case is automatically considered a new case and must be evaluated for recordability. This provision will handle the vast majority of injury and illness cases, which are new cases rather than recurrences or case continuations. Second, if the employee has previously had a recorded injury or illness of the same type and affecting the same body part, but the employee has completely recovered from the previous injury or illness, and a new workplace event or exposure causes the injury or illness (or its signs or symptoms) to reappear, the case is a recurrence that the employer must evaluate for recordability.

The implementation section of Section 1904.6 describes these requirements and includes explanations applying to two special circumstances. In the first case, paragraph 1904.6(b)(1) the employee has experienced a chronic injury or illness of a type that will progress regardless of further workplace exposure. Cases to which this provision applies are serious, chronic illness conditions such as occupational cancer, asbestosis, silicosis, chronic beryllium disease, etc. These occupational conditions generally continue to progress even though the worker is removed from further exposure. These conditions may change over time and be associated with recurrences of symptoms, or remissions, but the signs (e.g., positive chest roentgenogram, positive blood test) generally continue to be present throughout the course of the disease.

The second kind of case, addressed in paragraph 1904.6(b)(b)(2), requires employers to record chronic illness cases that recur as a result of exposures in the workplace. These conditions might include episodes of occupational asthma, reactive airways dysfunction syndrome (RADS), or contact allergic dermatitis, for example.

Paragraph 1904.6(b)(3) recognizes the role of physicians and other licensed health care professionals that the employer may choose to rely on when tracking a “new case” or making a continuation of an old case determination. If a physician or other licensed health care professional determines that an injury or illness has been resolved, the employer must consider the case to be resolved and record as a new case any episode that causes the signs and symptoms to recur as a result of exposure in the workplace. On the other hand, if the HCP consulted by the employer determines that the case is a chronic illness of the type addressed by paragraph 1904.6(b)(1), the employer would not record the case again. In either case, the employer would evaluate it for work-relatedness and then determine whether the original entry requires updating or the case meets the recording criteria. Paragraph (b)(3) also recognizes that the employer may ask for input from more than one HCP, or the employer and employee may each do so, and in such cases, the rule requires the employer to rely on the one judged by the employer to be most authoritative.

FREQUENTLY ASKED QUESTIONS: Section 1904.6 (OSHA Instruction, CPL 2-0.135, Chap. 5) **Section 1904.6 Determination of new cases**

Question 6-1. *How is an employer to determine whether an employee has “recovered completely” from a previous injury or illness such that a later injury or illness of the same type affecting the same part of the body resulting from an event or exposure at work is a “new case” under section 1904.6(a)(2)? If an employee’s signs and symptoms disappear for a day and then resurface the next day, should the employer conclude that the later signs and symptoms represent a new case?*

An employee has “recovered completely” from a previous injury or illness, for purposes of section 1904.6(a)(2), when he or she is fully healed or cured. The employer must use his best judgment based on factors such as the passage of time since the symp-

toms last occurred and the physical appearance of the affected part of the body. If the signs and symptoms of a previous injury disappear for a day only to reappear the following day, that is strong evidence the injury has not properly healed. The employer may, but is not required to, consult a physician or other licensed health care provider (PLHCP). Where the employer does consult a PLHCP to determine whether an employee has recovered completely from a prior injury or illness, it must follow the PLHCP’s recommendation. In the event the employer receives recommendations from two or more PLHCPs, the employer may decide which recommendation is the most authoritative and record the case based on that recommendation.

LETTERS OF INTERPRETATION: Section 1904.6

Section 1904.6 Determination of new cases

Letter of interpretation related to sections 1904.5, 1904.5(a), 1904.5(b)(2), 1904.6, 1904.6(a), 1904.7 and 1904.31 – Evaluation of seven scenarios for work-relatedness and recordkeeping requirements.

January 15, 2004

Ms. Leann M. Johnson-Koch
1200 Nineteenth Street, N.W.
Washington, D.C. 20036-2412

Dear Ms. Johnson-Koch:

Thank you for your E-mail to the Occupational Safety and Health Administration (OSHA) regarding the Injury and Illness Recording and Reporting Requirements contained in 29 CFR Part 1904. Your letter was forwarded to my office by Richard Fairfax, Director, Directorate of Enforcement Programs. The Division of Recordkeeping Requirements is responsible for the administration of the OSHA injury and illness recordkeeping system nationwide. Please excuse the delay in responding to your request.

In your letter, you ask OSHA to clarify the following scenarios to ensure accurate and consistent guidance to your members for purposes of OSHA Recordkeeping requirements. I will address your scenarios by first restating each one and then answering it.

Scenario 1:

- An employee reported to work at 7:00 a.m.
- At 12:15 p.m. the employee reported that his toes on his left foot had started swelling and his foot had started hurting.
- The employee wanted to go to a doctor for evaluation.
- On the First Report of Injury, that the employee completed before he went to the doctor, the employee indicated that the cause of the illness was “unknown (feet wet at cooling tower).”
- When answering the doctor’s question: “How did injury occur?” the employee answered that the only thing he could think of was that his feet were wet all the previous day due to work in the morning at a cooling tower. The cooling tower water is treated to remove bacteria and then used in process operations in the plant.
- The doctor described the illness/injury as foot edema/cellulitis.
- The doctor also prescribed the injury as an occupational disease, prescribed an antibiotic, and the employee missed one day of work.
- The company sent the employee to a second doctor who said to continue using the antibiotic.
- Neither doctor could state conclusively that the foot edema/cellulitis was or was not due to the employee’s feet being wet due to work at the cooling tower.
- Neither doctor is a specialist in skin disorders.
- During an incident review at the site, the employee again said he did not know if his feet being wet all day the previous day caused the injury/illness.
- The employee also stated that he had not worn the personal protective equipment, rubber boots, prescribed for this task.

The company determined that this injury/illness is not work-related (did not occur in the course of or as a result of employment), since neither physician nor the employee can state with certainty that the injury/illness was caused by the employee’s feet being wet all day due to work at the cooling tower. Since the injury/illness was determined to not be work-related, then the company deemed the incident non-recordable.

Response: A case is work-related if it is more likely than not that an event or exposure in the work environment was a cause of the injury or illness. The work event or exposure need only be one of the causes; it does not need to be the sole or predominant cause. In this case, the fact that neither the physician nor the employee could state with certainty that the employee’s edema was caused by working with wet feet is not dispositive. The physician’s description of the edema as an “occupational disease,” and the employee’s statement that working with wet feet was “the only thing he could think of” as the cause, indicate that it is more likely than not that working with wet feet was a cause. The case should be recorded on the OSHA 300 Log.

Scenario 2:

An employee must report to work by 8:00 a.m.

- The employee drove into the company parking lot at 7:30 a.m. and parked the car.
- The employee exited the car and proceeded to the office to report to work.
- The parking lot and sidewalks are privately owned by the facility and both are within the property line, but not the controlled access points (i.e., fence, guards).
- The employee stepped onto the sidewalk and slipped on the snow and ice.
- The employee suffered a back injury and missed multiple days of work.

The company believes that the employee was still in the process of the commute to work since the employee had not yet checked in at the office. Since a work task was not being performed, the site personnel deemed the incident not work-related and therefore not recordable.

Response: Company parking lots and sidewalks are part of the employer's establishment for recordkeeping purposes. Here, the employee slipped on an icy sidewalk while walking to the office to report for work. In addition, the event or exposure that occurred does not meet any of the work-related exceptions contained in 1904.5(b)(2). The employee was on the sidewalk because of work; therefore, the case is work-related regardless of the fact that he had not actually checked in.

Scenario 3:

The employee described in Scenario 2 missed 31 days of work due to the back injury.

- On day 31, the doctor provided a release for returning to work.
- The next morning (day 32), when the employee was due to report to work, the employee stated that his back was hurting, and the employee did not report to work.
- The employee scheduled a doctor's appointment, with the same doctor, and visited the doctor on day 33.
- The doctor issued a statement stating that the employee was not able to return to work.

Since the employee was released to return to work, the company does not believe it has to count the intervening two days on the OSHA log.

Response: The employer would have to enter the additional days away from work on the OSHA 300 log based on receiving information from the physician or other licensed health care professional that the employee was unable to work.

Scenario 4:

- An employee reports to work.
- Several hours later, the employee goes outside for a "smoke break."
- The employee slips on the ice and injures his back.

Since the employee was not performing a task related to the employee's work, the company has deemed this incident non-work related and therefore not recordable.

Response: Under Section 1904.5(b)(2)(v), an injury or illness is not work-related if it is solely the result of an employee doing personal tasks (unrelated to their employment) at the establishment outside of the employee's assigned working hours. In order for this exception to apply, the case must meet both of the stated conditions. The exception does not apply here because the injury or illness occurred within normal working hours. Therefore, your case in question is work-related, and if it meets the general recording criteria under Section 1904.7 the case must be recorded.

Scenario 5:

- An employee drives into the company parking lot at 7:30 a.m., exits his car, and proceeds to cross the parking lot to clock-in to work.
- A second employee, also on the way to work, approaches the first employee, and the two individuals get into a physical altercation in the parking lot. The first employee breaks an arm during the altercation.
- The employee goes to the doctor and receives medical treatment for his injury.

The company deems this non-work related, and therefore non-recordable, since the employees had not yet reported to work and a work task was not being performed at the time of the altercation.

Response: The recordkeeping regulation contains no general exception for purposes of determining work-relationship for cases involving acts of violence in the work environment. Company parking lots/access roads are part of the employer's premises and therefore part of the employer's establishment. Whether the employee had not clocked in to work does not affect the outcome for determining work-relatedness. The case is recordable on the OSHA log, because the injury meets the general recording criteria contained in Section 1904.7.

Scenario 6:

- An employee injured a knee performing work-related activities in 2001.
 - The accident was OSHA recordable and subject to worker's compensation.
 - The employee had arthroscopic knee surgery eleven months later and was released to full duty a month and a half after the arthroscopic surgery.
 - The employee had a second knee injury three months after the return to work release (after the first surgery).
 - Post-surgery (second surgery), the doctor prescribed Vioxx® as an anti-inflammatory.
 - Approximately one and one-half months after the second knee surgery, the employee was given another full release to return to work full duty and returned to work.
 - However, the doctor told the employee to continue to take Vioxx® as prescribed (as needed) and to return to the doctor as needed.
 - The employee scheduled a follow-up appointment with the doctor.
 - The day before the appointment, the employee bumped his knee at work.
 - During his scheduled doctor's appointment (was to be the last follow-up visit) the employee mentioned the latest incident (bumping the knee) to the doctor and showed him where the pain was occurring due to bumping his knee.
 - The doctor stated that the employee had an inflamed tendon (Grade 1 lateral collateral ligament sprain) that was not part of the initial surgery (patellar tendonitis).
 - The doctor stated in the diagnosis that the original injury that required knee surgery was resolved.
 - The doctor told the employee to continue taking Vioxx® for the inflamed tendon.
- Since the employee was already taking the medication prescribed (Vioxx®), the site does not believe this is recordable as a second incident.

Response: In the recordkeeping regulation, the employer is required to follow any determination a physician or other licensed health care professional has made about the status of a new case. The inflamed tendon is a new case because the employee had completely recovered from the previous injury and illness and a new event or exposure had occurred in the work environment. Therefore, for purposes of OSHA recordkeeping, the employer would enter the case on the OSHA 300 log as appropriate.

Scenario 7:

- A site hired numerous temporary workers at its plant.
 - Three temporary workers were injured.
 - They each received injuries that were recordable on the OSHA 300 Log.
 - The employees were under the direct supervision of the site.
- Is it correct that these injuries were recordable on the site log or should they have been recordable on the temp agency log? What are the criteria related to temporary workers that need to be reviewed to determine which OSHA log is appropriate for recording the injury/illness?

Response: Section 1904.31 states that the employer must record the injuries and illnesses that occur to employees not on its payroll if it supervises them on a day-to-day basis. Day-to-day supervision generally exists when the employer "supervises not only the output, product, or result to be accomplished by the person's work, but also the details, means, methods, and processes by which the work objective is accomplished."

Thank you for your interest in occupational safety and health. We hope you find this information helpful. OSHA requirements are set by statute, standards and regulations. Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. This letter constitutes OSHA's interpretation of the requirements discussed. Note that our enforcement guidance may be affected by changes to OSHA rules. In addition, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA's website at <http://www.osha.gov>. If you have any further questions, please contact the Division of Recordkeeping Requirements, at 202-693-1702.

Sincerely,

Frank Frodyma
Acting Director

Determining work-relatedness when the work event or exposure is only one of the discernable causes; not the sole or predominant cause.

January 13, 2004

William K. Principe
Constangy, Brooks & Smith, LLC
Suite 2400
230 Peachtree Street, N.W.
Atlanta, Georgia 30303-1557

Dear Mr. Principe:

Thank you for your comments pertaining to the Occupational Safety and Health Administration's (OSHA) Injury and Illness Recording and Reporting requirements contained in 29 CFR Part 1904. Please accept my apology for the delay in our response.

Specifically, you ask OSHA to clarify in each scenario you describe whether the employee who sustains an injury or illness while he or she is engaged in an activity such as walking or bending is considered work-related. As you note, a case is presumed work-related under the recordkeeping rule if an event or exposure in the work environment is a discernable cause of the injury or illness. The work event or exposure need only be one of the discernable causes; it need not be the sole or predominant cause. The preamble to the rule contains a passage that is relevant in determining whether this presumption applies in the scenarios in your letter. The preamble states, in relevant part, as follows:

In applying [the presumption of work-relatedness], the question employers must answer is whether there is an identifiable event or exposure which occurred in the work environment and resulted in the injury or illness. "Thus, if an employee trips while walking across a level factory floor, the resulting injury is considered work-related under the geographic presumption because the precipitating event - the tripping accident - occurred in the workplace. The case is work-related even if the employer cannot determine why the employee tripped, or whether any particular workplace hazard caused the accident to occur."

In each of the eight scenarios in your letter, the activity engaged in by the employee at the time of the injury (walking, tripping, climbing a staircase, sneezing, bending down) is an "event" which would trigger application of the presumption. In the absence of evidence to overcome the presumption, the injury is work-related. Thus, in the absence of evidence to overcome the presumption, an ankle injury caused by a trip that occurred while the employee was walking down a level seamless hallway at work is work-related, regardless of whether the accident is attributable to a defect in the hall. By the same reasoning, if the activity of walking down a hallway caused the employee's knee to buckle or to sprain the ankle, the injury is work-related. If an injury or illness did not result from an identifiable event or exposure in the work environment, but only manifested itself during work, the injury is not work-related. For example, if the employee had a non-occupational event or exposure, and there is no evidence of a work-related event or exposure that was a cause of the injury or illness, the injury should not be recorded.

You also ask whether the determination of work-relationship would be affected by the existence of a pre-existing condition, whether work-related or non-work-related, affecting the same body part that is injured. Under the rule, a pre-existing condition is an injury or illness resulting solely from a non-work-related event or exposure. If an employee's pre-existing condition is worsened as a result of an event or exposure at work, the case is not work-related unless the work event or exposure "significantly aggravated" the preexisting condition (i.e., the case meets the recording criteria contained in Section 1904.5(b)(4)). If the employee with a pre-existing work-related injury to a body part suffers a subsequent work-related injury of the same type to the same body part, the subsequent injury is recordable (assuming the general recording criteria are met) if it is a "new case" as discussed in Section 1904.6.

Thank you for your interest in occupational safety and health. We hope you find this information helpful. OSHA requirements are set by statute, standards and regulations. Our interpretation letters

explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. This letter constitutes OSHA's interpretation of the requirements discussed. Note that our enforcement guidance may be affected by changes to OSHA rules. In addition, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA's website at <http://www.osha.gov>. If you have any further questions, please contact the Division of Recordkeeping Requirements, at 202-693-1702.

Sincerely,

Frank Frodyma
Acting Director
Directorate of Evaluation and Analysis

Section 1904.7 General recording criteria

(66 FR 6126, Jan. 19, 2001)

REGULATION: Section 1904.7

Subpart C – Recordkeeping forms and recording criteria (66 FR 6123, Jan. 19, 2001)

Note to Subpart C: This Subpart describes the work-related injuries and illnesses that an employer must enter into the OSHA records and explains the OSHA forms that employers must use to record work-related fatalities, injuries, and illnesses.

Section 1904.7 General Recording Criteria

(a) Basic requirement.

You must consider an injury or illness to meet the general recording criteria, and therefore to be recordable, if it results in any of the following: death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness. You must also consider a case to meet the general recording criteria if it involves a significant injury or illness diagnosed by a physician or other licensed health care professional, even if it does not result in death, days away from work, restricted work or job transfer, medical treatment beyond first aid, or loss of consciousness.

(b) Implementation.

(1) *How do I decide if a case meets one or more of the general recording criteria?*

A work-related injury or illness must be recorded if it results in one or more of the following:

- (i) Death. See Section 1904.7(b)(2).
- (ii) Days away from work. See Section 1904.7(b)(3).
- (iii) Restricted work or transfer to another job. See Section 1904.7(b)(4).
- (iv) Medical treatment beyond first aid. See Section 1904.7(b)(5).
- (v) Loss of consciousness. See Section 1904.7(b)(6).
- (vi) A significant injury or illness diagnosed by a physician or other licensed health care professional. See Section 1904.7(b)(7).

(2) *How do I record a work-related injury or illness that results in the employee's death?*

You must record an injury or illness that results in death by entering a check mark on the OSHA 300 Log in the space for cases resulting in death. You must also report any work-related fatality to OSHA within eight (8) hours, as required by Section 1904.39.

(3) *How do I record a work-related injury or illness that results in days away from work?*

When an injury or illness involves one or more days away from work, you must record the injury or illness on the OSHA 300 Log with a check mark in the space for cases involving days away and an entry of the number of calendar days away from work in the number of days column. If the employee is out for an extended period of time, you must enter an estimate of the days that the employee will be away, and update the day count when the actual number of days is known.

(i) Do I count the day on which the injury occurred or the illness began?

No, you begin counting days away on the day after the injury occurred or the illness began.

(ii) How do I record an injury or illness when a physician or other licensed health care professional recommends that the worker stay at home but the employee comes to work anyway?

You must record these injuries and illnesses on the OSHA 300 Log using the check box for cases with days away from work and enter the number of calendar days away recommended by the physician or other licensed health care professional. If a physician or other licensed health care professional recommends days away, you should encourage your employee to follow that recommendation. However, the days away must be recorded whether the injured or ill employee follows the physician or licensed health care professional's recommendation or not. If you receive recommendations from two or more physicians or other licensed health care professionals, you may make a decision as to which recommendation is the most authoritative, and record the case based upon that recommendation.

(iii) How do I handle a case when a physician or other licensed health care professional recommends that the worker return to work but the employee stays at home anyway?

In this situation, you must end the count of days away from work on the date the physician or

other licensed health care professional recommends that the employee return to work.

(iv) How do I count weekends, holidays, or other days the employee would not have worked anyway?

You must count the number of calendar days the employee was unable to work as a result of the injury or illness, regardless of whether or not the employee was scheduled to work on those day(s). Weekend days, holidays, vacation days or other days off are included in the total number of days recorded if the employee would not have been able to work on those days because of a work-related injury or illness.

(v) How do I record a case in which a worker is injured or becomes ill on a Friday and reports to work on a Monday, and was not scheduled to work on the weekend?

You need to record this case only if you receive information from a physician or other licensed health care professional indicating that the employee should not have worked, or should have performed only restricted work, during the weekend. If so, you must record the injury or illness as a case with days away from work or restricted work, and enter the day counts, as appropriate.

(vi) How do I record a case in which a worker is injured or becomes ill on the day before scheduled time off such as a holiday, a planned vacation, or a temporary plant closing?

You need to record a case of this type only if you receive information from a physician or other licensed health care professional indicating that the employee should not have worked, or should have performed only restricted work, during the scheduled time off. If so, you must record the injury or illness as a case with days away from work or restricted work, and enter the day counts, as appropriate.

(vii) Is there a limit to the number of days away from work I must count?

Yes, you may “cap” the total days away at 180 calendar days. You are not required to keep track of the number of calendar days away from work if the injury or illness resulted in more than 180 calendar days away from work and/or days of job transfer or restriction. In such a case, entering 180 in the total days away column will be considered adequate.

(viii) May I stop counting days if an employee who is away from work because of an injury or illness retires or leaves my company?

Yes, if the employee leaves your company for some reason unrelated to the injury or illness, such as retirement, a plant closing, or to take another job, you may stop counting days away from work or days of restriction/job transfer. If the employee leaves your company because of the injury or illness, you must estimate the total number of days away or days of restriction/job transfer and enter the day count on the 300 Log.

(ix) If a case occurs in one year but results in days away during the next calendar year, do I record the case in both years?

No, you only record the injury or illness once. You must enter the number of calendar days away for the injury or illness on the OSHA 300 Log for the year in which the injury or illness occurred. If the employee is still away from work because of the injury or illness when you prepare the annual summary, estimate the total number of calendar days you expect the employee to be away from work, use this number to calculate the total for the annual summary, and then update the initial log entry later when the day count is known or reaches the 180-day cap.

(4) How do I record a work-related injury or illness that results in restricted work or job transfer?

When an injury or illness involves restricted work or job transfer but does not involve death or days away from work, you must record the injury or illness on the OSHA 300 Log by placing a check mark in the space for job transfer or restriction and an entry of the number of restricted or transferred days in the restricted workdays column.

(i) How do I decide if the injury or illness resulted in restricted work?

Restricted work occurs when, as the result of a work-related injury or illness:

(A) You keep the employee from performing one or more of the routine functions of his or her job, or from working the full workday that he or she would otherwise have been scheduled to work; or

(B) A physician or other licensed health care professional recommends that the employee not perform one or more of the routine functions of his or her job, or not work the full workday that he or she would otherwise have been scheduled to work.

(ii) What is meant by “routine functions”?

For recordkeeping purposes, an employee’s routine functions are those work activities the employee regularly performs at least once per week.

(iii) Do I have to record restricted work or job transfer if it applies only to the day on which the injury occurred or the illness began?

No, you do not have to record restricted work or job transfers if you, or the physician or other licensed health care professional, impose the restriction or transfer only for the day on which the injury occurred or the illness began.

(iv) If you or a physician or other licensed health care professional recommends a work restriction, is the injury or illness automatically recordable as a “restricted work” case?

No, a recommended work restriction is recordable only if it affects one or more of the employee’s routine job functions. To determine whether this is the case, you must evaluate the restriction in light of the routine functions of the injured or ill employee’s job. If the restriction from you or the physician or other licensed health care professional keeps the employee from performing one or more of his or her routine job functions, or from working the full workday the injured or ill employee would otherwise have worked, the employee’s work has been restricted and you must record the case.

(v) How do I record a case where the worker works only for a partial work shift because of a work-related injury or illness?

A partial day of work is recorded as a day of job transfer or restriction for recordkeeping purposes, except for the day on which the injury occurred or the illness began.

(vi) If the injured or ill worker produces fewer goods or services than he or she would have produced prior to the injury or illness but otherwise performs all of the routine functions of his or her work, is the case considered a restricted work case?

No, the case is considered restricted work only if the worker does not perform all of the routine functions of his or her job or does not work the full shift that he or she would otherwise have worked.

(vii) How do I handle vague restrictions from a physician or other licensed health care professional, such as that the employee engage only in “light duty” or “take it easy for a week”?

If you are not clear about the physician or other licensed health care professional’s recommendation, you may ask that person whether the employee can do all of his or her routine job functions and work all of his or her normally assigned work shift. If the answer to both of these ques-

tions is “Yes,” then the case does not involve a work restriction and does not have to be recorded as such. If the answer to one or both of these questions is “No,” the case involves restricted work and must be recorded as a restricted work case. If you are unable to obtain this additional information from the physician or other licensed health care professional who recommended the restriction, record the injury or illness as a case involving restricted work.

(viii) What do I do if a physician or other licensed health care professional recommends a job restriction meeting OSHA’s definition, but the employee does all of his or her routine job functions anyway?

You must record the injury or illness on the OSHA 300 Log as a restricted work case. If a physician or other licensed health care professional recommends a job restriction, you should ensure that the employee complies with that restriction. If you receive recommendations from two or more physicians or other licensed health care professionals, you may make a decision as to which recommendation is the most authoritative, and record the case based upon that recommendation.

(ix) How do I decide if an injury or illness involved a transfer to another job?

If you assign an injured or ill employee to a job other than his or her regular job for part of the day, the case involves transfer to another job. Note: This does not include the day on which the injury or illness occurred.

(x) Are transfers to another job recorded in the same way as restricted work cases?

Yes, both job transfer and restricted work cases are recorded in the same box on the OSHA 300 Log. For example, if you assign, or a physician or other licensed health care professional recommends that you assign, an injured or ill worker to his or her routine job duties for part of the day and to another job for the rest of the day, the injury or illness involves a job transfer. You must record an injury or illness that involves a job transfer by placing a check in the box for job transfer.

(xi) How do I count days of job transfer or restriction?

You count days of job transfer or restriction in the same way you count days away from work, using Section 1904.7(b)(3)(i) to (viii), above. The only difference is that, if you permanently assign the injured or ill employee to a job that has been modified or permanently changed in a manner

that eliminates the routine functions the employee was restricted from performing, you may stop the day count when the modification or change is made permanent. You must count at least one day of restricted work or job transfer for such cases.

(5) How do I record an injury or illness that involves medical treatment beyond first aid?

If a work-related injury or illness results in medical treatment beyond first aid, you must record it on the OSHA 300 Log. If the injury or illness did not involve death, one or more days away from work, one or more days of restricted work, or one or more days of job transfer, you enter a check mark in the box for cases where the employee received medical treatment but remained at work and was not transferred or restricted.

(i) What is the definition of medical treatment?

“Medical treatment” means the management and care of a patient to combat disease or disorder. For the purposes of Part 1904, medical treatment does not include:

(A) Visits to a physician or other licensed health care professional solely for observation or counseling;

(B) The conduct of diagnostic procedures, such as x-rays and blood tests, including the administration of prescription medications used solely for diagnostic purposes (e.g., eye drops to dilate pupils); or

(C) “First aid” as defined in paragraph (b)(5)(ii) of this section.

(ii) What is “first aid”?

For the purposes of Part 1904, “first aid” means the following:

(A) Using a non-prescription medication at non-prescription strength (for medications available in both prescription and non-prescription form, a recommendation by a physician or other licensed health care professional to use a non-prescription medication at prescription strength is considered medical treatment for recordkeeping purposes);

(B) Administering tetanus immunizations (other immunizations, such as Hepatitis B vaccine or rabies vaccine, are considered medical treatment);

(C) Cleaning, flushing or soaking wounds on the surface of the skin;

(D) Using wound coverings such as bandages, Band-Aids™, gauze pads, etc.; or using butterfly bandages or Steri-Strips™ (other wound closing devices such as sutures, staples, etc., are considered medical treatment);

(E) Using hot or cold therapy;

(F) Using any non-rigid means of support, such

as elastic bandages, wraps, non-rigid back belts, etc. (devices with rigid stays or other systems designed to immobilize parts of the body are considered medical treatment for recordkeeping purposes);

(G) Using temporary immobilization devices while transporting an accident victim (e.g., splints, slings, neck collars, back boards, etc.).

(H) Drilling of a fingernail or toenail to relieve pressure, or draining fluid from a blister;

(I) Using eye patches;

(J) Removing foreign bodies from the eye using only irrigation or a cotton swab;

(K) Removing splinters or foreign material from areas other than the eye by irrigation, tweezers, cotton swabs or other simple means;

(L) Using finger guards;

(M) Using massages (physical therapy or chiropractic treatment are considered medical treatment for recordkeeping purposes); or

(N) Drinking fluids for relief of heat stress.

(iii) Are any other procedures included in first aid?

No, this is a complete list of all treatments considered first aid for Part 1904 purposes.

(iv) Does the professional status of the person providing the treatment have any effect on what is considered first aid or medical treatment?

No, OSHA considers the treatments listed in Section 1904.7(b)(5)(ii) of this Part to be first aid regardless of the professional status of the person providing the treatment. Even when these treatments are provided by a physician or other licensed health care professional, they are considered first aid for the purposes of Part 1904.

Similarly, OSHA considers treatment beyond first aid to be medical treatment even when it is provided by someone other than a physician or other licensed health care professional.

(v) What if a physician or other licensed health care professional recommends medical treatment but the employee does not follow the recommendation?

If a physician or other licensed health care professional recommends medical treatment, you should encourage the injured or ill employee to follow that recommendation. However, you must record the case even if the injured or ill employee does not follow the physician or other licensed health care professional's recommendation.

(6) Is every work-related injury or illness case involving a loss of consciousness recordable?

Yes, you must record a work-related injury or illness if the worker becomes unconscious, regardless

of the length of time the employee remains unconscious.

(7) What is a “significant” diagnosed injury or illness that is recordable under the general criteria even if it does not result in death, days away from work, restricted work or job transfer, medical treatment beyond first aid, or loss of consciousness?

Work-related cases involving cancer, chronic irreversible disease, a fractured or cracked bone, or a punctured eardrum must always be recorded under the general criteria at the time of diagnosis by a physician or other licensed health care professional.

Note to Section 1904.7: OSHA believes that most significant injuries and illnesses will result in one of the criteria listed in Section 1904.7(a): death, days away from work, restricted work or job transfer, medical treatment beyond first aid, or loss of conscious-

ness. However, there are some significant injuries, such as a punctured eardrum or a fractured toe or rib, for which neither medical treatment nor work restrictions may be recommended. In addition, there are some significant progressive diseases, such as byssinosis, silicosis, and some types of cancer, for which medical treatment or work restrictions may not be recommended at the time of diagnosis but are likely to be recommended as the disease progresses. OSHA believes that cancer, chronic irreversible diseases, fractured or cracked bones, and punctured eardrums are generally considered significant injuries and illnesses, and must be recorded at the initial diagnosis even if medical treatment or work restrictions are not recommended, or are postponed, in a particular case.

PREAMBLE DISCUSSION: Section 1904.7

(66 FR 5968-5998, Jan. 19, 2001)

The following are selected excerpts from the preamble to the Occupational Injury and Illness Recording and Reporting Requirements, the Recordkeeping rule (66 FR 5916, 29 CFR Parts 1904 and 1952). These excerpts represent some of the key discussions related to the final rule (66 FR 6122, 29 CFR Parts 1904 and 1952).

Section 1904.7 General recording criteria.

Section 1904.7 contains the general recording criteria for recording work-related injuries and illnesses. This section describes the recording of cases that meet one or more of the following six criteria: death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, loss of consciousness, or diagnosis as a significant injury or illness by a physician or other licensed health care professional.

Paragraph 1904.7(a)

Paragraph 1904.7(a) describes the basic requirement for recording an injury or illness in the OSHA recordkeeping system. It states that employers must record any work-related injury or illness that meets one or more of the final rule’s general recording criteria. There are six such criteria: death, days away from work, days of restricted work or job transfer, medical treatment beyond first aid, loss of consciousness, or diagnosis by a physician or other licensed health care professional as a significant injury or illness....

Paragraph 1904.7(b)

Paragraph 1904.7(b) tells employers how to record cases meeting each of the six general recording criteria and states how each case is to be entered on the OSHA 300 Log. Paragraph 1904.7(b)(1) provides a

simple decision table listing the six general recording criteria and the paragraph number of each in the final rule. It is included to aid employers and recordkeepers in recording these cases.

1904.7(b)(2) Death

Paragraph 1904.7(b)(2) requires the employer to record an injury or illness that results in death by entering a check mark on the OSHA 300 Log in the space for fatal cases. This paragraph also directs employers to report work-related fatalities to OSHA within 8 hours and cross references the fatality and catastrophe reporting requirements in Section 1904.39 of the final rule, Reporting fatalities and multiple hospitalizations to OSHA....

Paragraph 1904.7(b)(3) Days Away From Work

Paragraph 1904.7(b)(3) contains the requirements for recording work-related injuries and illnesses that result in days away from work and for counting the total number of days away associated with a given case. Paragraph 1904.7(b)(3) requires the employer to record an injury or illness that involves one or more days away from work by placing a check mark on the OSHA 300 Log in the space reserved for day(s) away cases and entering the number of calendar days away from work in the column reserved for that purpose. This paragraph also states that, if the employee

is away from work for an extended time, the employer must update the day count when the actual number of days away becomes known....

Paragraphs 1904.7(b)(3)(i) through (vi) implement the basic requirements. Paragraph 1904.7(b)(3)(i) states that the employer is not to count the day of the injury or illness as a day away, but is to begin counting days away on the following day. Thus, even though an injury or illness may result in some loss of time on the day of the injurious event or exposure because, for example, the employee seeks treatment or is sent home, the case is not considered a days-away-from-work case unless the employee does not work on at least one subsequent day because of the injury or illness. The employer is to begin counting days away on the day following the injury or onset of illness....

Paragraphs 1904.7(b)(3)(ii) and (iii) direct employers how to record days-away cases when a physician or other licensed health care professional (HCP) recommends that the injured or ill worker stay at home or that he or she return to work but the employee chooses not to do so. OSHA requires employers to follow the physician's or HCP's recommendation when recording the case. Further, whether the employee works or not is in the control of the employer, not the employee. That is, if an HCP recommends that the employee remain away from work for one or more days, the employer is required to record the injury or illness as a case involving days away from work and to keep track of the days; the employee's wishes in this case are not relevant, since it is the employer who controls the conditions of work. Similarly, if the HCP tells the employee that he or she can return to work, the employer is required by the rule to stop counting the days away from work, even if the employee chooses not to return to work. OSHA is aware that there may be situations where the employer obtains an opinion from a physician or other health care professional and a subsequent HCP's opinion differs from the first. (The subsequent opinion could be that of an HCP retained by the employer or the employee.) In this case, the employer is the ultimate recordkeeping decision-maker and must resolve the differences in opinion; he or she may turn to a third HCP for this purpose, or may make the recordability decision himself or herself.

Paragraph 1904.7(b)(3)(iv) specifies how the employer is to account for weekends, holidays, and other days during which the employee was unable to work because of a work-related injury or illness during a period in which the employee was not sched-

uled to work. The rule requires the employer to count the number of calendar days the employee was unable to work because of the work-related injury or illness, regardless of whether or not the employee would have been scheduled to work on those calendar days....

Paragraph 1904.7(b)(3)(v) tells the employer how to count days away for a case where the employee is injured or becomes ill on the last day of work before some scheduled time off, such as on the Friday before the weekend or the day before a scheduled vacation, and returns to work on the next day that he or she was scheduled to work. In this situation, the employer must decide if the worker would have been able to work on the days when he or she was not at work. In other words, the employer is not required to count as days away any of the days on which the employee would have been able to work but did not because the facility was closed, the employee was not scheduled to work, or for other reasons unrelated to the injury or illness. However, if the employer determines that the employee's injury or illness would have kept the employee from being able to work for part or all of time the employee was away, those days must be counted toward the days away total.

Paragraph 1904.7(b)(3)(vi) allows the employer to stop counting the days away from work when the injury or illness has resulted in 180 calendar days away from work. When the injury or illness results in an absence of more than 180 days, the employer may enter 180 (or 180+) on the Log....

Paragraph 1904.7(b)(3)(vii) specifies that employers whose employees are away from work because of a work-related injury or illness and who then decide to leave the company's employ or to retire must determine whether the employee is leaving or retiring because of the injury or illness and record the case accordingly. If the employee's decision to leave or retire is a result of the injury or illness, this paragraph requires the employer to estimate and record the number of calendar days away or on restricted work/job transfer the worker would have experienced if he or she had remained on the employer's payroll. This provision also states that, if the employee's decision was unrelated to the injury or illness, the employer is not required to continue to count and record days away or on restricted work/job transfer.

Paragraph 1904.7(b)(3)(viii) directs employers how to handle a case that carries over from one year to the next. Some cases occur in one calendar year and then result in days away from work in the next year.

For example, a worker may be injured on December 20th and be away from work until January 10th. The final rule directs the employer only to record this type of case once, in the year that it occurred. If the employee is still away from work when the annual summary is prepared (before February 1), the employer must either count the number of days the employee was away or estimate the total days away that are expected to occur, use this estimate to calculate the total days away during the year for the annual summary, and then update the Log entry later when the actual number of days is known or the case reaches the 180-day cap allowed in Section 1904.7(b)(3)(v)....

...OSHA has decided to require employers to count calendar days, both for the totals for days away from work and the count of restricted workdays....

Changing to a calendar day counting system will also make it easier to count days away or restricted for part-time workers, because the difficulties of counting scheduled time off for part-time workers will be eliminated. This will, in turn, mean that the data for part-time workers will be comparable to that for full-time workers, *i.e.*, days away will be comparable for both kinds of workers, because scheduled time will not bias the counting method. Calendar day counts will also be a better measure of severity, because they will be based on the length of disability instead of being dependent on the individual employee's work schedule. This policy will thus create more complete and consistent data and help to realize one of the major goals of this rulemaking: to improve the quality of the injury and illness data.

OSHA recognizes that moving to calendar day counts will have two effects on the data. First, it will be difficult to compare injury and illness data gathered under the former rule with data collected under the new rule. This is true for day counts as well as the overall number and rate of occupational injuries and illnesses. Second, it will be more difficult for employers to estimate the economic impacts of lost time. Calendar day counts will have to be adjusted to accommodate for days away from work that the employee would not have worked even if he or she was not injured or ill. This does not mean that calendar day counts are not appropriate in these situations, but it does mean that their use is more complicated in such cases. Those employers who wish to continue to collect additional data, including scheduled workdays lost, may continue to do so. However, employers must count and record calendar days for the OSHA injury and illness Log.

Thus, on balance, OSHA believes that any problems introduced by moving to a calendar-day system will be more than offset by the improvements in the data from one case to the next and from one employer to another, and by the resulting improvements in year-to-year analysis made possible by this change in the future, *i.e.*, by the improved consistency and quality of the data.

The more difficult problem raised by the shift to calendar days occurs in the case of the injury or illness that results on the day just before a weekend or some other prescheduled time off. Where the worker continues to be off work for the entire time because of the injury or illness, these days are clearly appropriately included in the day count. As previously discussed, if a physician or other licensed health care professional issues a medical release at some point when the employee is off work, the employer may stop counting days at that point in the prescheduled absence. Similarly, if the HCP tells the injured or ill worker not to work over the scheduled time off, the injury was severe enough to require days away and these must all be counted. In the event that the worker was injured or became ill on the last day before the weekend or other scheduled time off and returns on the scheduled return date, the employer must make a reasonable effort to determine whether or not the employee would have been able to work on any or all of those days, and must count the days and enter them on the Log based on that determination. In this situation, the employer need not count days on which the employee would have been able to work, but did not, because the facility was closed, or the employee was not scheduled to work, or for other reasons unrelated to the injury or illness....

Capping the Count of Lost Workdays

...After a review of the evidence submitted to the record, OSHA has decided to include in the final rule a provision that allows the employer to stop counting days away from work or restricted workdays when the case has reached 180 days....

Selection of the Day Count Cap

...After careful consideration, OSHA has decided to cap the day counts at 180 days and to express the count as days rather than months....

OSHA has decided to cap the counts at 180 days to eliminate any effect such capping might have on the median days away from work data reported by BLS....

Paragraph 1904.7(b)(4) Restricted Work or Transfer to Another Job

Another class of work-related injuries and illnesses that Section 8(c) of the Act identifies as non-minor and thus recordable includes any case that results in restriction of work or motion...or transfer to another job.

Final Rule's Restricted Work and Job Transfer Provisions, and OSHA's Reasons for Adopting Them

Paragraph 1904.7(b)(4) contains the restricted work and job transfer provisions of the final rule....

The final rule's requirements in paragraph 1904.10(b)(4) of the final rule state:

(4) How do I record a work-related injury or illness that involves restricted work or job transfer?

When an injury or illness involves restricted work or job transfer but does not involve death or days away from work, you must record the injury or illness on the OSHA 300 Log by placing a check mark in the space for job transfer or restricted work and entering the number of restricted or transferred days in the restricted work column.

(i) How do I decide if the injury or illness resulted in restricted work?

Restricted work occurs when, as the result of a work-related injury or illness:

- (A) You keep the employee from performing one or more of the routine functions of his or her job, or from working the full workday that he or she would otherwise have been scheduled to work; or
- (B) A physician or other licensed health care professional recommends that the employee not perform one or more of the routine functions of his or her job, or not work the full workday that he or she would otherwise have been scheduled to work.

(ii) What is meant by "routine functions"?

For recordkeeping purposes, an employee's routine functions are those work activities the employee regularly performs at least once per week.

(iii) Do I have to record restricted work or job transfer if it applies only to the day on which the injury occurred or the illness began?

No. You do not have to record restricted work or job transfers if you, or the physician or other licensed health care professional, impose the restriction or transfer only for the day on which the injury occurred or the illness began.

(iv) If you or a physician or other licensed health care professional recommends a work restriction, is the injury or illness automatically recordable as a "restricted work" case?

No. A recommended work restriction is recordable only if it affects one or more of the employee's routine job functions. To determine whether this is the

case, you must evaluate the restriction in light of the routine functions of the injured or ill employee's job. If the restriction from you or the physician or other licensed health care professional keeps the employee from performing one or more of his or her routine job functions, or from working the full workday the injured or ill employee would otherwise have worked, the employee's work has been restricted and you must record the case.

(v) How do I record a case where the worker works only for a partial work shift because of a work-related injury or illness?

A partial day of work is recorded as a day of job transfer or restriction for recordkeeping purposes, except for the day on which the injury occurred or the illness began.

(vi) If the injured or ill worker produces fewer goods or services than he or she would have produced prior to the injury or illness but otherwise performs all of the activities of his or her work, is the case considered a restricted work case?

No. The case is considered restricted work only if the worker does not perform all of the routine functions of his or her job or does not work the full shift that he or she would otherwise have worked.

(vii) How do I handle vague restrictions from a physician or other licensed health care professional, such as that the employee engage only in "light duty" or "take it easy for a week"?

If you are not clear about a physician or other licensed health care professional's recommendation, you may ask that person whether the employee can perform all of his or her routine job functions and work all of his or her normally assigned work shift. If the answer to both of these questions is "Yes," then the case does not involve a work restriction and does not have to be recorded as such. If the answer to one or both of these questions is "No," the case involves restricted work and must be recorded as a restricted work case. If you are unable to obtain this additional information from the physician or other licensed health care professional who recommended the restriction, record the injury or illness as a case involving job transfer or restricted work.

(viii) What do I do if a physician or other licensed health care professional recommends a job restriction meeting OSHA's definition but the employee does all of his or her routine job functions anyway?

You must record the injury or illness on the OSHA 300 Log as a restricted work case. If a physician or other licensed health care professional recommends a job restriction, you should ensure that the employee complies with that restriction. If you receive recommendations

from two or more physicians or other licensed health care providers, you may make a decision as to which recommendation is the most authoritative, and record the case based upon that recommendation.

...The final rule's concept of restricted work is based both on the type of work activities the injured or ill worker is able to perform and the length of time the employee is able to perform these activities. The term "routine functions of the job" in paragraphs 1904.7(b)(4)(i) and (b)(4)(ii) clarifies that OSHA considers an employee who is unable, because of a work-related injury or illness, to perform the job activities he or she usually performs to be restricted in the work he or she may perform....

...OSHA agrees that it makes little sense to consider an employee who is prevented by an injury or illness from performing a particular job function he or she never or rarely performed to be restricted....

For example, OSHA finds that, for the purposes of recordkeeping, an activity that is performed only once per month is not performed "regularly." ...

...In the final rule, OSHA has decided that defining restricted work as work that an employee would regularly have performed at least once per week is appropriate, *i.e.*, OSHA believes that the range of activities captured by this interval of time will generally reflect the range of an employee's usual work activities. Activities performed less frequently than once per week reflect more uncommon work activities that are not considered routine duties for the purposes of this rule. However, the final rule does not rely on the duties the employee actually performed during the week when he or she was injured or became ill. Thus, even if an employee did not perform the activity within the last week, but usually performs the activity once a week, the activity will be included....

The final rule's restricted work provisions also clarify that work restriction must be imposed by the employer or be recommended by a health care professional before the case is recordable. Only the employer has the ultimate authority to restrict an employee's work, so the definition is clear that, although a health care professional may recommend the restriction, the employer makes the final determination of whether or not the health care professional's recommended restriction involves the employee's routine functions. Restricted work assignments may involve several steps: an HCP's recommendation, or employer's determination to restrict the employee's work, the employer's analysis of jobs to determine

whether a suitable job is available, and assignment of the employee to that job. All such restricted work cases are recordable, even if the health care professional allows some discretion in defining the type or duration of the restriction....

...[T]he Congress has directed that the recordkeeping system capture data on non-minor work-related injuries and illnesses and specifically on restricted work cases, both so that the national statistics on such injuries and illnesses will be complete and so that links between the causes and contributing factors to such injuries and illnesses will be identified (29 U.S.C. 651(b)). Days away and restricted work/job transfer cases together constitute two of the most important kinds of job-related injuries and illnesses, and it would be inappropriate not to record these serious cases....

Under the final rule, employers are not required to record a case as a restricted work case if the restriction is imposed on the employee only for the day of the injury or onset of illness....

...OSHA has made this change to bring the recording of restricted work cases into line with that for days away cases: under the final rule, employers are not required to record as days away or restricted work cases those injuries and illnesses that result in time away or time on restriction or job transfer lasting only for the day of injury or illness onset....

...Under the final rule (see section 1904.9), mandated removals made in accordance with an OSHA health standard must be recorded either as days away from work or as days of restricted work activity, depending on the specific action an employer takes. Since these actions are mandated, no disincentive to record is created by this recordkeeping rule....

...Transfers or restrictions taken before the employee has experienced an injury or illness do not meet the first recording requirement of the recordkeeping rule, *i.e.*, that a work-related injury or illness must have occurred for recording to be considered at all. A truly preventive medical treatment, for example, would be a tetanus vaccination administered routinely to an outdoor worker. However, transfers or restrictions whose purpose is to allow an employee to recover from an injury or illness as well as to keep the injury or illness from becoming worse are recordable because they involve restriction or work transfer caused by the injury or illness. All restricted work cases and job transfer cases that result from an injury or illness that is work-related are recordable on the employer's Log.

As the regulatory text for paragraph (b)(4) makes clear, the final rule's requirements for the recording

of restricted work cases are similar in many ways to those pertaining to restricted work under the former rule. First, the final rule only requires employers to record as restricted work cases those cases in which restrictions are imposed or recommended as a result of a work-related injury or illness. A work restriction that is made for another reason, such as to meet reduced production demands, is not a recordable restricted work case. For example, an employer might “restrict” employees from entering the area in which a toxic chemical spill has occurred or make an accommodation for an employee who is disabled as a result of a non-work-related injury or illness. These cases would not be recordable as restricted work cases because they are not associated with a work-related injury or illness. However, if an employee has a work-related injury or illness, and that employee’s work is restricted by the employer to prevent exacerbation of, or to allow recuperation from, that injury or illness, the case is recordable as a restricted work case because the restriction was necessitated by the work-related injury or illness. In some cases, there may be more than one reason for imposing or recommending a work restriction, e.g., to prevent an injury or illness from becoming worse or to prevent entry into a contaminated area. In such cases, if the employee’s work-related illness or injury played any role in the restriction, OSHA considers the case to be a restricted work case.

Second, for the definition of restricted work to apply, the work restriction must be decided on by the employer, based on his or her best judgment or on the recommendation of a physician or other licensed health care professional. If a work restriction is not followed or implemented by the employee, the injury or illness must nevertheless be recorded on the Log as a restricted case....

Third, like the former rule, the final rule’s definition of restricted work relies on two components: whether the employee is able to perform the duties of his or her pre-injury job, and whether the employee is able to perform those duties for the same period of time as before.

Paragraph 1904.7(b)(5) Medical Treatment Beyond First Aid

...As a result of this final rule, OSHA will now apply the same recordability criteria to both injuries and illnesses (see the discussion of this issue in the Legal Authority section of this preamble). The Agency believes that doing so will simplify the decision-making process that employers carry out when determining which work-related injuries and illnesses to record and will also result in more complete data on

occupational illness, because employers will know that they must record these cases when they result in medical treatment beyond first aid, regardless of whether or not a physician or other licensed health care professional has made a diagnosis....

...Under the final rule, employers will be able to rely on a single list of 14 first aid treatments. These treatments will be considered first aid whether they are provided by a lay person or a licensed health care professional. However, the final rule includes the following definition of medical treatment; “management and care of a patient for the purpose of combating disease or disorder;” this definition excludes observation and counseling, diagnostic procedures, and the listed first aid items....

...The following discussion describes the definitions of first aid and medical treatment in the final rule and explains the Agency’s reasons for including each item on the first aid list.

Final Rule

The final rule, at Section 1904.7(b)(5)(i), defines medical treatment as the management and care of a patient for the purpose of combating disease or disorder. For the purposes of Part 1904, medical treatment does not include:

- (A) Visits to a physician or other licensed health care professional solely for observation or counseling;
- (B) The conduct of diagnostic procedures, such as x-rays and blood tests, including the administration of prescription medications used solely for diagnostic purposes (e.g., eye drops to dilate pupils); or
- (C) “First aid” as defined in paragraph (b)(5)(ii) of this section.

The final rule, at paragraph (b)(5)(ii), defines first aid as follows:

- (A) Using a nonprescription medication at nonprescription strength (for medications available in both prescription and non-prescription form, a recommendation by a physician or other licensed health care professional to use a non-prescription medication at prescription strength is considered medical treatment for recordkeeping purposes).
- (B) Administering tetanus immunizations (other immunizations, such as hepatitis B vaccine or rabies vaccine, are considered medical treatment).
- (C) Cleaning, flushing or soaking wounds on the surface of the skin;
- (D) Using wound coverings, such as bandages, Band-Aids®, gauze pads, etc.; or using butterfly bandages or Steri-Strips® (other wound closing devices, such as sutures, staples, etc. are considered medical treatment);
- (E) Using hot or cold therapy;
- (F) Using any non-rigid means of support, such as

- elastic bandages, wraps, non-rigid back belts, etc. (devices with rigid stays or other systems designed to immobilize parts of the body are considered medical treatment for recordkeeping purposes);
- (G) Using temporary immobilization devices while transporting an accident victim (*e.g.*, splints, slings, neck collars, back boards, etc.)
- (H) Drilling of a fingernail or toenail to relieve pressure, or draining fluid from a blister;
- (I) Using eye patches;
- (J) Removing foreign bodies from the eye using only irrigation or a cotton swab;
- (K) Removing splinters or foreign material from areas other than the eye by irrigation, tweezers, cotton swabs, or other simple means;
- (L) Using finger guards;
- (M) Using massages (physical therapy or chiropractic treatment are considered medical treatment for recordkeeping purposes);
- (N) Drinking fluids for relief of heat stress.

This list of first aid treatments is comprehensive, *i.e.*, any treatment not included on this list is not considered first aid for OSHA recordkeeping purposes. OSHA considers the listed treatments to be first aid regardless of the professional qualifications of the person providing the treatment; even when these treatments are provided by a physician, nurse, or other health care professional, they are considered first aid for recordkeeping purposes....

...The medical treatment definition in the final rule is taken from *Dorland's Illustrated Medical Dictionary*, and is thus consistent with usage in the medical community.

The three listed exclusions from the definition--visits to a health care professional solely for observation or counseling; diagnostic procedures, including prescribing or administering of prescription medications used solely for diagnostic purposes; and procedures defined in the final rule as first aid--clarify the applicability of the definition and are designed to help employers in their determinations of recordability....

...Employers will thus be clear that any condition that is treated, or that should have been treated, with a treatment not on the first aid list is a recordable injury or illness for recordkeeping purposes....

In making its decisions about the items to be included on the list of first aid treatments, OSHA relied on its experience with the former rule, the advice of the Agency's occupational medicine and occupational nursing staff, and a thorough review of the record comments. In general, first aid treatment can be distinguished from medical treatment as follows:

- First aid is usually administered after the injury or

illness occurs and at the location (*e.g.*, workplace) where the injury or illness occurred.

- First aid generally consists of one-time or short-term treatment.
- First aid treatments are usually simple and require little or no technology.
- First aid can be administered by people with little training (beyond first aid training) and even by the injured or ill person.
- First aid is usually administered to keep the condition from worsening, while the injured or ill person is awaiting medical treatment.

The final rule's list of treatments considered first aid is based on the record of the rulemaking, OSHA's experience in implementing the recordkeeping rule since 1986, a review of the BLS *Recordkeeping Guidelines*, letters of interpretation, and the professional judgment of the Agency's occupational physicians and nurses....

OSHA agrees that counseling should not be considered medical treatment and has expressly excluded it from the definition of medical treatment. Counseling is often provided to large groups of workers who have been exposed to potentially traumatic events. Counseling may be provided on a short-term basis by either a licensed health care professional or an unlicensed person with limited training. OSHA believes that capturing cases where counseling was the only treatment provided do not rise to the level of recording; other counseling cases, where prescription medications, days away from work, or restricted work activity is involved, would be captured under those criteria....

...OSHA believes that visits to a health care professional for observation, testing, diagnosis, or to evaluate diagnostic decisions should be excluded from the definition of medical treatment in the final rule. Visits to a hospital, clinic, emergency room, physician's office or other facility for the purpose of seeking the advice of a health care professional do not themselves constitute treatment. OSHA believes that visits to a hospital for observation or counseling are not, of and by themselves, medical treatment. Accordingly, the final rule excludes these activities from the definition of medical treatment....

OSHA disagrees...that the exclusion for diagnostic procedures is overly vague. It is the experience of the Agency that employers generally understand the difference between procedures used to combat an injury or illness and those used to diagnose or assess an injury or illness. In the event that the employer does not have this knowledge, he or she may contact the health care professional to obtain help with this decision. If the employer does not have this knowl-

edge, and elects not to contact the health care professional, OSHA would expect the employer to refer to the first aid list and, if the procedure is not on the list, to presume that the procedure is medical treatment and record the case....

OSHA agrees with those commenters who recommended the exclusion of diagnostic procedures from the definition of medical treatment. Diagnostic procedures are used to determine whether or not an injury or illness exists, and do not encompass therapeutic treatment of the patient. OSHA has included such procedures on the first aid list in the final rule with two examples of diagnostic procedures to help reduce confusion about the types of procedures that are excluded....

In the final rule, OSHA has not included prescription medications, whether given once or over a longer period of time, in the list of first aid treatments. The Agency believes that the use of prescription medications is not first aid because prescription medications are powerful substances that can only be prescribed by a licensed health care professional, and for the majority of medications in the majority of states, by a licensed physician. The availability of these substances is carefully controlled and limited because they must be prescribed and administered by a highly trained and knowledgeable professional, can have detrimental side effects, and should not be self-administered.

Some commenters asked whether a case where a prescription was written by a physician and given to the injured or ill employee but was not actually filled or taken would be recordable. In some instances the employee, for religious or other reasons, refuses to fill the prescription and take the medicine. In other cases, the prescriptions are issued on a “take-as-needed” basis. In these cases, the health care professional gives the patient a prescription, often for pain medication, and tells the patient to fill and take the prescription if he or she needs pain relief. OSHA’s long-standing policy has been that if a prescription of this type has been issued, medical treatment has been provided and the case must therefore be recorded....

OSHA has decided to retain its long-standing policy of requiring the recording of cases in which a health care professional issues a prescription, whether that prescription is filled or taken or not. The patient’s acceptance or refusal of the treatment does not alter the fact that, in the health care professional’s judgment, the case warrants medical treatment....

The final rule does not consider the prescribing of non-prescription medications, such as aspirin or over-

the-counter skin creams, as medical treatment. However, if the drug is one that is available both in prescription and nonprescription strengths, such as ibuprofen, and is used or recommended for use by a physician or other licensed health care professional at prescription strength, the medical treatment criterion is met and the case must be recorded. There is no reason for one case to be recorded and another not to be recorded simply because one physician issued a prescription and another told the employee to use the same medication at prescription strength but to obtain it over the counter. Both cases received equal treatment and should be recorded equally....

...The final rule simply lists non-prescription medications, and expects non-prescription medications to be included regardless of form. Therefore, non-prescription medicines at non-prescription strength, whether in ointment, cream, pill, liquid, spray, or any other form are considered first aid. OSHA has also removed antiseptics from the description of non-prescription medications. Following the same logic used for ointments, there is no need to list the variety of possible uses of non-prescription medications. Non-prescription medicines are first aid regardless of the way in which they are used....

...[T]he Agency has decided to remove the use of oxygen from the first aid list and to consider any use of oxygen medical treatment. Oxygen administration is a treatment that can only be provided by trained medical personnel, uses relatively complex technology, and is used to treat serious injuries and illnesses. The use of any artificial respiration technology, such as Intermittent Positive Pressure Breathing (IPPB), would also clearly be considered medical treatment under the final rule....

In the final rule, tetanus immunizations are included as item B on the first aid list. These immunizations are often administered to a worker routinely to maintain the required level of immunity to the tetanus bacillus. These immunizations are thus based not on the severity of the injury but on the length of time since the worker has last been immunized.

The issue of whether or not immunizations and inoculations are first aid or medical treatment is irrelevant for recordkeeping purposes unless a work-related injury or illness has occurred. Immunizations and inoculations that are provided for public health or other purposes, where there is no work-related injury or illness, are not first aid or medical treatment, and do not in themselves make the case recordable. However, when inoculations such as gamma globulin, rabies, etc. are given to treat a specific injury or illness, or in response to workplace

exposure, medical treatment has been rendered and the case must be recorded. The following example illustrates the distinction OSHA is making about inoculations and immunizations: if a health care worker is given a hepatitis B shot when he or she is first hired, the action is considered first aid and the case would not be recordable; on the other hand, if the same health care worker has been occupationally exposed to a splash of potentially contaminated blood and a hepatitis B shot is administered as prophylaxis, the shot constitutes medical treatment and the case is recordable....

OSHA believes that cleaning, flushing or soaking of wounds on the skin surface is the initial emergency treatment for almost all surface wounds and that these procedures do not rise to the level of medical treatment. This relatively simple type of treatment does not require technology, training, or even a visit to a health care professional. More serious wounds will be captured as recordable cases because they will meet other recording criteria, such as prescription medications, sutures, restricted work, or days away from work. Therefore, OSHA has included cleaning, flushing or soaking of wounds on the skin surface as an item on the first aid list. As stated previously, OSHA does not believe that multiple applications of first aid should constitute medical treatment; it is the nature of the treatment, not how many times it is applied, that determines whether it is first aid or medical treatment....

OSHA agrees with the commenters who suggested that [wound coverings] be considered first aid treatment. They are included in item D of the first aid list. Steri strips and butterfly bandages are relatively simple and require little or no training to apply, and thus are appropriately considered first aid....

...OSHA has also decided not to provide exclusions for first aid items based on their purpose or intent. If the medical professional decides stitches or sutures are necessary and proper for the given injury, they are medical treatment.

Because OSHA has decided not to include a list of medical treatments in the final rule, there is no need to articulate that the use of other wound closing devices, such as surgical staples, tapes, glues or other means are medical treatment. Because they are not included on the first aid list, they are by definition medical treatment....

In the final rule, OSHA has included hot and cold treatment as first aid treatment, regardless of the number of times it is applied, where it is applied, or the injury or illness to which it is applied....

It is OSHA's judgment that hot and cold treatment is simple to apply, does not require special training,

and is rarely used as the only treatment for any significant injury or illness. If the worker has sustained a significant injury or illness, the case almost always involves some other form of medical treatment (such as prescription drugs, physical therapy, or chiropractic treatment); restricted work; or days away from work. Therefore, there is no need to consider hot and cold therapy to be medical treatment, in and of itself. Considering hot and cold therapy to be first aid also clarifies and simplifies the rule, because it means that employers will not need to consider whether to record when an employee uses hot or cold therapy without the direction or guidance of a physician or other licensed health care professional....

OSHA has included two items related to orthopedic devices in the final definition of first aid. Item F includes "[u]sing any non-rigid means of support, such as elastic bandages, wraps, non-rigid back belts, etc. (devices with rigid stays or other systems designed to immobilize parts of the body are considered medical treatment for recordkeeping purposes)." OSHA has included more examples of the devices (wraps and non-rigid back belts) to help make the definition clearer. However, OSHA believes that the use of orthopedic devices such as splints or casts should be considered medical treatment and not first aid. They are typically prescribed by licensed health care professionals for long term use, are typically used for serious injuries and illnesses, and are beyond the everyday definition of first aid....

However, OSHA agrees with those commenters who stated that the use of these devices during an emergency to stabilize an accident victim during transport to a medical facility is not medical treatment. In this specific situation, a splint or other device is used as temporary first aid treatment, may be applied by non-licensed personnel using common materials at hand, and often does not reflect the severity of the injury. OSHA has included this item as G on the first aid list: "[u]sing temporary immobilization devices while transporting an accident victim (e.g., splints, slings, neck collars, etc.)" ...

...[Drilling of a fingernail or toenail to relieve pressure, or draining fluid from a blister.] OSHA has decided to retain this item on the first aid list and to add the lancing of blisters as well. These are both one time treatments provided to relieve minor soreness caused by the pressure beneath the nail or in the blister. These are relatively minor procedures that are often performed by licensed personnel but may also be performed by the injured worker. More serious injuries of this type will continue to be captured if they meet one or more of the other recording criteria. OSHA has specifically mentioned finger nails and

toenails to provide clarity. These treatments are now included as item H on the first aid list....

...In the final rule, OSHA has included the use of eye patches as first aid in item I of the first aid list. Eye patches can be purchased without a prescription, and are used for both serious and non-serious injuries and illnesses....

In the final rule, OSHA has included as item J “Removing foreign bodies from the eye using only irrigation or a cotton swab.” OSHA believes that it is often difficult for the health care professional to determine if the object is embedded or adhered to the eye, and has not included this suggested language in the final rule. In all probability, if the object is embedded or adhered, it will not be removed simply with irrigation or a cotton swab, and the case will be recorded because it will require additional treatment.

OSHA believes that it is appropriate to exclude those cases from the Log that involve a foreign body in the eye of a worker that can be removed from the eye merely by rinsing it with water (irrigation) or touching it with a cotton swab. These cases represent minor injuries that do not rise to the level requiring recording. More significant eye injuries will be captured by the records because they involve medical treatment, result in work restrictions, or cause days away from work....

Item 13, the last item listed in the proposed definition of first aid, was “Removal of splinters or foreign material from areas other than the eyes by irrigation, tweezers, cotton swabs or other simple means.” The Recordkeeping Guidelines distinguished between foreign body removal cases on the basis of the complexity of the removal technique used. According to the Guidelines, the “removal of foreign bodies from a wound if the procedure is complicated because of depth of embedment, size or location” was medical treatment, while “removal of foreign bodies from a wound, if procedure is uncomplicated, and is, for example, by tweezers or other simple technique” was first aid.

In the final rule, OSHA has decided to retain item 13 essentially as proposed, and this first aid treatment appears as item K on the first aid list. The inclusion of the phrase “other simple means” will provide some flexibility and permit simple means other than those listed to be considered first aid. Cases involving more complicated removal procedures will be captured on the Log because they will require medical treatment such as prescription drugs or stitches or will involve restricted work or days away from work. OSHA believes that cases involving the excision of the outer layer of skin are not appropriately

considered first aid . . .; excision of tissue requires training and the use of surgical instruments.

Additions to the First Aid List Suggested by Commenters

In addition to comments about the first aid items OSHA proposed to consider first aid, a number of commenters asked for additional clarifications or recommended additions to the first aid list. The items suggested included exercise, chiropractic treatment, massage, debridement, poison ivy, bee stings, heat disorders, and burns.

Exercise: ...[E]xercises that amount to self-administered physical therapy, and are normally recommended by a health care professional who trains the worker in the proper frequency, duration and intensity of the exercise. Physical therapy treatments are normally provided over an extended time as therapy for a serious injury or illness, and OSHA believes that such treatments are beyond first aid and that cases requiring them involve medical treatment.

Chiropractic treatment: ...OSHA does not distinguish, for recordkeeping purposes, between first aid and medical treatment cases on the basis of number of treatments administered. OSHA also does not distinguish between various kinds of health care professionals, assuming they are operating within their scope of practice. If a chiropractor provides observation, counseling, diagnostic procedures, or first aid procedures for a work-related injury or illness, the case would not be recordable. On the other hand, if a chiropractor provides medical treatment or prescribes work restrictions, the case would be recordable.

Massage therapy: ... OSHA believes that massages are appropriately considered first aid and has included them as item M in the final rule’s first aid list. However, physical therapy or chiropractic manipulation are treatments used for more serious injuries, and are provided by licensed personnel with advanced training and therefore rise to the level of medical treatment beyond first aid.

Debridement: ...Debridement is the surgical excision, or cutting away, of dead or contaminated tissue from a wound....

OSHA has decided not to include debridement as a first aid treatment. This procedure must be performed by a highly trained professional using surgical instruments. Debridement is also usually performed in conjunction with other forms of medical treatment, such as sutures, prescription drugs, etc.

Intravenous (IV) administration of glucose and saline: ...In the final rule ...OSHA has decided not to

include the IV administration of fluids on the first aid list because these treatments are used for serious medical events, such as post-shock, dehydration or heat stroke. The administration of IVs is an advanced procedure that can only be administered by a person with advanced medical training, and is usually performed under the supervision of a physician.

[A commenter] also recommended three additions to the first aid list: UV treatment of blisters, rashes and dermatitis; acupuncture, when administered by a licensed health care professional; and electronic stimulation. After careful consideration, OSHA has decided not to include these treatments as first aid. Each of these treatments must be provided by a person with specialized training, and is usually administered only after recommendation by a physician or other licensed health care professional.

Several commenters asked that treatments for two specific types of disorders be added to the list: heat disorders and burns. OSHA has not added these types of conditions to the first aid list because the list includes treatments rather than conditions. However, OSHA has added fluids given by mouth for the relief of heat disorders to the list.

In the final rule, OSHA agrees ... that drinking fluids for the relief of heat disorders is a first aid rather than medical treatment and item N on the final first aid list is “drinking fluids for relief of heat stress.” OSHA believes that more extensive treatment, including the administration of fluids by intravenous injections (IV), are medical treatment, and more serious cases of heat disorders involving them must be entered into the records. In addition, any diagnosis by a physician or other licensed health care professional of heat syncope (fainting due to heat) is recordable under paragraph 1904.7(b)(6), Loss of Consciousness.

Burns: ...[B]urns will be treated just as other types of injury are, *i.e.*, minor burn injuries will not be recordable, while more serious burns will be recorded because they will involve medical treatment. For example, a small second degree burn to the forearm that is treated with nothing more than a bandage is not recordable. A larger or more severe second degree burn that is treated with prescription creams or antibiotics, or results in restricted work, job transfer, or days away from work is recordable. The vast majority of first degree burns and minor second degree burns will not be recorded because they will not meet the recording criteria, including medical treatment. However, more serious first and second degree burns that receive medical treatment will be recorded, and third degree burns should always be

recorded because they require medical treatment....

Paragraph 1904.7(b)(6) Loss of Consciousness

The rule requires the employer to record any work-related injury or illness resulting in a loss of consciousness. The recording of occupational injuries and illnesses resulting in loss of consciousness is clearly required by Sections 8(c) and 24 of the OSH Act. The new rule differs from the former rule only in clearly applying the loss of consciousness criterion to illnesses as well as injuries. Since the former rule required the recording of all illnesses, illnesses involving loss of consciousness were recordable, and thus OSHA expects that this clarification will not change recording practices. Thus, any time a worker becomes unconscious as a result of a workplace exposure to chemicals, heat, an oxygen deficient environment, a blow to the head, or some other workplace hazard that causes loss of consciousness, the employer must record the case....

In order to be a recordable event, a loss of consciousness must be the result of a workplace event or exposure. Loss of consciousness is no different, in this respect, from any other injury or illness. The exceptions to the presumption of work-relationship at Section 1904.5(b)(2)(ii) allow the employer to exclude cases that “involve signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs outside the work environment.” This exception allows the employer to exclude cases where a loss of consciousness is due solely to a personal health condition, such as epilepsy, diabetes, or narcolepsy....

The final rule does not contain an exception for loss of consciousness associated with phobias or first aid treatment. OSHA notes, however, that the exception at paragraph 1904.5(b)(2)(iii) allows the employer to rebut the presumption of work relationship if “the injury or illness results solely from voluntary participation in a wellness program or in a medical, fitness, or recreational activity such as blood donation, physical, flu shot, exercise class, racquetball, or baseball.” This exception would eliminate the recording of fainting episodes involving voluntary vaccination programs, blood donations and the like. However, episodes of fainting from mandatory medical procedures such as blood tests mandated by OSHA standards, mandatory physicals, and so on would be considered work-related events, and would be recordable on the Log if they meet one or more of the recording criteria. Similarly, a fainting episode involving a phobia stemming from an event or exposure in the work environment would be recordable....

...In this final rule, OSHA has not included a separate definition for the term “loss of consciousness.” However, the language of paragraph 1904.7(b)(6) has been carefully crafted to address two issues. First, the paragraph refers to a worker becoming “unconscious,” which means a complete loss of consciousness and not a sense of disorientation, “feeling woozy,” or an other diminished level of awareness. Second, the final rule makes it clear that loss of consciousness does not depend on the amount of time the employee is unconscious. If the employee is rendered unconscious for any length of time, no matter how brief, the case must be recorded on the OSHA 300 Log.

Paragraph 1904.7(b)(7) Recording Significant Work-Related Injuries and Illnesses Diagnosed by a Physician or Other Licensed Health Care Professional

Paragraph 1904.7(b)(7) of this final rule requires the recording of any significant work-related injury or illness diagnosed by a physician or other licensed health care professional. Paragraph 1904.7(b)(7) clarifies which significant, diagnosed work-related injuries and illnesses OSHA requires the employer to record in those rare cases where a significant work-related injury or illness has not triggered recording under one or more of the general recording criteria, *i.e.*, has not resulted in death, loss of consciousness, medical treatment beyond first aid, restricted work or job transfer, or days away from work. Based on the Agency’s prior recordkeeping experience, OSHA believes that the great majority of significant occupational injuries and illnesses will be captured by one or more of the other general recording criteria in Section 1904.7. However, OSHA has found that there is a limited class of significant work-related injuries and illnesses that may not be captured under the other Section 1904.7 criteria. Therefore, the final rule stipulates at paragraph 1904.7(b)(7) that any significant work-related occupational injury or illness that is not captured by any of the general recording criteria but is diagnosed by a physician or other licensed health care professional be recorded in the employer’s records.

Under the final rule, an injury or illness case is considered significant if it is a work-related case involving occupational cancer (*e.g.*, mesothelioma), chronic irreversible disease (*e.g.*, chronic beryllium disease), a fractured or cracked bone (*e.g.*, broken arm, cracked rib), or a punctured eardrum. The employer must record such cases within 7 days of receiving a diagnosis from a physician or other licensed health care professional that an injury or illness of this kind has occurred....

...[T]here are some significant injuries, such as a punctured eardrum or a fractured toe or rib, for which neither medical treatment nor work restrictions may be administered or recommended.

There are also a number of significant occupational diseases that progress once the disease process begins or reaches a certain point, such as byssinosis, silicosis, and some types of cancer, for which medical treatment or work restrictions may not be recommended at the time of diagnosis, although medical treatment and loss of work certainly will occur at later stages. This provision is designed to capture this small group of significant work-related cases. Although the employer is required to record these illnesses even if they manifest themselves after the employee leaves employment (assuming the illness meets the standards for work-relatedness that apply to all recordable incidents), these cases are less likely to be recorded once the employee has left employment. OSHA believes that work-related cancer, chronic irreversible diseases, fractures of bones or teeth and punctured eardrums are generally recognized as constituting significant diagnoses and, if the condition is work-related, are appropriately recorded at the time of initial diagnosis even if, at that time, medical treatment or work restrictions are not recommended.

...[T]o address the gap in case capture presented by significant injury and illness cases that escape the general recording criteria, OSHA is requiring employers to record cases of chronic, irreversible disease under the Section 1904.7(b)(7) criterion. This means that if long-term workplace exposure to aniline results in a chronic, irreversible liver or kidney disease, the case would be recordable at the time of diagnosis, even if no medical treatment is administered at that time and no time is lost from work. The regulatory text of paragraph 1904.7(b)(7) limits the types of conditions that are recordable, however, to significant diagnosed injury and illness cases, which are defined as cancer, chronic irreversible diseases, fractured or cracked bones, and punctured eardrums.

How Should the Agency Define “Significant” Injury or Illness?

...OSHA believes that the conditions that are required to be recorded under Section 1904.7(b)(7) of the final rule represent significant occupational injuries and illnesses as described in the OSH Act. Some clearly significant injuries or illnesses are not amenable to medical treatment, at least at the time of initial diagnosis. For example, a fractured rib, a broken toe, or a punctured eardrum are often, after being diagnosed, left to heal on their own without medical treatment

and may not result in days away from work, but they are clearly significant injuries. Similarly, an untreatable occupational cancer is clearly a significant injury or illness. The second set of conditions identified in paragraph 1904.7(b)(7), chronic irreversible diseases, are cases that would clearly become recordable at some point in the future (unless the employee leaves employment before medical treatment is provided), when the employee's condition worsens to a point where medical treatment, time away from work, or restricted work are needed. By providing for recording at the time of diagnosis, paragraph 1904.7(b)(7) of the final rule makes the significant, work-related condition recordable on discovery, a method that ensures the collection to timely data. This approach will result in better injury and illness data and also is likely to be more straightforward for employers to comply with, since there is no further need to track the case to determine whether, and at what point, it becomes recordable.

The core of the recording requirement codified at Section 1904.7(b)(7) is the employer's determination that a "significant" injury or illness has been diagnosed....In the final rule, OSHA has adopted an approach...focusing on two types of injury and illness: those that may be essentially untreatable, at least in the early stages and perhaps never (fractured and cracked bones, certain types of occupational cancer, and punctured eardrums) and those expected to progressively worsen and become serious over time (chronic irreversible diseases). ...[T]he final rule relies exclusively on the diagnosis of a limited class of injuries and illnesses by a physician or other licensed health care professional.

Clarifying That Cases Captured by Paragraph 1904.7(b)(7) Must Be Work Related

...OSHA wishes to reiterate that any condition that is recordable on the OSHA injury and illness record-keeping forms must be work-related, and Section 1904.7(b)(7) includes the term "work-related" to make this fact clear. In addition, because the employer will be dealing with a physician or other licensed health care professional, he or she may also be able to consult with the health care professional about the work-relatedness of the particular case. If the employer determines, based either on his or her own findings or those of the professional, that the symptoms are merely arising at work, but are caused by some non-work illness, then the case would not be recorded, under exception (b)(2)(ii) to the work-relatedness presumption at Section 1904.5(b)(2) of the final rule. Similarly, if workplace events or exposures contributed only insignificantly to the aggravation of a worker's preexisting condition, the case need not be recorded under Section 1904.5(a) and Section 1904.5(b)(3) of the final rule.

The provisions of Section 1904.7(b)(7) of the final rule thus meet the objectives of (1) capturing significant injuries and illnesses that do not meet the other general recording criteria of death, days away from work, restricted work or job transfer, medical treatment beyond first aid, or loss of consciousness; (2) excluding minor injuries and illnesses; (3) addressing a limited range of disorders; and (4) making it clear that these injuries and illnesses must be work-related before they must be recorded.

FREQUENTLY ASKED QUESTIONS: Section 1904.7 (OSHA Instruction, CPL 2-0.135, Chap. 5) **Section 1904.7 General recording criteria**

Question 7-1. *The old rule required the recording of all occupational illnesses, regardless of severity. For example, a work-related skin rash was recorded even if it didn't result in medical treatment. Does the rule still capture these minor illness cases?*

No. Under the new rule, injuries and illnesses are recorded using the same criteria. As a result, some minor illness cases are no longer recordable. For example, a case of work-related skin rash is now recorded only if it results in days away from work, restricted work, transfer to another job, or medical treatment beyond first aid.

Question 7-2. *Does the size or degree of a burn determine recordability?*

No. The size or degree of a work-related burn does not determine recordability. If a work-related first, second, or third degree burn results in one or more of the outcomes in section 1904.7 (days away, work restrictions, medical treatment, etc.), the case must be recorded.

Question 7-3. *If an employee dies during surgery made necessary by a work-related injury or illness, is the case recordable? What if the surgery occurs weeks or months after the date of the injury or illness?*

If an employee dies as a result of surgery or other complications following a work-related injury or illness, the case is recordable. If the underlying injury

or illness was recorded prior to the employee's death, the employer must update the Log by lining out information on less severe outcomes, e.g., days away from work or restricted work, and checking the column indicating death.

Question 7-4. *An employee hurts his or her left arm and is told by the doctor not to use the left arm for one week. The employee is able to perform all of his or her routine job functions using only the right arm (though at a slower pace and the employee is never required to use both arms to perform his or her job functions). Would this be considered restricted work?*

No. If the employee is able to perform all of his or her routine job functions (activities the employee regularly performs at least once per week), the case does not involve restricted work. Loss of productivity is not considered restricted work.

Question 7-5. *Are surgical glues used to treat lacerations considered "first aid?"*

No. surgical glue is a wound closing device. All wound closing devices except for butterfly and steri strips are by definition "medical treatment," because they are not included on the first aid list.

Question 7-6. *Item N on the first aid list is "drinking fluids for relief of heat stress." Does this include administering intravenous (IV) fluids?*

No. Intravenous administration of fluids to treat work-related heat stress is medical treatment.

Question 7-7. *Is the use of a rigid finger guard considered first aid?*

Yes. The use of finger guards is always first aid.

Question 7-8. *For medications such as Ibuprofen that are available in both prescription and non-prescription form, what is considered to be prescription strength? How is an employer to determine whether a non-prescription medication has been recommended at prescription strength for purposes of section 1904.7(b)(5)(i)(C)(ii)(A)?*

The prescription strength of such medications is determined by the measured quantity of the therapeutic agent to be taken at one time, i.e., a single dose. The single dosages that are considered prescription strength for four common over-the-counter

drugs are:

Ibuprofen (such as Advil™;) - Greater than 467 mg
Diphenhydramine (such as Benadryl™;) - Greater than 50 mg

Naproxen Sodium (such as Aleve™;) - Greater than 220 mg

Ketoprofen (such as Orudus KT™;) - Greater than 25mg

To determine the prescription-strength dosages for other drugs that are available in prescription and non-prescription formulations, the employer should contact OSHA, the United States Food and Drug Administration, their local pharmacist or their physician.

Question 7-9 *If an employee who sustains a work-related injury requiring days away from work is terminated for drug use based on the results of a post-accident drug test, how is the case recorded? May the employer stop the day count upon termination of the employee for drug use under section 1904.7(b)(3)(vii)?*

Under section 1904.7(b)(3)(vii), the employer may stop counting days away from work if an employee who is away from work because of an injury or illness leaves the company for some reason unrelated to the injury or illness, such as retirement or a plant closing. However, when the employer conducts a drug test based on the occurrence of an accident resulting in an injury at work and subsequently terminates the injured employee, the termination is related to the injury. Therefore, the employer must estimate the number of days that the employee would have been away from work due to the injury and enter that number on the 300 Log.

Question 7-10. *Once an employer has recorded a case involving days away from work, restricted work or medical treatment and the employee has returned to his regular work or has received the course of recommended medical treatment, is it permissible for the employer to delete the Log entry based on a physician's recommendation, made during a year-end review of the Log, that the days away from work, work restriction or medical treatment were not necessary?*

The employer must make an initial decision about the need for days away from work, a work restriction, or medical treatment based on the information available, including any recommendation by a physician or other licensed health care professional. Where the employer receives contemporaneous recommendations from two or more physicians or other licensed

health care professionals about the need for days away, a work restriction, or medical treatment, the employer may decide which recommendation is the most authoritative and record the case based on that recommendation. Once the days away from work or work restriction have occurred or medical treatment has been given, however, the employer may not delete the Log entry because of a physician's recommendation, based on a year-end review of the Log, that the days away, restriction or treatment were unnecessary.

Question 7-10a. *If a physician or other licensed health care professional recommends medical treatment, days away from work or restricted work activity as a result of a work-related injury or illness, can the employer decline to record the case based on a contemporaneous second provider's opinion that the recommended medical treatment, days away from work or work restriction are unnecessary, if the employer believes the second opinion is more authoritative?*

Yes. However, once medical treatment is provided for a work-related injury or illness, or days away from work or work restriction have occurred, the case is recordable. If there are conflicting contemporaneous recommendations regarding medical treatment, or the need for days away from work or restricted work activity, but the medical treatment is not actually provided and no days away from work or days of work restriction have occurred, the employer may determine which recommendation is the most authoritative and record on that basis. In the case of prescription medications, OSHA considers that medical treatment is provided once a prescription is issued.

Question 7-11. *Section 1904.7(b)(5)(ii) of the rule defines first aid, in part, as "removing splinters or foreign material from areas other than the eye by irrigation, tweezers, cotton swabs or other simple means." What are "other simple means" of removing splinters that are considered first aid?*

"Other simple means" of removing splinters, for purposes of the first-aid definition, means methods that are reasonably comparable to the listed methods. Using needles, pins or small tools to extract splinters would generally be included.

Question 7-12. *How long must a modification to a job last before it can be considered a permanent modification under section 1904.7(b)(4)(xi)?*

Section 1904.7(b)(4)(xi) of the rule allows an employer to stop counting days of restricted work or transfer to another job if the restriction or transfer is made permanent. A permanent restriction or transfer is one that is expected to last for the remainder of the employee's career. Where the restriction or transfer is determined to be permanent at the time it is ordered, the employer must count at least one day of the restriction or transfer on the Log. If the employee whose work is restricted or who is transferred to another job is expected to return to his or her former job duties at a later date, the restriction or transfer is considered temporary rather than permanent.

Question 7-13. *If an employee loses his arm in a work-related accident and can never return to his job, how is the case recorded? Is the day count capped at 180 days?*

If an employee never returns to work following a work-related injury, the employer must check the "days away from work" column, and enter an estimate of the number of days the employee would have required to recuperate from the injury, up to 180 days.

Question 7-14. *If an employee who routinely works ten hours a day is restricted from working more than eight hours following a work-related injury, is the case recordable?*

Generally, the employer must record any case in which an employee's work is restricted because of a work-related injury. A work restriction, as defined in section 1904.7(b)(4)(i)(A), occurs when the employer keeps the employee from performing one or more routine functions of the job, or from working the full workday the employee would otherwise have been scheduled to work. The case in question is recordable if the employee would have worked 10 hours had he or she not been injured.

Question 7-15. *If an employee is exposed to chlorine or some other substance at work and oxygen is administered as a precautionary measure, is the case recordable?*

If oxygen is administered as a purely precautionary measure to an employee who does not exhibit any symptoms of an injury or illness, the case is not recordable. If the employee exposed to a substance exhibits symptoms of an injury or illness, the administration of oxygen makes the case recordable.

Question 7-16. *Is the employer subject to a citation for violating section 1904.7(b)(4)(viii) if an employee fails to follow a recommended work restriction?*

Section 1904.7(b)(4)(viii) deals with the recordability of cases in which a physician or other health care professional has recommended a work restriction. The section also states that the employer “should ensure that the employee complies with the [recommended] restriction.” This language is purely advisory and does not impose an enforceable duty upon employers to ensure that employees comply with the recommended restriction. [Note: In the absence of conflicting opinions from two or more health care professionals, the employer ordinarily must record the case if a health care professional recommends a work restriction involving the employee’s routine job functions.]

Question 7-17. *Are work-related cases involving chipped or broken teeth recordable?*

Yes, under section 1904.7(b)(7), these cases are considered a significant injury or illness when diagnosed by a physician or other health care professional. As discussed in the preamble of the final rule, work-related fractures of bones or teeth are recognized as constituting significant diagnoses and, if the condition is work-related, are appropriately recorded at the time of initial diagnosis even if the case does not involve any of the other general recording criteria.

Question 7-18. *How would the employer record the change on the OSHA 300 Log for an injury or illness after the injured worker reached the cap of 180 days for restricted work and then was assigned to “days away from work”?*

The employer must check the box that reflects the most severe outcome associated with a given injury or illness. The severity of any case decreases on the log from column G (Death) to column J (Other recordable case). Since days away from work is a more severe outcome than restricted work the employer is required to remove the check initially placed in the box for job transfer or restriction and enter a check in the box for days away from work (column H). Employers are allowed to cap the number of days away and/or restricted work/job transfer when a case involves 180 calendar days. For purposes of recordability, the employer would enter 180 days in the “Job transfer or restriction” column and may also enter 1 day in the “Days away from work”

column to prevent confusion or computer related problems.

Question 7-19. *Does the employer have to record a work-related injury and illness if an employee experiences minor musculoskeletal discomfort, the health care professional determines that the employee is fully able to perform all of his or her routine job functions, but the employer assigns a work restriction to the injured employee?*

As set out in Chapter 2, I., F. of the Recordkeeping Policies and Procedures Manual (CPL 2-0.135) a case would not be recorded under section 1904.7(b)(4) if (1) the employee experiences minor musculoskeletal discomfort, and (2) a health care professional determines that the employee is fully able to perform all of his or her routine job functions, and (3) the employer assigns a work restriction to that employee for the purpose of preventing a more serious condition from developing. If a case is or becomes recordable under any other general recording criteria contained in section 1904.7, such as medical treatment beyond first aid, a case involving minor musculoskeletal discomfort would be recordable.

Question 7-20. *Are injuries and illnesses recordable if they occurred during employment, but were not discovered until after the injured or ill employee was terminated or retired?*

These cases are recordable throughout the five-year record retention and updating period contained in section 1904.33. The cases would be recorded on either the log of the year in which the injury or illness occurred or the last date of employment.

Question 7-21. *If an employee leaves the company after experiencing a work-related injury or illness that results in days away from work and/or days of restricted work/job transfer how would an employer record the case?*

If the employee leaves the company for some reason(s) unrelated to the injury or illness, section 1904.7(b)(3)(viii) of the rule allows the employer to stop counting days away from work or days of restriction/job transfer. In order to stop a count the employer must first have a count to stop. Thus, the employer must count at least one day away from work or day of restriction/job transfer on the OSHA 300 Log. If the employee leaves the company for some reason(s) related to the injury or illness, section 1904.7(b)(3)(viii) of the rule directs the employer to

make an estimate of the count of days away from work or days of restriction/job transfer expected for the particular type of case.

Question 7-22 *If an employee has an adverse reaction to a smallpox vaccination, is it recordable under OSHA's recordkeeping rule?*

If an employee has an adverse reaction to a smallpox vaccination, the reaction is recordable if it is work-related (see 29 CFR 1904.5) and meets the general recording criteria contained in 29 CFR 1904.7. A reaction caused by a smallpox vaccination is work-related if the vaccination was necessary to enable the employee to perform his or her work duties. Such a reaction is work-related even though the employee was not required to receive it, if the vaccine was provided by the employer to protect the employee against exposure to smallpox in the work environment. For example, if a health care employer establishes a program to vaccinate employees who may be involved in treating people suffering from the effects of a smallpox outbreak, reactions to the vaccine would be work-related. The same principle applies to adverse reactions among emergency response workers whose duties may cause them to be exposed to smallpox. The vaccinations in this circumstance are analogous to inoculations given to employees to immunize them from diseases to which they may be exposed to in the course of work-related overseas travel.

Question 7-23. *An employee has a work-related shoulder injury resulting in days of restricted work activity. While working on restricted duty, the*

employee sustains a foot injury which results in a different work restriction. How would the employer record these cases?

For purposes of OSHA recordkeeping the employer would stop the count of the days of restricted work activity due to the first case, the shoulder injury, and enter the foot injury as a new case and record the number of restricted work days. If the restriction related to the second case, the foot injury, is lifted and the employee is still subject to the restriction related to their shoulder injury, the employer must resume the count of days of restricted work activity for that case.

Question 7-24. *An employee is provided antibiotics for anthrax, although the employee does not test positive for exposure/infection. Is this a recordable event on the OSHA log?*

No. A case must involve a death, injury, or illness to be recordable. A case involving an employee who does not test positive for exposure/infection would not be recordable because the employee is not injured or ill.

Question 7-25. *An employee tests positive for anthrax exposure/infection and is provided antibiotics. Is this a recordable event on the OSHA log?*

Yes. Under the Recordkeeping requirements, a work-related anthrax exposure/infection coupled with administration of antibiotics or other medical treatment must be recorded on the log.

SETTLEMENT AGREEMENT: Section 1904.7

Occupational Injury and Illness Recording and Reporting - 66:66943-66944, December 27, 2001

On November 16, 2001, OSHA entered into a settlement agreement with the National Association of Manufacturers (NAM) to resolve NAM's legal challenge to OSHA's revised recordkeeping regulations in 29 CFR Part 1904, Occupational Injury and Illness Recording and Reporting Requirements. As part of the agreement, OSHA agreed to publish a copy of the OSHA-NAM settlement agreement in the Federal Register within 30 days.

C. A case is not recordable under 1904.7(b)(4) as a restricted work case if the employee experiences minor musculoskeletal discomfort, a health care professional determines that the employee is fully able to perform all of his or her routine job functions, and the employer assigns a work restriction to that employee for the purpose of preventing a more serious condition from developing.

LETTERS OF INTERPRETATION: Section 1904.7

Section 1904.7 General recording criteria

OSHA requirements are set by statute, standards and regulations. Letters of interpretation explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. These letters constitute OSHA's interpretation of the requirements discussed. Note that OSHA enforcement guidance may be affected by changes to OSHA rules. Also, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA's website at <http://www.osha.gov>.

Letters of Interpretation constitute OSHA's interpretation only of the requirements discussed and may not be applicable to any situation not delineated within the original correspondence.

Letter of interpretation related to section 1904.7(b)(5)(ii) –

Use of glue to close a wound is medical treatment; prescription antibiotics/antiseptics for preventive treatment of a wound is medical treatment.

August 26, 2004

Mr. Ronald Bjork
Manager, Safety, Health & Security
CNH America LLC
East Moline Plant
1100 Third Street
East Moline, IL 61244

Dear Mr. Bjork:

This is in response to your letter of April 21, 2004 requesting clarification whether two types of treatments constitute first aid or medical treatment for purposes of applying OSHA's recordkeeping rule.

The first treatment is glue used to close a wound. The use of medical glue to close a wound is not first aid, and therefore must be considered medical treatment. First aid includes the use of the following wound-covering devices: bandages, Band Aids[®], gauze pads, butterfly bandages, or Steri-Strips[®], 29 CFR 1904.7(b)(5)(ii)(D). Other wound-closing devices, such as sutures, staples, tapes, or glues are considered medical treatment. See 66 FR 5989 (January 19, 2001).

The second treatment is the use of a prescription antibiotic for a puncture wound. Under the rule, the use of prescription medication to treat a wound is medical treatment. This follows even if the medication is an antibiotic or antiseptic administered following an injury to prevent a possible infection. In the preamble to the rule, OSHA specifically considered and rejected an exception for prescription antibiotics or antiseptics. See 66 FR 5986.

Thank you for your interest in occupational safety and health. We hope you find this information helpful. OSHA requirements are set by statute, standards, and regulations. Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. This letter constitutes OSHA's interpretation of the requirements discussed. Note that our enforcement guidance may be affected by changes to OSHA rules. In addition, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA's website at <http://www.osha.gov>. If you have any further questions, please contact my Division of Recordkeeping Requirements, at 202-693-1702.

Sincerely,

Keith Goddard, Director
Directorate of Evaluation and Analysis

Letter of interpretation related to sections 1904.5, 1904.5(a), 1904.5(b)(2), 1904.6, 1904.6(a), 1904.7 and 1904.31 –
Evaluation of seven scenarios for work-relatedness and recordkeeping requirements.

January 15, 2004

Ms. Leann M. Johnson-Koch
1200 Nineteenth Street, N.W.
Washington, D.C. 20036-2412

Dear Ms. Johnson-Koch:

Thank you for your E-mail to the Occupational Safety and Health Administration (OSHA) regarding the Injury and Illness Recording and Reporting Requirements contained in 29 CFR Part 1904. Your letter was forwarded to my office by Richard Fairfax, Director, Directorate of Enforcement Programs. The Division of Recordkeeping Requirements is responsible for the administration of the OSHA injury and illness recordkeeping system nationwide. Please excuse the delay in responding to your request.

In your letter, you ask OSHA to clarify the following scenarios to ensure accurate and consistent guidance to your members for purposes of OSHA Recordkeeping requirements. I will address your scenarios by first restating each one and then answering it.

Scenario 1:

- An employee reported to work at 7:00 a.m.
- At 12:15 p.m. the employee reported that his toes on his left foot had started swelling and his foot had started hurting.
- The employee wanted to go to a doctor for evaluation.
- On the First Report of Injury, that the employee completed before he went to the doctor, the employee indicated that the cause of the illness was “unknown (feet wet at cooling tower).”

- When answering the doctor’s question: “How did injury occur?” the employee answered that the only thing he could think of was that his feet were wet all the previous day due to work in the morning at a cooling tower. The cooling tower water is treated to remove bacteria and then used in process operations in the plant.
- The doctor described the illness/injury as foot edema/cellulitis.
- The doctor also prescribed the injury as an occupational disease, prescribed an antibiotic, and the employee missed one day of work.
- The company sent the employee to a second doctor who said to continue using the antibiotic.
- Neither doctor could state conclusively that the foot edema/cellulitis was or was not due to the employee’s feet being wet due to work at the cooling tower.
- Neither doctor is a specialist in skin disorders.
- During an incident review at the site, the employee again said he did not know if his feet being wet all day the previous day caused the injury/illness.
- The employee also stated that he had not worn the personal protective equipment, rubber boots, prescribed for this task.

The company determined that this injury/illness is not work-related (did not occur in the course of or as a result of employment), since neither physician nor the employee can state with certainty that the injury/illness was caused by the employee’s feet being wet all day due to work at the cooling tower. Since the injury/illness was determined to not be work-related, then the company deemed the incident non-recordable.

Response: A case is work-related if it is more likely than not that an event or exposure in the work environment was a cause of the injury or illness. The work event or exposure need only be one of the causes; it does not need to be the sole or predominant cause. In this case, the fact that neither the physician nor the employee could state with certainty that the employee’s edema was caused by working with wet feet is not dispositive. The physician’s description of the edema as an “occupational disease,” and the employee’s statement that working with wet feet was “the only thing he could think of” as the cause, indicate that it is more likely than not that working with wet feet was a cause. The case should be recorded on the OSHA 300 Log.

Scenario 2:

An employee must report to work by 8:00 a.m.

- The employee drove into the company parking lot at 7:30 a.m. and parked the car.
- The employee exited the car and proceeded to the office to report to work.

- The parking lot and sidewalks are privately owned by the facility and both are within the property line, but not the controlled access points (i.e., fence, guards).
- The employee stepped onto the sidewalk and slipped on the snow and ice.
- The employee suffered a back injury and missed multiple days of work.

The company believes that the employee was still in the process of the commute to work since the employee had not yet checked in at the office. Since a work task was not being performed, the site personnel deemed the incident not work-related and therefore not recordable.

Response: Company parking lots and sidewalks are part of the employer’s establishment for recordkeeping purposes. Here, the employee slipped on an icy sidewalk while walking to the office to report for work. In addition, the event or exposure that occurred does not meet any of the work-related exceptions contained in 1904.5(b)(2). The employee was on the sidewalk because of work; therefore, the case is work-related regardless of the fact that he had not actually checked in.

Scenario 3:

The employee described in Scenario 2 missed 31 days of work due to the back injury.

- On day 31, the doctor provided a release for returning to work.
- The next morning (day 32), when the employee was due to report to work, the employee stated that his back was hurting, and the employee did not report to work.
- The employee scheduled a doctor’s appointment, with the same doctor, and visited the doctor on day 33.
- The doctor issued a statement stating that the employee was not able to return to work.

Since the employee was released to return to work, the company does not believe it has to count the intervening two days on the OSHA log.

Response: The employer would have to enter the additional days away from work on the OSHA 300 log based on receiving information from the physician or other licensed health care professional that the employee was unable to work.

Scenario 4:

- An employee reports to work.
- Several hours later, the employee goes outside for a “smoke break.”
- The employee slips on the ice and injures his back.

Since the employee was not performing a task related to the employee’s work, the company has deemed this incident non-work related and therefore not recordable.

Response: Under Section 1904.5(b)(2)(v), an injury or illness is not work-related if it is solely the result of an employee doing personal tasks (unrelated to their employment) at the establishment outside of the employee’s assigned working hours. In order for this exception to apply, the case must meet both of the stated conditions. The exception does not apply here because the injury or illness occurred within normal working hours. Therefore, your case in question is work-related, and if it meets the general recording criteria under Section 1904.7 the case must be recorded.

Scenario 5:

- An employee drives into the company parking lot at 7:30 a.m., exits his car, and proceeds to cross the parking lot to clock-in to work.
- A second employee, also on the way to work, approaches the first employee, and the two individuals get into a physical altercation in the parking lot. The first employee breaks an arm during the altercation.
- The employee goes to the doctor and receives medical treatment for his injury.

The company deems this non-work related, and therefore non-recordable, since the employees had not yet reported to work and a work task was not being performed at the time of the altercation.

Response: The recordkeeping regulation contains no general exception for purposes of determining work-relationship for cases involving acts of violence in the work environment. Company parking lots/access roads are part of the employer’s premises and therefore part of the employer’s establishment. Whether the employee had not clocked in to work does not affect the outcome for determining work-relatedness. The case is recordable on the OSHA log, because the injury meets the general recording criteria contained in Section 1904.7.

Scenario 6:

- An employee injured a knee performing work-related activities in 2001.
- The accident was OSHA recordable and subject to worker's compensation.
- The employee had arthroscopic knee surgery eleven months later and was released to full duty a month and a half after the arthroscopic surgery.
- The employee had a second knee injury three months after the return to work release (after the first surgery).
- Post-surgery (second surgery), the doctor prescribed Vioxx® as an anti-inflammatory.
- Approximately one and one-half months after the second knee surgery, the employee was given another full release to return to work full duty and returned to work.
- However, the doctor told the employee to continue to take Vioxx® as prescribed (as needed) and to return to the doctor as needed.
- The employee scheduled a follow-up appointment with the doctor.
- The day before the appointment, the employee bumped his knee at work.
- During his scheduled doctor's appointment (was to be the last follow-up visit) the employee mentioned the latest incident (bumping the knee) to the doctor and showed him where the pain was occurring due to bumping his knee.
- The doctor stated that the employee had an inflamed tendon (Grade 1 lateral collateral ligament sprain) that was not part of the initial surgery (patellar tendonitis).
- The doctor stated in the diagnosis that the original injury that required knee surgery was resolved.
- The doctor told the employee to continue taking Vioxx® for the inflamed tendon.

Since the employee was already taking the medication prescribed (Vioxx®), the site does not believe this is recordable as a second incident.

Response: In the recordkeeping regulation, the employer is required to follow any determination a physician or other licensed health care professional has made about the status of a new case. The inflamed tendon is a new case because the employee had completely recovered from the previous injury and illness and a new event or exposure had occurred in the work environment. Therefore, for purposes of OSHA recordkeeping, the employer would enter the case on the OSHA 300 log as appropriate.

Scenario 7:

- A site hired numerous temporary workers at its plant.
- Three temporary workers were injured.
- They each received injuries that were recordable on the OSHA 300 Log.
- The employees were under the direct supervision of the site.

Is it correct that these injuries were recordable on the site log or should they have been recordable on the temp agency log? What are the criteria related to temporary workers that need to be reviewed to determine which OSHA log is appropriate for recording the injury/illness?

Response: Section 1904.31 states that the employer must record the injuries and illnesses that occur to employees not on its payroll if it supervises them on a day-to-day basis. Day-to-day supervision generally exists when the employer "supervises not only the output, product, or result to be accomplished by the person's work, but also the details, means, methods, and processes by which the work objective is accomplished."

Thank you for your interest in occupational safety and health. We hope you find this information helpful. OSHA requirements are set by statute, standards and regulations. Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. This letter constitutes OSHA's interpretation of the requirements discussed. Note that our enforcement guidance may be affected by changes to OSHA rules. In addition, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA's website at <http://www.osha.gov>. If you have any further questions, please contact the Division of Recordkeeping Requirements, at 202-693-1702.

Sincerely,

Frank Frodyma
Acting Director

March 19, 2003

Ms. Marcia Seeler
Health and Safety Consultant
Post Office Box 3154
Wellfleet, Massachusetts 02667

Dear Ms. Seeler:

Thank you for your January 6, 2003 letter to the Occupational Safety and Health Administration (OSHA) regarding the Injury and Illness Recording and Reporting requirements contained in 29 CFR Part 1904. You state that an employee who sustained a work-related bruise on his knee was told by a physician not to return to work until undergoing an MRI, and that the employee was off work for some days before the procedure could be performed. You recorded the case based on the days away from work, and ask whether the entry may now be lined out because the MRI showed that no OSHA recordable injury occurred.

The case was properly recorded based on the physician's recommendation that the employee not return to work before undergoing an MRI for his bruised knee. Paragraph 1904.7(b)(3) contains the requirements for recording work-related injuries and illnesses that result in days away from work and for counting the total number of days away associated with a given case. In addition, paragraphs 1904.7(b)(3)(ii) and (iii) direct employers how to record days away cases when a physician or other licensed health care professional (HCP) recommends that the injured or ill worker stay at home or that he or she return to work but the employee chooses not to do so. As these paragraphs make clear, OSHA requires employers to follow the physician's or HCP's recommendation when recording a case. For purposes of OSHA recordkeeping, the case met the criteria in section 1904.7 at the time of recording because the employee had sustained a work-related injury--a bruised knee--involving one or more days away from work. The subsequent MRI results do not change these facts. Accordingly, the MRI results are not a basis to line out the entry.

Thank you for your interest in occupational safety and health. We hope you find this information helpful. OSHA requirements are set by statute, standards and regulations. Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. This letter constitutes OSHA's interpretation of the requirements discussed. Note that our enforcement guidance may be affected by changes to OSHA rules. Also, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA's website at <http://www.osha.gov>. If you have any further questions, please contact the Division of Recordkeeping Requirements at 202-693-1702.

Sincerely,

John L. Henshaw
Assistant Secretary

Letter of interpretation related to section 1904.7(b)(5)(ii)(D) –
Use of liquid bandages on wounds is considered first aid.

August 8, 2002

Mr. Carl O. Sall, CIH
Director of Occupational Safety and Health Compliance
Comprehensive Health Services Incorporated
8229 Boone Boulevard, Suite 700
Vienna, Virginia 22182-2623

Dear Mr. Sall:

This is in response to your letter dated August 8, 2002. Thank you for your comments pertaining to the Occupational Safety and Health Administration's (OSHA) Injury and Illness Recording and Reporting requirements contained in 29 CFR Part 1904.

Specifically, you ask OSHA to clarify whether an injury and illness case which resulted in treatment with Band-Aid Brand Liquid Bandage™ would be considered first aid or medical treatment. The concept that underlies the medical treatment vs. first aid distinction made between this type of treatment centers around the basic difference between wound closures and wound coverings. The recordkeeping rule defines first aid under section 1904.7(b)(5)(ii)(D), Using wound coverings, such as bandages, Band-Aids™, gauze pads, etc.; or using butterfly bandages or Steri-strips™ (other wound closing devices, such as sutures, staples, etc. are considered medical treatment). Therefore, the use of wound coverings, like Band-Aid Brand Liquid Bandage™ is deemed to be first aid treatment.

I hope that you find this information useful. Thank you for your interest in occupational safety and health and OSHA. If you have any further questions, please contact the Division of Recordkeeping Requirements, at 202-693-1702

Sincerely,

John L. Henshaw
Assistant Secretary

Letter of interpretation related to section 1904.7(b)(5)(ii)(A) –

Recording of cases in which a health care professional issues a prescription, whether that prescription is filled or not.

October 29, 2001

Mr. Danny Dean Harris
Loss Control Manager
Maverick Tube Corp.
Post Office Box 248
Armored, Arkansas 72310

Dear Mr. Harris:

This is in response to your letter dated October 29, 2001. Thank you for your comments pertaining to the Occupational Safety and Health Administration's (OSHA) injury and illness recordkeeping requirements contained in 29 CFR Part 1904. Due to the October closing of the Brentwood postal facility in Washington, D.C., and the subsequent sanitizing treatment of the mail that was handled by that facility, your correspondence was significantly delayed in reaching us. Please accept my apology for the delay in our response.

OSHA revised its injury and illness recordkeeping requirements under the following rulemaking procedures. On February 2, 1996, the agency published a notice of proposed rulemaking (NPRM) requesting public comment on the proposed revision to the recordkeeping requirements. OSHA received over 450 sets of comments and held six days of public hearings in response to the NPRM. OSHA analyzed all comments received and developed its final rule based upon that analysis. On January 19, 2001, OSHA published its final rule. Your comments are similar to many comments submitted to OSHA as part of the rulemaking process. The following is an excerpt from the final rule which explains OSHA's position regarding the points you raise.

The final rule, 29 CFR Part 1904 Occupational Injury and Illness Recording and Reporting Requirements, Section 1904.7(b)(5)(ii)(A) defines first aid as: Using a nonprescription medication at nonprescription strength (for medications available in both prescription and non-prescription form, a recommendation by a physician or other licensed health care professional to use a non-prescription medication at prescription strength is considered medical treatment for recordkeeping purposes). OSHA has not included prescription medications, whether given once or over a longer period of time, in the list of first aid treatments. The Agency believes that the use of prescription medications is not first aid because prescription medications are powerful substances that can only be prescribed by a physician or licensed health care professional. The availability of these substances is carefully controlled and limited because they must be prescribed and administered by a highly trained and knowledgeable professional. OSHA maintains its longstanding policy of requiring the recording of cases in which a health care professional issues a prescription, whether that prescription is filled or not. Medical treatment includes treatment that is used as well as those that should have been used. The patient's acceptance or refusal of the treatment does not alter the fact that, in the health care professional's judgement, the case warranted a script for the issuance of prescription medicine. For these reasons, the new recordkeeping rule continues OSHA's longstanding policy of considering the use of prescription medication as medical treatment, regardless of the reason it is prescribed.

I hope that you find this information useful. Thank you for your interest in occupational safety and health and OSHA. If you have any further questions, please contact the Division of Recordkeeping Requirements, at 202-693-1702

Sincerely,

John L. Henshaw
Assistant Secretary

Section 1904.8 Recording criteria for needlestick and sharps injuries

(66 FR 6123, Jan. 19, 2001)

REGULATION: Section 1904.8

Subpart C – Recordkeeping Forms and Recording Criteria (66 FR 6123, Jan. 19, 2001)

Note to Subpart C: This Subpart describes the work-related injuries and illnesses that an employer must enter into the OSHA records and explains the OSHA forms that employers must use to record work-related fatalities, injuries, and illnesses.

Section 1904.8 Recording criteria for needlestick and sharps injuries (66 FR 6128, Jan. 19, 2001)

(a) Basic requirement.

You must record all work-related needlestick injuries and cuts from sharp objects that are contaminated with another person's blood or other potentially infectious material (as defined by 29 CFR 1910.1030). You must enter the case on the OSHA 300 Log as an injury. To protect the employee's privacy, you may not enter the employee's name on the OSHA 300 Log (see the requirements for privacy cases in paragraphs 1904.29(b)(6) through 1904.29(b)(9)).

(b) Implementation.

(1) *What does "other potentially infectious material" mean?*

The term "other potentially infectious materials" is defined in the OSHA Bloodborne Pathogens standard at Section 1910.1030(b). These materials include:

- (i) Human bodily fluids, tissues and organs, and
- (ii) Other materials infected with the HIV or hepatitis B (HBV) virus such as laboratory cultures or tissues from experimental animals.

(2) *Does this mean that I must record all cuts, lacerations, punctures, and scratches?*

No, you need to record cuts, lacerations, punctures, and scratches only if they are work-related and

involve contamination with another person's blood or other potentially infectious material. If the cut, laceration, or scratch involves a clean object, or a contaminant other than blood or other potentially infectious material, you need to record the case only if it meets one or more of the recording criteria in Section 1904.7.

(3) If I record an injury and the employee is later diagnosed with an infectious bloodborne disease, do I need to update the OSHA 300 Log?

Yes, you must update the classification of the case on the OSHA 300 Log if the case results in death, days away from work, restricted work, or job transfer. You must also update the description to identify the infectious disease and change the classification of the case from an injury to an illness.

(4) *What if one of my employees is splashed or exposed to blood or other potentially infectious material without being cut or scratched? Do I need to record this incident?*

You need to record such an incident on the OSHA 300 Log as an illness if:

- (i) It results in the diagnosis of a bloodborne illness, such as HIV, hepatitis B, or hepatitis C; or
- (ii) It meets one or more of the recording criteria in Section 1904.7.

PREAMBLE DISCUSSION: Section 1904.8

(66 FR 5998-6003, Jan. 19, 2001)

The following are selected excerpts from the preamble to the Occupational Injury and Illness Recording and Reporting Requirements, the Recordkeeping rule (66 FR 5916, 29 CFR Parts 1904 and 1952). These excerpts represent some of the key discussions related to the final rule (66 FR 6122, 29 CFR Parts 1904 and 1952).

Section 1904.8 Additional recording criteria for needlestick and sharps injuries

Section 1904.8 of the final rule deals with the recording of a specific class of occupational injuries involving punctures, cuts and lacerations caused by needles or other sharp objects contaminated or reason-

ably anticipated to be contaminated with blood or other potentially infectious materials that may lead to bloodborne diseases, such as Acquired Immunodeficiency Syndrome (AIDS), hepatitis B or hepatitis C. The final rule uses the terms "contaminated," "other potentially infectious material," and "occupational

exposure” as these terms are defined in OSHA’s Bloodborne Pathogens standard (29 CFR 1910.1030). These injuries are of special concern to healthcare workers because they use needles and other sharp devices in the performance of their work duties and are therefore at risk of bloodborne infections caused by exposures involving contaminated needles and other sharps. Although healthcare workers are at particular risk of bloodborne infection from these injuries, other workers may also be at risk of contracting potentially fatal bloodborne disease. For example, a worker in a hospital laundry could be stuck by a contaminated needle left in a patient’s bedding, or a worker in a hazardous waste treatment facility could be occupationally exposed to bloodborne pathogens if contaminated waste from a medical facility was not treated before being sent to waste treatment.

Section 1904.8(a) requires employers to record on the OSHA Log all work-related needlestick and sharps injuries involving objects contaminated (or reasonably anticipated to be contaminated) with another person’s blood or other potentially infectious material (OPIM). The rule prohibits the employer from entering the name of the affected employee on the Log to protect the individual’s privacy; employees are understandably sensitive about others knowing that they may have contracted a bloodborne disease. For these cases, and other types of privacy concern cases, the employer simply enters “privacy concern case” in the space reserved for the employee’s name. The employer then keeps a separate, confidential list of privacy concern cases with the case number from the Log and the employee’s name; this list is used by the employer to keep track of the injury or illness so that the Log can later be updated, if necessary, and to ensure that the information will be available if a government representative needs information about injured or ill employees during a workplace inspection (see Section 1904.40). The regulatory text of Section 1904.8 refers recordkeepers and others to Section 1904.29(b)(6) through Section 1904.29(b)(10) of the rule for more information about how to record privacy concern cases of all types, including those involving needlesticks and sharps injuries. The implementation section of Section 1904.8(b)(1) defines “other potentially infectious material” as it is defined in OSHA’s Bloodborne Pathogens Standard (29 CFR Section 1910.1030, paragraph (b)). Other potentially infectious materials include (i) human bodily fluids, human tissues and organs, and (ii) other materials infected with the HIV or hepatitis B (HBV) virus such as laboratory cultures or tissues from experimental

animals. (For a complete list of OPIM, see paragraph (b) of 29 CFR 1910.1030.)

Although the final rule requires the recording of all workplace cut and puncture injuries resulting from an event involving contaminated sharps, it does not require the recording of all cuts and punctures. For example, a cut made by a knife or other sharp instrument that was not contaminated by blood or OPIM would not generally be recordable, and a laceration made by a dirty tin can or greasy tool would also generally not be recordable, providing that the injury did not result from a contaminated sharp and did not meet one of the general recording criteria of medical treatment, restricted work, etc. Paragraph (b)(2) of Section 1904.8 contains provisions indicating which cuts and punctures must be recorded because they involve contaminated sharps and which must be recorded only if they meet the general recording criteria.

Paragraph (b)(3) of Section 1904.8 contains requirements for updating the OSHA 300 Log when a worker experiences a wound caused by a contaminated needle or sharp and is later diagnosed as having a bloodborne illness, such as AIDS, hepatitis B or hepatitis C. The final rule requires the employer to update the classification of such a privacy concern case on the OSHA 300 Log if the outcome of the case changes, *i.e.*, if it subsequently results in death, days away from work, restricted work, or job transfer. The employer must also update the case description on the Log to indicate the name of the bloodborne illness and to change the classification of the case from an injury (*i.e.*, the needlestick) to an illness (*i.e.*, the illness that resulted from the needlestick). In no case may the employer enter the employee’s name on the Log itself, whether when initially recording the needlestick or sharp injury or when subsequently updating the record....

The last paragraph (paragraph (c)) of Section 1904.8 deals with the recording of cases involving workplace contact with blood or other potentially infectious materials that do not involve needlesticks or sharps, such as splashes to the eye, mucous membranes, or non-intact skin. The final recordkeeping rule does not require employers to record these incidents unless they meet the final rule’s general recording criteria (*i.e.*, death, medical treatment, loss of consciousness, restricted work or motion, days away from work, diagnosis by an HCP) or the employee subsequently develops an illness caused by bloodborne pathogens. The final rule thus provides employers, for the first time, with regulatory language delineating how they are to record injuries

caused by contaminated needles and other sharps, and how they are to treat other exposure incidents (as defined in the Bloodborne Pathogens standard) involving blood or OPIM. “Contaminated” is defined just as it is in the Bloodborne Pathogens standard: “Contaminated means the presence or the reasonably anticipated presence of blood or other potentially infectious materials on an item or surface.” ...

After a review of the many comments in the record on this issue, OSHA has decided to require the recording of all workplace injuries from needlesticks and sharp objects that are contaminated with another person’s blood or other potentially infectious material (OPIM) on the OSHA Log. These cases must be recorded, as described above, as privacy concern cases, and the employer must keep a separate list of the injured employees’ names to enable government personnel to track these cases....

OSHA finds that these injuries are significant injuries because of the risk of seroconversion, disease, and death they pose (see the preamble to the OSHA Bloodborne Pathogens Standard at 56 FR 64004)....

OSHA disagrees with those commenters who argued that the Section 1904.8 recording requirement would be duplicative or redundant with the requirements in the Bloodborne Pathogens standard (29 CFR 1910.1030). That standard requires the employer to document the route(s) of exposure and the circumstances under which the exposure incident occurred, but does not require that it be recorded on the Log (instead, the standard requires only that such documentation be maintained with an employee’s medical records). The standard also has no provisions requiring an employer to aggregate such information so that it can be analyzed and used to correct hazardous conditions before they result in additional exposures and/or infections. The same is true for other medical records kept by employers: they do not substitute for the OSHA Log or meet the purposes of the Log, even though they may contain information about a case that is also recorded on the Log.

OSHA is requiring only that lacerations and puncture wounds that involve contact with another person’s blood or other potentially infectious materials be recorded on the Log. Exposure incidents involving exposure of the eyes, mouth, other mucous membranes or non-intact skin to another person’s blood or OPIM need not be recorded unless they meet one or more of the general recording criteria, result in a positive blood test (seroconversion), or result in the diagnosis of a significant illness by a health care professional. Otherwise, these exposure incidents are

considered only to involve exposure and not to constitute an injury or illness. In contrast, a needlestick laceration or puncture wound is clearly an injury and, if it involves exposure to human blood or other potentially infectious materials, it rises to the level of seriousness that requires recording. For splashes and other exposure incidents, the case does not rise to this level any more than a chemical exposure does. If an employee who has been exposed via a splash in the eye from the blood or OPIM of a person with a bloodborne disease actually contracts an illness, or seroconverts, the case would be recorded (provided that it meets one or more of the general recording criteria).

Privacy Issues

...The final recordkeeping rule addresses this issue by prohibiting the entry of the employee’s name on the OSHA 300 Log for injury and illness cases involving blood and other potentially infectious material. Further, by requiring employers to record all needlestick and sharps incidents, regardless of the seroconversion status of the employee, coworkers and representatives who have access to the Log will be unable to ascertain the disease status of the injured worker....

OSHA believes that hepatitis C cases should, like other illness cases, be tested for recordability using the geographic presumption that provides the principal rationale for determining work-relatedness throughout this rule....

PART 1910.1030 — OSHA Bloodborne Pathogens Standard.

Section 1910.1030(h)(5) Sharps injury log.

Section 1910.1030(h)(5)(i) The employer shall establish and maintain a sharps injury log for the recording of percutaneous injuries from contaminated sharps. The information in the sharps injury log shall be recorded and maintained in such manner as to protect the confidentiality of the injured employee. The sharps injury log shall contain, at a minimum:

- (A) The type and brand of device involved in the incident,
- (B) The department or work area where the exposure incident occurred, and
- (C) An explanation of how the incident occurred.

Section 1910.1030(h)(5)(ii) The requirement to establish and maintain a sharps injury log shall apply to any employer who is required to maintain a log of occupational injuries and illnesses under 29 CFR 1904.

FREQUENTLY ASKED QUESTIONS: Section 1904.8 (OSHA Instruction, CPL 2-0.135, Chap. 5)

Section 1904.8 Recording criteria for needlesticks and sharps injuries

Question 8-1. *Can you clarify the relationship between the OSHA recordkeeping requirements and the requirements in the Bloodborne Pathogens standard to maintain a sharps injury log?*

The OSHA Bloodborne Pathogens Standard states: "The requirement to establish and maintain a sharps injury log shall apply to any employer who is required to maintain a log of occupational injuries and illnesses under 29 CFR 1904." Therefore, if an employer is exempted from the OSHA recordkeeping rule, the employer does not have to maintain a sharps log. For example, dentists' offices and doctors' offices are not required to keep a sharps log after January 1, 2002.

Question 8-2. *Can I use the OSHA 300 Log to meet the Bloodborne Pathogen Standard's requirement for a sharps injury log?*

Yes. You may use the 300 Log to meet the requirements of the sharps injury log provided you enter the type and brand of the device causing the sharps injury on the Log and you maintain your records in a way that segregates sharps injuries from other types of work-related injuries and illnesses, or allows sharps injuries to be easily separated.

LETTERS OF INTERPRETATION: Section 1904.8

Section 1904.8 Recording criteria for needlesticks and sharps injuries

This section will be developed as letters of interpretation become available.

Section 1904.9

Recording criteria for cases involving medical removal under OSHA standards

(66 FR 6129, Jan. 19, 2001)

REGULATION: Section 1904.9

Subpart C – Recordkeeping forms and recording criteria

(66 FR 6123, Jan. 19, 2001)

Note to Subpart C: This Subpart describes the work-related injuries and illnesses that an employer must enter into the OSHA records and explains the OSHA forms that employers must use to record work-related fatalities, injuries, and illnesses.

Section 1904.9 Recording criteria for cases involving medical removal under OSHA standards

(a) Basic requirement.

If an employee is medically removed under the medical surveillance requirements of an OSHA standard, you must record the case on the OSHA 300 Log.

(b) Implementation.

(1) How do I classify medical removal cases on the OSHA 300 Log?

You must enter each medical removal case on the OSHA 300 Log as either a case involving days away from work or a case involving restricted work activity, depending on how you decide to comply with the medical removal requirement. If the medical removal is the result of a chemical exposure, you must enter the case on the OSHA 300 Log by checking the “poisoning” column.

(2) Do all of OSHA’s standards have medical removal provisions?

No, some OSHA standards, such as the standards covering bloodborne pathogens and noise, do not have medical removal provisions. Many OSHA standards that cover specific chemical substances have medical removal provisions. These standards include, but are not limited to, lead, cadmium, methylene chloride, formaldehyde, and benzene.

(3) Do I have to record a case where I voluntarily removed the employee from exposure before the medical removal criteria in an OSHA standard are met?

No, if the case involves voluntary medical removal before the medical removal levels required by an OSHA standard are reached, you do not need to record the case on the OSHA 300 Log.

PREAMBLE DISCUSSION: Section 1904.9

(66 FR 6003, Jan. 19, 2001)

The following are selected excerpts from the preamble to the Occupational Injury and Illness Recording and Reporting Requirements, the Recordkeeping rule (66 FR 5916, 29 CFR Parts 1904 and 1952). These excerpts represent some of the key discussions related to the final rule (66 FR 6122, 29 CFR Parts 1904 and 1952).

Section 1904.9 Additional recording criteria for cases involving medical removal under OSHA standards.

The final rule, in paragraph 1904.9(a), requires an employer to record an injury or illness case on the OSHA 300 Log when the employee is medically removed under the medical surveillance requirements of any OSHA standard. Paragraph 1904.9(b)(1) requires each such case to be recorded as a case involving days away from work (if the employee does not work during the medical removal) or as a case involving restricted work activity (if the employee continues to work but in an area where exposures are not present.) This paragraph also requires any

medical removal related to chemical exposure to be recorded as a poisoning illness.

Paragraph 1904.9(b)(2) informs employers that some OSHA standards have medical removal provisions and others do not. For example, the Bloodborne Pathogens Standard (29 CFR 1910.1030) and the Occupational Noise Standard (29 CFR 1910.95) do not require medical removal. Many of the OSHA standards that contain medical removal provisions are related to specific chemical substances, such as lead (29 CFR 1901.1025), cadmium (29 CFR 1910.1027), methylene chloride (29 CFR 1910.1052), formaldehyde (29 CFR 1910.1048), and benzene (29 CFR 1910.1028).

Paragraph 1904.9(b)(3) addresses the issue of medical removals that are not required by an OSHA standard. In some cases employers voluntarily rotate employees from one job to another to reduce exposure to hazardous substances; job rotation is an administrative method of reducing exposure that is permitted in some OSHA standards. Removal (job transfer) of an asymptomatic employee for administrative exposure control reasons does not require the case to be recorded on the OSHA 300 Log because no injury or illness -- the first step in the recordkeeping process -- exists. Paragraph 1904.9(b)(3) only applies to those substances with OSHA mandated medical removal criteria. For injuries or illnesses caused by exposure to other substances or hazards, the employer must look to the general requirements of paragraphs 1910.7(b)(3) and (4) to determine how to record the days away or days of restricted work.

The provisions of Section 1904.9 are not the only recording criteria for recording injuries and illnesses from these occupational exposures. These provisions merely clarify the need to record specific cases, which are often established with medical test results, that result in days away from work, restricted work, or job transfer. The Section 1904.9 provisions are included to produce more consistent data and provide needed interpretation of the requirements for employers. However, if an injury or illness results in the other criteria of Section 1904.7 (death, medical treatment, loss of consciousness, days away from work, restricted work, transfer to another job, or diagnosis as a significant illness or injury by a physician or other licensed health care professional) the case must be recorded whether or not the medical removal provisions of an OSHA standard have been met....

...The medical removal provisions of each standard were set using scientific evidence established in the record devoted to that rulemaking. OSHA takes care when setting the medical removal provisions of standards to ensure that these provision reflect a material harm, *i.e.*, the existence of an abnormal condition that is non-minor and thus worthy of entry in the OSHA injury and illness records....

OSHA finds that cases involving a mandatory medical removal are cases that involve serious, significant, disabling illnesses resulting in restriction of work and transfer to another job, or both. These medical restrictions result either in days away from work or days when the worker can work but is restricted from performing his or her customary duties....

As stated previously, a "diagnosis of substantial impairment of a bodily function" is not required for a case to meet OSHA recordkeeping criteria, nor is it a limitation to recordability under the OSH Act. Many injuries and illnesses meet the recording criteria of the Act but lack diagnosis of a substantial impairment of a bodily function. Although the medical removal provisions are included in OSHA's standards to encourage participation in the medical program by employees and to prevent progression to serious and perhaps irreversible illness, they also reflect illnesses caused by exposures in the workplace and are thus themselves recordable. The workers are being removed not only to prevent illness, but to prevent further damage beyond what has already been done. Thus OSHA does not agree that medical removal measures are purely preventive in nature; instead, they are also remedial measures taken when specific biological test results indicate that a worker has been made ill by workplace exposures.

OSHA has therefore included section 1904.9 in the final rule to provide a uniform, simple method for recording a variety of serious disorders that have been addressed by OSHA standards. The Section 1904.9 provisions of the final rule cover all of the OSHA standards with medical removal provisions, regardless of whether or not those provisions are based on medical tests, physicians' opinions, or a combination of the two. Finally, by relying on the medical removal provisions in any OSHA standard, section 1904.9 of the final rule establishes recording criteria for future standards, and avoids the need to amend the recordkeeping rule whenever OSHA issues a standard containing a medical removal level.

FREQUENTLY ASKED QUESTIONS: Section 1904.9 (OSHA Instruction, CPL 2-0.135, Chap. 5)

Section 1904.9 Recording criteria for cases involving medical removal under OSHA standards

This section will be developed as letters of interpretation become available.

LETTERS OF INTERPRETATION: Section 1904.9

Section 1904.9 Recording criteria for cases involving medical removal under OSHA standards

This section will be developed as letters of interpretation become available.

Section 1904.10

Recording criteria for cases involving occupational hearing loss

(66 FR 6129, Jan. 19, 2001)

REGULATION: Section 1904.10

Subpart C – Recordkeeping forms and recording criteria

(66 FR 6123, Jan. 19, 2001)

Note to Subpart C: This Subpart describes the work-related injuries and illnesses that an employer must enter into the OSHA records and explains the OSHA forms that employers must use to record work-related fatalities, injuries, and illnesses.

Part 1904 – [AMENDED]

Section 1904.10 Recording criteria for cases involving occupational hearing loss (67 FR 44047, July 1, 2002)

(a) Basic requirement.

If an employee's hearing test (audiogram) reveals that the employee has experienced a work-related Standard Threshold Shift (STS) in hearing in one or both ears, and the employee's total hearing level is 25 decibels (dB) or more above audiometric zero (averaged at 2000, 3000, and 4000 Hz) in the same ear(s) as the STS, you must record the case on the OSHA 300 Log.

(b) Implementation.

(1) What is a Standard Threshold Shift?

A Standard Threshold Shift, or STS, is defined in the occupational noise exposure standard at 29 CFR 1910.95(g)(10)(i) as a change in hearing threshold, relative to the baseline audiogram for that employee, of an average of 10 decibels (dB) or more at 2000, 3000, and 4000 hertz (Hz) in one or both ears.

(2) How do I evaluate the current audiogram to determine whether an employee has an STS and a 25-dB hearing level?

(i) STS. If the employee has never previously experienced a recordable hearing loss, you must compare the employee's current audiogram with that employee's baseline audiogram. If the employee has previously experienced a recordable hearing loss, you must compare the employee's current audiogram with the employee's revised baseline audiogram (the audiogram reflecting the employee's previous recordable hearing loss case).

(ii) 25-dB loss. Audiometric test results reflect the employee's overall hearing ability in comparison to audiometric zero. Therefore, using the employee's current audiogram, you must use the average hearing level at 2000, 3000, and 4000 Hz to determine whether or not the employee's total hearing level is 25 dB or more.

(3) May I adjust the current audiogram to reflect the effects of aging on hearing?

Yes. When you are determining whether an STS has occurred, you may age adjust the employee's current audiogram results by using Tables F-1 or F-2, as appropriate, in Appendix F of 29 CFR 1910.95. You may not use an age adjustment when determining whether the employee's total hearing level is 25 dB or more above audiometric zero.

(4) Do I have to record the hearing loss if I am going to retest the employee's hearing?

No, if you retest the employee's hearing within 30 days of the first test, and the retest does not confirm the recordable STS, you are not required to record the hearing loss case on the OSHA 300 Log. If the retest confirms the recordable STS, you must record the hearing loss illness within seven (7) calendar days of the retest. If subsequent audiometric testing performed under the testing requirements of the § 1910.95 noise standard indicates that an STS is not persistent, you may erase or line-out the recorded entry.

(5) Are there any special rules for determining whether a hearing loss case is work-related?

No. You must use the rules in § 1904.5 to determine if the hearing loss is work-related. If an event or exposure in the work environment either caused or contributed to the hearing loss, or significantly aggravated a pre-existing hearing loss, you must consider the case to be work related.

(6) If a physician or other licensed health care professional determines the hearing loss is not work-related, do I still need to record the case?

If a physician or other licensed health care professional determines that the hearing loss is not work-related or has not been significantly aggravated by occupational noise exposure, you are not required to consider the case work-related or to record the case on the OSHA 300 Log.

PART 1904—[AMENDED] (67 FR 77170, Dec. 17, 2002)

(7) *How do I complete the 300 Log for a hearing loss case?*

When you enter a recordable hearing loss case on the OSHA 300 Log, you must check the 300 Log column for hearing loss.

PREAMBLE DISCUSSION: Section 1904.10

(66 FR 6004-6012, Jan. 19, 2001)

The following are selected excerpts from the preamble to the Occupational Injury and Illness Recording and Reporting Requirements, the Recordkeeping rule (66 FR 5916, 29 CFR Parts 1904 and 1952). These excerpts represent some of the key discussions related to the final rule (66 FR 6122, 29 CFR Parts 1904 and 1952).

Section 1904.10 Recording criteria for cases involving occupational hearing loss

The recording criteria employers should use to record occupational hearing loss on the OSHA recordkeeping forms have been an issue since OSHA first proposed to require hearing conservation programs for general industry employers (39 FR 37775, October 24, 1974). Job-related hearing loss is a significant occupational safety and health issue because millions of workers are employed in noisy workplaces and thousands of workers experience noise-induced hearing loss each year. Noise-induced hearing loss is a serious and irreversible condition that may affect the safety and well-being of workers for the rest of their lives....

The changes made to the OSHA 300 form improve the quality of the data collected nationally on this important occupational condition by providing consistent hearing loss recording criteria, thus improving the consistency of the hearing loss statistics generated by the BLS occupational injury and illness collection program. National hearing loss statistics are also improved because OSHA has added a column to the OSHA 300 Log that requires employers, for the first time, to separately collect and summarize data specific to occupational hearing loss. These changes mean that the BLS will collect hearing loss data in future years, both for cases with and without days away from work, which will allow for more reliable published statistics concerning this widespread occupational disorder.... If the employee is not covered by the 29 CFR 1910.95 noise standard, OSHA rules do not require the employer to administer baseline or periodic audiograms, and the 1904 rule does not impose any new requirements for employers to obtain baseline information where it is not already required. However, some employers conduct such tests and acquire such information for other reasons. If the employer's workplace is a high noise environment (*i.e.*, has noise levels that exceed

85 dBA) and the employer has the relevant audiogram information for an employee, the employer must record any identified work-related hearing loss equal to or greater than an OSHA defined STS on the log. This means that an employer in the construction industry, for example, who is aware that his or her work activities regularly generate high noise levels and who has audiometric data on the hearing level of the employees exposed to those noise levels must record on the Log any [recordable hearing loss] detected in those workers. OSHA believes that this approach to the recording of work-related hearing loss cases among these workers not covered by the noise standard is appropriate because it is reasonable, protective, and administratively straightforward....

Paragraphs 1904.10(b)(3) and (4) of the final rule allow the employer to take into account the hearing loss that occurs as a result of the aging process and to retest an employee who has an STS on an audiogram to ensure that the STS is permanent before recording it. The employer may correct the employee's audiogram results for aging, using the same methods allowed by the OSHA Noise standard (29 CFR 1910.95). Appendix F of Section 1910.95 provides age correction for presbycusis (age-induced hearing loss) in Tables F-1 (for males) and F-2 (for females). Further, as permitted by the Noise standard, the employer may obtain a second audiogram for employees whose first audiogram registers an STS if the second audiogram is taken within 30 days of the first audiogram. The employer may delay recording of the hearing loss case until the STS is confirmed by the second audiogram and is, of course, not required to record the case if the second audiogram reveals that the STS was not permanent.... Paragraph 1904.10(b)(5) of the final rule establishes how employers are to determine the work-relatedness of hearing loss cases. This paragraph specifies that, in accordance with the recordkeeping rule's definition

of work-relationship, hearing loss is presumed to be work-related for recordkeeping purposes if the employee is exposed to noise in the workplace at an 8-hour time-weighted average of 85 dB(A) or greater, or to a total noise dose of 50 percent, as defined in 29 CFR 1910.95. (Noise dose is defined as the amount of actual employee exposure to noise relative to the permissible exposure limit for noise; a dose greater than 100% represents exposure above the limit.) For hearing loss cases where the employee is not exposed to this level of workplace noise, or where the employee is not covered by the Occupational Noise standard, the employer must use the rules set out in § 1904.5 to determine if the hearing loss is to be considered work related for recordkeeping purposes.

Paragraph 1904.10(b)(6) allows the employer not to record a hearing loss case if a physician or other licensed health care professional determines that the hearing loss is not work-related or has not been aggravated by occupational noise exposure. This provision is consistent with the Occupational Noise standard, and it allows the employer not to record a hearing loss case that is not related to workplace events or exposures; examples of such cases are hearing loss cases occurring before the employee is hired or those unrelated to workplace noise.

The recordkeeping provisions in section 1904.10 of the final recordkeeping rule thus match the provisions of the Occupational Noise standard by (1) covering the same employers and employees (with the exception of cases occurring among employees not covered by that standard whose employers have audiometric test results and high-noise workplaces); (2) using the same measurements of workplace noise; (3) using a common definition of hearing loss, *i.e.*, the STS; (4) using the same hearing loss measurement methods; (5) using the same definitions of baseline audiogram and revised baseline audiogram; (6) using the same method to account for age correction in audiogram results; and (7) allowing certain temporary threshold shifts to be set aside if a subsequent audiogram demonstrates that they are not permanent or a physician or other licensed health care professional finds they are not related to workplace noise exposure....

As is the case for many OSHA rules, the 1981 Noise standard was challenged in the courts, which stayed several provisions. In 1983, OSHA revised the hearing conservation amendment to revoke many of the provisions stayed by the court, lift an administrative stay implemented by OSHA, and make technical corrections (48 FR 9738). One of those provisions

involved the definition of STS, which was renamed a “standard” rather than “significant” threshold shift to help differentiate the two separate methods used to calculate the STS in the 1981 and 1983 rules. Although OSHA changed the calculation method used to establish an STS in 1983, the role and importance of the STS concept in the context of a hearing conservation program was unchanged. The main reason for changing the definition of STS in the 1983 standard was to simplify the original calculation and address the concerns of employers and audiology professionals who wished to avoid using a computer to calculate an STS. The standard requires employers to take follow-up actions when an STS is identified, notify the affected employee, evaluate and refit hearing protectors, retrain the employee, and, if necessary, refer the employee for medical evaluation....

...In the 1981 preamble to the Hearing Conservation Amendment, OSHA found that a 10 dB shift in hearing threshold is significant because it is outside the range of audiometric error and “it is serious enough to warrant prompt attention” (46 FR 4144). The 1983 preamble reinforces these findings. It states that:

Correctly identifying standard threshold shifts will enable employers and employees to take corrective action so that the progression of hearing loss may be stopped before it becomes handicapping. Moreover, a standardized definition of STS will ensure that the protection afforded to exposed employees is uniform in regard to follow-up procedures. * * *

OSHA reaffirms its position on the ideal criterion for STS which was articulated in the January 16, 1981 promulgation (see 46 FR 4144). The criterion must be sensitive enough to identify meaningful changes in hearing level so that follow-up procedures can be implemented to prevent further deterioration of hearing but must not be so sensitive as to pick up spurious shifts (sometimes referred to as “false positives”). In other words, the criterion selected must be outside the range of audiometric error (48 FR 9760).

OSHA believes that many of the reasons stated in the 1983 preamble make the STS an appropriate recording criterion for recordkeeping purposes. For example, employers are familiar with the STS definition, which is also sensitive enough to identify a non-minor change in hearing. Use of the STS also reduces the confusion that would arise were OSHA to require employers to maintain two baselines: one required by the Occupational Noise standard and one required for recordkeeping purposes....

OSHA recognizes that using the correction for presbycusis when interpreting audiogram results is

controversial among experts in the field of audiology and that NIOSH has developed a new criteria document on occupational noise exposure (“Criteria for a Recommended Standard; Occupational Noise Exposure, Revised Criteria, 1998; U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health; June 1998) which at present does not recommend applying presbycusis correction values to actual employee audiometric data. However, since the Occupational Noise standard itself permits employers to adjust the interpretation of audiograms for the effects of aging, it would be inconsistent and administratively complex to prohibit this practice in the recordkeeping rule. Accordingly, Section 1904.10(b)(3) allows the employer to adjust for aging when determining the recordability of hearing loss. The adjustment is made using Tables F-1 or F-2, as appropriate (table F-1 applies to men and F-2 applies to women), in Appendix F of 29 CFR 1910.95. However, use of the correction for aging is not mandatory, just as it is not mandatory in the Noise standard itself....

...[I]n the final rule, at paragraph 1904.10(b)(4), employers are permitted, if they choose, to retest the employee to confirm or disprove that an STS reflected on the first audiogram was attributable to a cold or some other extraneous factor and was not persistent. If the employer elects to retest, the employer need not record the case until the retest is completed. If the retest confirms the hearing loss results, the case must be recorded within 7 calendar days. If the retest refutes the original test, the case is not recordable, and the employer does not have to take further action for OSHA recordkeeping purposes. The 30 day limit in the final recordkeeping rule is consistent with the 30 day retest provision of Section 1910.95(g)(5)(ii), which allows the employer to obtain a retest within 30 days and consider the results of the retest as the annual audiogram if the STS recorded on the first test is determined not to persist.

OSHA believes that the 30 day retest option allows the employer to exclude false positive results and temporary threshold shifts from the data while ensuring the timely and appropriate recording of true positive results. Adding language to the final recordkeeping rule to specify different procedures, depending on whether the employer chooses to conduct a re-test within 30 days, adds some complexity to the final rule, but OSHA finds that this added complexity is appropriate because it will reduce burden for some employers and improve the accuracy of the hearing loss data....

...For workers who are exposed to the noise levels that require medical surveillance under Section 1910.95 (an 8-hour time-weighted average of 85 dB(A) or greater, or a total noise dose of 50 percent), it is highly likely that workplace noise is the cause of or, at a minimum, has contributed to the observed STS. It is not necessary for the workplace to be the sole cause, or even the predominant cause, of the hearing loss in order for it to be work-related. Because the final recordkeeping rule relies upon the coverage of the Occupational Noise standard, it is also not necessary for OSHA to include a minimum time of exposure provision. The Occupational Noise standard does not require a baseline audiogram to be taken for up to six months after the employee is first exposed to noise in the workplace, and the next annual audiogram would not be taken until a year after that.

For any worker to have an applicable change in audiogram results under the Occupational Noise standard, the worker would have been exposed to levels of noise exceeding 85 dB(A) for at least a year, and possibly even for 18 months.

In addition, the provisions allowing for review by a physician or other licensed health care professional allow for the exclusion of hearing loss cases that are not caused by noise exposure, such as off the job traumatic injury to the ear, infections, and the like. OSHA notes that this presumption is consistent with a similar presumption in OSHA's Occupational Noise standard (in both cases, an employer is permitted to rebut this presumption if he or she suspects that the hearing loss shown on an employer's audiogram in fact has a medical etiology and this is confirmed by a physician or other licensed health care professional)....

Shifts in hearing must be calculated separately for each ear, in accordance with the requirements of Section 1910.95. However, if a single audiogram reflects a loss of hearing in both ears, only one hearing loss case must be entered into the records. The issue of revising baseline audiograms to evaluate the extent of future hearing loss pertains to a hearing loss case that has been entered on the Log. If a single-ear STS loss has been recorded on the Log, then the baseline audiogram should be adjusted for that ear, and that ear only. If an STS affecting both ears has been recorded on the Log, then the baseline audiogram may be revised and applied to both ears. This means that there should be no cases where the baseline audiogram has been adjusted and the case has not been recorded on the Log.

[67 FR 44038, July 1, 2002]

II. Recording Occupational Hearing Loss Cases

Section 1904.10 of the January 19, 2001 final recordkeeping rule required employers to record, by checking the “hearing loss” column on the OSHA 300 Log, all cases in which an employee’s hearing test (audiogram) revealed that a Standard Threshold Shift (STS) in hearing acuity had occurred. An STS was defined as “a change in hearing threshold, relative to the most recent audiogram for that employee, of an average of 10 decibels or more at 2000, 3000 and 4000 Hertz (Hz) in one or both ears.” The recordkeeping rule itself does not require the employer to test employee’s hearing. However, OSHA’s occupational noise standard (29 CFR 1910.95) requires employers in general industry to conduct periodic audiometric testing of employees when employees’ noise exposures are equal to, or exceed, an 8-hour time-weighted average of 85dBA. Under the provisions of Section 1910.95, if such testing reveals that an employee has sustained a hearing loss equal to an STS, the employer must take protective measures, including requiring the use of hearing protectors, to prevent further hearing loss. Employers in the construction, agriculture, oil and gas drilling and servicing are not covered by Section 1910.95, and therefore are not required by OSHA to provide hearing tests. If employers in these industries voluntarily conduct hearing tests they are required to record hearing loss cases meeting the recording criteria set forth in the final Section 1904.10 rule.

[67 FR 77169, Dec. 17, 2002]

D. Other Hearing Loss Issues

The preamble to the final rule stated that employers in the shipbuilding industries are not covered by OSHA’s noise standard Section 1910.95 and are therefore not required to perform audiometric tests. (67 FR 44038, 44040). This statement was an error. OSHA Directive STD 0.2 Identification of General Industry Safety and Health Standards (29 CFR 1910) Applicable to Shipyard Work specifically states that employers in the shipbuilding industry that are covered by the 29 CFR part 1915 Standards are required to comply with a number of 29 CFR Part 1910 standards, including the Section 1910.95 requirements for occupational noise.

[67 FR 44038-44044, July 1, 2002]

II. Recording Occupational Hearing Loss Cases (continued)

One of the major issues in the recordkeeping rule-making was to determine the level of occupational

hearing loss that constitutes a health condition serious enough to warrant recording. This was necessary because the final rule no longer requires recording of minor or insignificant health conditions that do not result in one or more of the general recording criteria such as medical treatment, restricted work, or days away from work (See, *e.g.*, 66 FR 5931). In its 1996 Federal Register notice OSHA proposed a requirement to record hearing loss averaging 15 dB at 2000, 3000 and 4000 Hz in one or both ears (61 FR 4040). OSHA adopted the lower 10-dB threshold in the final rule based in part upon comments that “(a)n age-corrected STS is a large hearing change that can affect communicative competence” (66 FR 6008).

OSHA’s Decision

Following consideration of the comments received in response to the July 3, 2001 proposal to modify the hearing loss recording criteria, OSHA has decided to require employers to record audiometric results indicating a Standard Threshold Shift (STS) only when such STS cases also reflect a total hearing level of at least 25 dB from audiometric zero. The STS calculation uses audiometric results averaged over the frequencies 2000, 3000 and 4000 Hz, using the original baseline and annual audiograms required by the OSHA noise standard Section 1910.95. The rule also allows the employer to adjust the employee’s audiogram results used to determine an STS to subtract hearing loss caused by aging, allows the employer to retest the workers’ hearing to make sure the hearing loss is persistent, and allows the employer to seek and follow the advice of a physician or licensed health care professional in determining whether or not the hearing loss was work-related.

The approach adopted in the final rule has several advantages. By using the STS definition from the OSHA noise standard Section 1910.95, the Section 1904.10 regulation uses a sensitive measure of hearing loss that has occurred while the employee is employed by his or her current employer. By requiring all recorded cases of hearing loss to exceed 25 dB from audiometric zero, the regulation assures that all recorded hearing losses are significant illnesses.

The hearing loss recording level is also compatible with the final rule’s definition of injury or illness, “an abnormal condition or disorder” (Section 1904.46). Various scales used to rate hearing loss consider hearing levels less than 25 dB to be within the “normal range” (American Medical Association Guidelines to the Evaluation of Material Impairment, American Academy of Family Physicians, Audiology Awareness Campaign). The recording level is also

compatible with the definition of material impairment used by OSHA and MSHA in the development of standards for occupational noise exposure (64 FR 49548, 48 FR 9738).

The hearing loss recording requirements in Section 1904.10 differ from the requirements of the OSHA noise standard (Section 1910.95) because under the noise standard the employer is required to take certain actions (employee notification, providing hearing protectors or refitting of hearing protectors, etc.) for *all* 10-db standard threshold shifts while the part 1904 rule only requires the recording of STSs that also exceed the total 25-db level. OSHA believes that this is an appropriate policy, because 10-db shifts in hearing at higher levels (above 25 dB) are more significant....

When audiometric testing is done, test tones are presented at various sound levels, usually increasing or decreasing in 5-dB steps. The employee is asked to respond whenever a tone is heard, with the goal being finding the lowest level at which the employee can consistently hear. The standard measurement for measuring hearing level is decibels, a logarithmic scale. For the first increase in hearing level from 0 to 10 dB, the sound intensity increases 10 fold. The next 10 dB is a 100-fold increase. By the time a person's hearing level changes from 0 to 30 dB hearing level, he or she needs 1,000 times more sound intensity to just barely hear.

Although the part 1904 recordkeeping regulation and the Section 1910.95 noise standard treat the STS cases differently, this has no effect on the noise standard's requirements and does not have any effect on the requirement for employers to comply with Section 1910.95. When employers detect work-related STS cases, they are required to take all of the follow-up actions required by the noise standard.

Additionally, the STS measure uses existing measurements and calculations employers are already using to comply with the OSHA noise standard, resulting in less paperwork burden for employers covered by both rules. Employers are required to take one additional step to determine if the STS has also resulted in a total hearing level of 25 dB or more, and if so, to record it. The position taken in Section 1904.10 provides a reasonable compromise between the commenters' highly polarized views on the proper recording level. The final rule's hearing loss recording provisions provide a reasonable "middle ground" solution to reconcile the differences between a highly sensitive measure of hearing loss (all 10-db shifts) and increasingly insensitive measures (15, 20, or 25-db shifts).

The approach used in this final rule is a newly developed alternative that was not considered in the January 2001 rulemaking because none of the commenters to the 1996 proposed rule suggested it....

OSHA believes that the Section 1904.10 requirements will improve the nation's statistics on occupational hearing loss and that more hearing loss cases will be entered on employers' OSHA 300 Logs. However, OSHA recognizes that the new requirements may not result in comprehensive statistics for occupational hearing loss. Employees may experience significant hearing loss in industries where audiometric testing is not required (construction, agriculture, oil and gas drilling and servicing), and is not provided voluntarily by the employer, and thus is never entered into the records. Likewise, an employee may experience gradual hearing loss while employed by several employers, but never work for the same employer long enough to allow a recordable STS to be captured. As to the effect on trend analysis, caution must be used when comparing Section 1904.10 hearing loss data that span the effective date of this rule. The new hearing loss recording rule will result in the recording of additional cases of hearing loss, not as a result of a change in the number of workers who experience hearing loss, but simply because of the recordkeeping change.

OSHA finds that recording only 25-dB shifts from the employee's baseline audiogram is not an appropriate policy. If an employee had significant hearing loss before being hired by the employer, additional hearing loss would not be recorded until well beyond the point of disability. This would not conform to the requirements of section 24 of the Act directing the Secretary to "[c]ompile accurate statistics on work injuries and illnesses which shall include all disabling, serious, or significant injuries and illnesses * * *" (emphasis added) (29 U.S.C. 673). The recording of 25-dB shifts in hearing acuity, measured from the employee's original baseline audiogram would clearly understate the true incidence of work-related hearing loss. Likewise, if the part 1904 regulation were to require only the recording of 15 or 20-dB shifts, or categorically exclude the first STS case the rule would exclude many legitimate and serious hearing loss cases that should rightfully be entered into the records and the Nation's injury and illness statistics. This approach would be especially deficient at capturing hearing loss in those employees who change employers several times during their working lives....

OSHA does not agree with the commenters who argued that because the function of the OSHA standards and regulations, including the part 1904 regula-

tion, is to protect workers, worker protection would be compromised by any policy other than the recording of all STS cases. OSHA encourages employers and employees to use the OSHA injury and illness records to improve workplace safety and health conditions, and this is one of the functions of the Part 1904 records. However, this is not the only function of the records. They are also used to generate injury and illness statistics for the Nation and for individual workplaces. They are used by OSHA representatives to identify hazards during workplace inspections, and are collected by OSHA to target its intervention efforts to more hazardous worksites (See 66 FR 5916-5917). As stated in the 2001 rulemaking, “[n]o new protections are being provided by the recordkeeping rule.” Further, the OSH Act does not require the recording of all injuries and illnesses and specifically excludes certain minor injury and illness cases. This exclusion, which is discussed in the preamble to the January 19, 2001 final rule, applies to both injuries and illnesses, including hearing loss (See 66 FR 5931-5932). It is thus entirely appropriate for the recordkeeping rule to exclude certain minor illness cases while capturing more serious cases.

The hearing loss recording requirements of Section 1904.10 will not deprive employers and employees of information about noise hazards or diminish workers’ protection against the hazards of noise in the workplace. The occupational noise exposure standard requires that employees in general industry be tested for hearing loss when noise exposure exceeds an 8-hour time-weighted average of 85dB, and that employees be informed, in writing, if a 10-dB shift has occurred. The audiometric test records must be retained for the duration of the affected employee’s employment. (See 29 CFR 1910.95(g), (m)). The noise standard also specifies the protective measures to be taken to prevent further hearing loss for employees who have experienced a 10-dB shift, including the use of hearing protectors and referral for audiological evaluation where appropriate. (See 29 CFR 1910.95(g)(8)). These requirements, which apply without regard to the recording criteria in the recordkeeping rule, will protect workers against the hazards of noise. The modified requirements of Section 1904.10 will therefore not deprive employers and workers of the means to detect and prevent hearing loss.

Finally, section 4(b)(4) of the OSH Act provides that “[n]othing in this Act shall be construed to supersede or in any manner affect any workmen’s compensation law or to enlarge or diminish or affect in any other manner the common law or statutory

rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.” 29 U.S.C. 653(b)(4). Accordingly, the OSHA recordkeeping rule will have no legal effect on state workers’ compensation systems. There is no evidence that the states have modified their systems to conform to OSHA’s previous hearing loss recording policies; in fact, the states are far from uniform in their treatment of occupational hearing loss. Therefore, OSHA does not expect the 1904 regulation to have any effect on state workers’ compensation systems in the future.

Audiometric Error

...OSHA agrees ... that the recordkeeping rule should not take any actions to address the issues of audiometric variability, and finds that there is no need to increase the recording loss threshold to 15 or 20 dB to account for variability. The OSHA noise standard includes provisions that standardize audiometric testing protocols. The requirements in Section 1910.95 (g) Audiometric Testing Program, Section 1910.95(h) Audiometric Test Requirements, Mandatory Appendix C to Section 1910.95 Audiometric Measuring Instruments, Mandatory Appendix D to Section 1910.95 Audiometric Test Rooms, and Mandatory Appendix E to Section 1910.95 Acoustic Calibration of Audiometers, and the incorporated provisions of American Standard Specification for Audiometers S3.6-1969 provide standardized methodologies for conducting hearing tests designed to assure, as far as possible, that audiograms are accurate....

It should be noted that it is impossible to eliminate audiometric errors in their entirety. Any recording level, no matter how it is set, will be subject to some level of false positive and false negative errors. However, OSHA believes that the audiometric testing requirements of Section 1910.95, if followed, will provide reasonably accurate audiometric data for the administration of the OSHA noise standard, and for the recording of occupational hearing loss. As [a commentor] commented: “(f)ollowing a standardized testing protocol (using 29 CFR 1910.95), and including adjustments for age and the use of a retest in 30 days, has provided accurate, consistent results.” OSHA believes that the provisions allowing the employer to age adjust audiograms, seek advice from a physician or other licensed health care professional for determining work-relationship, retest within 30 days, and remove cases later found not to be persistent provide reasonable checks against false positive results being recorded on the 300 Log.

Age Correction

The final rule carries forward the January 19, 2001 rule's conceptual framework allowing, but not requiring, the employer to age adjust an employee's annual audiogram when determining whether or not a 10-dB shift in hearing acuity has occurred....

While the final rule allows the employer to age-correct the STS portion of the recording criteria, there is no allowance for age correction for determining a 25-dB hearing level. The AMA Guides specifically state that total hearing loss should not be age-adjusted, and there is no recognized consensus method for age adjusting a single audiogram. The method used in Appendix F of Section 1910.95 is designed to age correct STS, not absolute hearing ability. The 25-dB criteria is used to assure the existence of a serious illness, and reflects the employee's overall health condition, regardless of causation. Age correcting the STS will provide adequate safeguards against recording age corrected hearing loss. Therefore, it would be inappropriate and unnecessary to age correct the 25-dB hearing level.

Persistence

...The OSHA noise standard addresses the issue of temporary hearing losses by allowing the employer to retest the employee's hearing within 30 days (1910.95(g)(7)(iii)). The 2001 rule adopted the same 30 day retest option at Section 1904.10(b)(4) by allowing the employer to delay recording if a retest was going to be performed in the next 30 days.

... OSHA has decided not to allow a longer retesting period. A longer retesting period would increase the likelihood that the employer would lose track of the case and therefore inadvertently fail to record the case. These errors would have a detrimental effect on the accuracy of the records and run counter to OSHA's goal of improving the quality of the injury and illness data. The Agency also believes that using different time periods for retesting in the part 1904 and Section 1910.95 rules would result in increased confusion for employers.

The Agency has also rejected the suggestion that all hearing loss cases must be confirmed prior to recording them. Waiting for one year or longer to record an occupational hearing loss would move the recording to a year in which the original hearing loss was not initially discovered, would be administratively more complex for employers, and would have a detrimental effect on the hearing loss data. Many legitimate hearing loss cases could go unrecorded simply because the employee did not receive a subsequent audiogram due to job changes or some

other circumstance that might occur before the next annual audiogram required by the noise standard....

...The OSHA noise standard at Section 1910.95(g)(3), requires that:

Audiometric tests shall be performed by a licensed or certified audiologist, otolaryngologist, or other physician, or by a technician who is certified by the Council of Accreditation in Occupational Hearing Conservation, or who has satisfactorily demonstrated competence in administering audiometric examinations, obtaining valid audiograms, and properly using, maintaining and checking calibration and proper functioning of the audiometers being used. A technician who operates microprocessor audiometers does not need to be certified. A technician who performs audiometric tests must be responsible to an audiologist, otolaryngologist or physician.

Because the noise standard already requires audiograms to be conducted by, or under the supervision of, a qualified professional, subsequent audiograms that may refute the persistence of a recorded hearing loss will be reviewed by the appropriate professional. The Section 1904.10 rule simply cross-references the need for the audiograms to be obtained pursuant to the requirements of Section 1910.95, so there is no need for the Section 1904.10 rule to repeat the review requirement. . . . [T]he rule does not require the employer to maintain documentation concerning the removal of cases. Section 1910.95(m)(2) of the noise standard requires the employer to keep records of all audiometric tests that are performed, and those records will be available, should they be needed for future reference. As a result, there is no need to add a duplicative paperwork burden in the Section 1904.10 rule. Therefore, Section 1904.10(b)(4) states that "If subsequent audiometric testing indicates that an STS is not persistent, you may erase or line-out the recorded entry." OSHA has added this additional regulatory language to minimize the recording of temporary hearing loss cases while capturing complete data on the incidence of hearing loss disorders.

Frequencies

...OSHA has decided to continue to use the frequencies used in the Section 1910.95 OSHA noise standard (2000, 3000, and 4000 Hz). While "most" communication occurs at lower frequencies, these are clearly audible frequencies where some speech occurs, and where hearing loss can have a significant impact on workers' lives outside of verbal communication. Using these frequencies reduces the burden

on employers that would be created by requiring separate calculations of audiometric results, and, as ...stated “(w)ith regard to the early effects of noise exposure, it seems reasonable to extend the definition across the standard shift frequencies 2000, 3000, and 4000 Hz” (Ex. 3-62).

Baseline Reference and Revision of Baseline

...The two-part test for recording that is being adopted in the final rule uses the baseline audiogram as the reference point for determining whether or not the employee has had a change in hearing while employed by his or her current employer, and then uses audiometric zero as the reference point for determining the overall hearing ability of the affected employee. OSHA agrees that the employee’s baseline audiogram is a superior reference point for measuring a change of hearing, a Standard Threshold Shift. Using the baseline audiogram taken upon employment reduces the effect of any prior hearing loss the employee may have experienced, whether it is non-occupational hearing loss or occupational hearing loss caused by previous employment. Therefore, the final rule uses the employee’s original baseline audiogram as the reference for the STS component of an initial hearing loss case, and uses the revised baseline audiogram from that initial case as the reference for future cases.

The 25-dB total hearing level component of an OSHA recordable hearing loss uses a reference of audiometric zero. This portion of the recording criteria is used to assure that the employee’s total hearing level is beyond the normal range of hearing, so it does not exclude hearing loss due to non-work causes, prior employment, or any other cause. The measurement simply reflects the employee’s current hearing ability as reflected in the most recent audiogram. This comparison to audiometric zero is a simple matter, because audiometers are designed to provide results that are referenced to audiometric zero. The hearing level at each frequency is oftentimes printed by the equipment, so there is rarely a need to perform manual calculations....

[67 FR 77169, Dec.17, 2002]

D. Other Hearing Loss Issues

...The second issue involves the computation of a Standard Threshold Shift (STS), which is one part of the two-part recording criteria recently published (67 FR 44037-44048). (The case must also reflect a 25 dB hearing level compared to audiometric zero.) The STS computation is to be made in accordance with the Occupational Noise Exposure Standard 1910.95.

As OSHA stated in the preamble to the July 1, 2002 rulemaking, the Section 1904.10 regulation “[u]ses existing measurements employers are already using to comply with the OSHA noise standard, resulting in less paperwork burden for employers covered by both rules” (67 FR 44040). Under 1910.95, the employee’s current audiogram is compared to the employee’s baseline audiogram, which may be the original audiogram taken when the employee was first placed in a hearing conservation program, or the revised baseline audiogram allowed by the Occupational Noise Exposure standard. Paragraph 1910.95(g)(9) of the noise rule states:

(9) Revised baseline. An annual audiogram may be substituted for the baseline audiogram when, in the judgment of the audiologist, otolaryngologist, or physician who is evaluating the audiogram:

- (i) The standard threshold shift revealed by the audiogram is persistent, or
- (ii) The hearing threshold shown in the annual audiogram indicates significant improvement over the baseline audiogram.

OSHA’s former recording criteria required the employer to track separate baselines for recording and hearing conservation purposes. However, the new Part 1904 hearing loss recording system relies on the existing 1910.95 calculations, and separate baselines will no longer be required. In short, under the new Part 1904, a recordable hearing loss case occurs when an employee experiences an STS (as defined in 29 CFR 1910.95), the STS is work-related, and the employee’s aggregate hearing loss exceeds 25dB from audiometric zero.

[67 FR 44044-44047, July 1, 2002]

Work Relationship

... [T]he final rule states that there are no special rules for determining work-relationship for hearing loss cases and restates the rule’s overall approach to determining work-relatedness -- that a case is work-related if one or more events or exposures in the work environment either caused or contributed to the hearing loss, or significantly aggravated a pre-existing hearing loss.

The final rule’s approach to determining work-relatedness differs from the January 2001 rule for three reasons. First, although it is likely that occupational exposure to noise in excess of 85 dBA will be a causal factor in hearing loss in some cases, a presumption of work-relatedness is not justified in all cases. Further evaluation is needed to make this determination. Second, the policy in the final rule is consistent with the general principle in § 1904.5 that

work-relatedness is to be determined on a case-by-case basis. Third, the approach used in the January 2001 rule is not supported by comments to the docket. None of the commenters supported the presumption, while many opposed it.

The final rule also continues the 2001 rule's policy allowing the employer to seek the guidance of a physician or other licensed health care professional when determining the work-relatedness of hearing loss cases. Paragraph (b)(6) of the rule states that if a physician or other licensed health care professional determines that the hearing loss is not work-related or has not been significantly aggravated by occupational noise exposure, the employer is not required to consider the case work-related, and therefore is not required to record it.

When evaluating the work relatedness of a given hearing loss case, the employer should take several factors into account. ...One important factor to consider is the effectiveness of the hearing protection program. When employees are exposed to high levels of noise in the workplace, and do not wear appropriate hearing protection devices, a case of hearing loss is more likely to be work-related. If an employee's hearing protection devices are not appropriate for the noise conditions, if they do not fit properly, or if they are not used properly and consistently, they may not provide enough protection to prevent workplace noise from contributing to a hearing loss case....

Miscellaneous Hearing Loss Issues

Several of OSHA's rules provide access rights to audiometric data. Section 1910.95(g)(8) of the noise standard requires employers to inform employees, in writing, that they have experienced a standard threshold shift. OSHA's rule for access to employee exposure and medical records (Section 1910.1020) requires employers to provide access to medical records, exposure records, and analyses of records to employees and their designated representatives. Finally, the part 1904 regulation requires employers to provide employee access to the OSHA injury and illness data.

State Plans

... During 2002, the State Plan States were allowed to maintain their policies for the recording of hearing loss, while OSHA reconsidered what the appropriate recording criteria should be. In the **Federal Register** document announcing the one year delay and the interim policy for year 2002, OSHA stated that when it issues a final determination for the recording of occupational hearing loss for calendar years 2003

and beyond, the states would be required to have identical criteria (66 FR 52033). Now that OSHA has issued its final determination, the States are required to promulgate identical criteria.

[67 FR 77168-77169, Dec.17, 2002]

B. OSHA's Reasons for Retaining the Hearing Loss Column

OSHA has decided to retain the hearing loss column. Doing so will improve the Nation's statistical information on occupational hearing loss, facilitate analysis of hearing loss data at individual workplaces, and improve the Agency's ability to assess this common occupational disorder. One of the major functions of the Part 1904 regulation is to produce national statistics for occupational injury and illness (29 U.S.C. 657(c)(1)). The data will clearly improve the Nation's statistics on occupational hearing loss....

Because the BLS statistics on case characteristics only reflect injuries and illnesses that result in days away from work, and workers commonly suffer hearing loss and never require a day away from work, the BLS estimates represent only a minor fraction of the total hearing loss experienced by U.S. workers and do not reflect the incidence of occupational hearing loss. A discussion of the BLS data systems and how they function may be found at <http://www.bls.gov/bls/safety.htm>. By providing a separate 300 Log column for this disorder, the data for hearing loss will be summarized by the employer at the end of the year, and will be captured by the BLS when sampled employers submit their summary injury and illness information. Thus, national statistics will be available, for the first time, that include cases that result in days away from work and those that do not....

The resulting statistics will be of value to several groups. The data will have value on their own as a public information resource that can be accessed by students, hearing loss professionals, researchers, and others. The data can be used by policy makers to prioritize hearing loss prevention efforts and measure the performance of those efforts, whether they are enforcement, guidance, outreach or consultation. OSHA believes that the greatest value of the data will be realized by employers and employees at individual workplaces. These individuals have always had the ability to determine the incidence of hearing loss cases in their workplace via analysis of the individual case descriptions on the OSHA 300 Logs; the hearing loss column will only make this task easier. The greater value of the column lies in the new ability to benchmark the hearing loss statistics of an individual workplace to the hearing loss statistics for industry

as a whole, or to hearing loss statistics for a comparable industry classification. This will allow employers and employees to compare their hearing loss prevention performance to the performance of their peers and know whether or not their efforts are succeeding. This is a function that is not required under the Section 1910.95 noise standard, and is a useful purpose of the Part 1904 records.

OSHA disagrees with the arguments against a hearing loss column. In response to the criticism that the data will not shed light on causes or provide value in determining preventive strategies, ...a mere entry on the Log does not, by itself, show an employer or employee how to prevent hearing loss. That is the function of further analysis of the hearing loss cases, the workplace, and the employer's hearing conservation program. In this matter, hearing loss is no different than any other type of injury or illness. The Log provides descriptive data about occupational injuries and illnesses and some of the circumstances surrounding them. It does not replace the need for causal analysis of occupational injuries and illnesses. ...OSHA notes that the data only reflect work-related hearing loss cases. Part 1904 requires the employer to consider the case to be work-related only when exposure at work either causes or contributes to a hearing loss, or significantly aggravates a pre-existing hearing loss (Section 1904.5). Section 1904.10(b)(6) allows the employer to consider the case non work-related if a

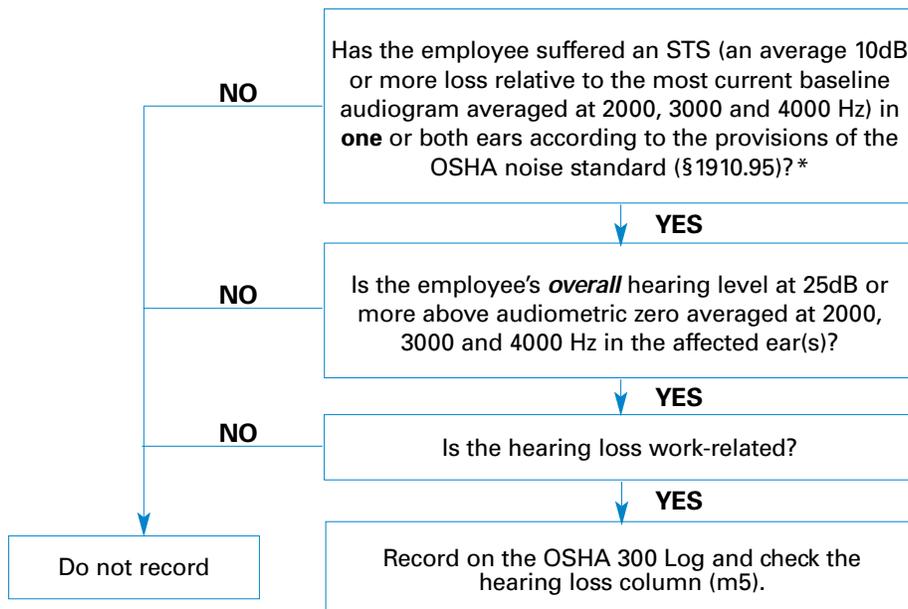
physician or other licensed health care professional determines the hearing loss is not work related.

Finally, the column is not burdensome. Although the rule does not require employers to use computer software to track injuries and illnesses, many employers do so voluntarily, and these employers will have some minimal initial costs to revise their software. Employers will also experience a small training cost to familiarize the employees who maintain the records with the new column. However, once these tasks are completed, it is no more burdensome to check a hearing loss column than one of the other columns on the form....

D. Other Hearing Loss Issues

...Third, OSHA has noted concern among employers because the application of the new two-part test in the new Section 1904.10 recording criteria will result in an increase in recorded hearing loss cases. As noted in the July 1, 2002 rulemaking, the new criteria will capture more hearing loss cases. Employers will experience an increase in recorded hearing loss cases in 2004 and future years. Caution must be used when comparing past and future data to prior years data. OSHA recognizes this increase, and will take the changes in the recordkeeping rule into account when evaluating an employer's injury and illness experience.

Use this 'decision tree' to determine whether the results of a audiometric exam reveal a recordable STS.



Note: In all cases, use the most current baseline to determine recordability as you would to calculate an STS under the hearing conservation provisions of the noise standard (§1910.95). If an STS occurs in only one ear, you may only revise the baseline audiogram for that ear.

* The audiogram may be adjusted for presbycusis (aging) as set out in 1910.95.

FREQUENTLY ASKED QUESTIONS: Section 1904.10 (OSHA Instruction, CPL 2-0.135, Chap. 5)
Section 1904.10 Recording criteria for cases involving occupational hearing loss

Question 10-1. *If an employee suffers a Standard Threshold Shift (STS) in only one ear, may the employer revise the baselines for both ears?*

No. A Standard Threshold Shift, or STS, is defined in the occupational noise exposure standard at 29 CFR 1910.95(g)(10)(i) as a change in hearing threshold, relative to the baseline audiogram for that employee, of an average of 10 decibels (dB) or more at 2000, 3000, and 4000 hertz (Hz) in one or both ears. The employer is permitted only to revise the baseline in the ear where the employee suffered an STS change in hearing threshold.

Question 10-2. *Which baseline is used to determine if a recordable Standard Threshold Shift (STS) has occurred this year?*

Employers should use the same baseline that they would use to comply with OSHA's Noise Standard, Part 1910.95. If the employer chose to revise an

employee's baseline due to a previous STS, then the employer would use the same revised baseline when determining recordability under section 1904.10 of the recordkeeping regulation.

Question 10-3. *If an employee experienced a recordable hearing loss case, where would the employer record the case on the OSHA 300 Log?*

Prior to 2004, employers should record work-related hearing loss cases according to the instructions included with the Recordkeeping Forms. If the loss is associated with an event, such as acoustic trauma (e.g., an explosion), it would be recorded as an injury with a check mark in column (M)(1). If the loss is not an injury, it would be recorded as an illness, with a check mark in the all other illness column. Beginning in January 2004, employers must record all hearing loss cases in the separate hearing loss column (M)(5).

LETTERS OF INTERPRETATION: Section 1904.10

Section 1904.10 Recording criteria for cases involving occupational hearing loss

OSHA requirements are set by statute, standards and regulations. Letters of interpretation explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. These letters constitute OSHA's interpretation of the requirements discussed. Note that OSHA enforcement guidance may be affected by changes to OSHA rules. Also, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA's website at <http://www.osha.gov>.

Letters of Interpretation constitute OSHA's interpretation only of the requirements discussed and may not be applicable to any situation not delineated within the original correspondence.

Letter of interpretation related to section 1904.10(b)(4) –

Recording criteria for recordkeeping cases involving occupational hearing loss.

March 4, 2004

Mr. Carl O. Sall, CIH
Director of Occupational Safety
and Health Compliance
Comprehensive Health Services, Inc.
8229 Boone Boulevard, Suite 700
Vienna, VA 22182-2623

Dear Mr. Sall:

This is in response to your letter dated February 13, 2003. Thank you for your comments pertaining to the Occupational Safety and Health Administration's (OSHA) Injury and Illness Recording and Reporting Requirements contained in 29 CFR Part 1904. In your letter you requested clarifications on some issues related to the recording criteria for cases involving occupational hearing loss. Your questions are summarized below, followed by our responses.

Question: Does the thirty-day retest start on the day the initial hearing exam was completed, or on the date that the results are given to the employer?

Response: For OSHA purposes, the thirty-day retest begins from the date of the first test under Section 1904.10(b)(4) in the regulation. Also, see the September 4, 1991 letter of interpretation to Mr. Paul V. Williams from Patricia Clark. A retest audiogram may not be substituted for an initial audiogram unless it is obtained within thirty calendar days of the date of initial audiogram regardless of the fact that an outside evaluating concern is used.

Question: Can I correct my OSHA 300 Log if on a subsequent exam an employee's hearing improves to a point that is no longer recordable?

Response: For purposes of OSHA recordkeeping, 1904.10(b)(4) states that "If subsequent audiometric testing indicates that a Standard Threshold Shift (STS) is not persistent, you may erase or line-out the recorded entry." While the recordkeeping rule does not require the employer to maintain documentation concerning the removal of cases, Section 1910.95(m)(2) of the noise standard requires the employer to keep records of all audiometric tests that are performed. Therefore, those records will be available, should they be needed for future reference.

Question: Does the hearing loss recordkeeping requirement apply to the Construction Industry?

Response: Yes. Employers in the construction industry are required to follow the recordkeeping requirements of 1904. Hearing losses of employees that meet the recording criteria set forth in 29 CFR 1904.10 must be recorded.

Finally, you have asked OSHA to review your draft examples of how to properly record an occupational hearing loss case. Work-related hearing loss cases must be recorded if they meet the requirements of 1904.10. Two basic questions must be answered:

1. Did the employee suffer a Standard Threshold Shift (STS) of 10 dB or more in one or both ears?
2. Is the employee's overall hearing level 25 dB or more above audiometric zero in the same or both ears?

If both questions can be answered yes, then it must be recorded on the OSHA 300 log. A decision tree has been enclosed to aid you with your recordkeeping requirements.

Thank you for your interest in occupational safety and health. We hope you find this information helpful. OSHA requirements are set by statute, standards, and regulations. Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. This letter constitutes OSHA's interpretation of the requirements discussed. Note that our enforcement guidance may be affected by changes to OSHA rules.

Also, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA's website at <http://www.osha.gov>. If you have any further questions, please contact the Division of Recordkeeping Requirements, at 202-693-1702.

Sincerely,

Frank Frodyma, Acting Director
Directorate of Evaluation and Analysis

Enclosure

Letter of interpretation related to sections 1904.10, 1910.95, 1910.95(g)(1), 1910.95(g)(5), 1910.95(g)(7), 1910.95(g)(9) and 1910.95(g)(10) –

Baseline audiogram revision due to persistent STS or improved thresholds; revision must be made for each ear separately.

May 8, 2003

Ms. Linda Ballas
Linda Ballas & Associates
4413 Copper Creek Lane
Toledo, OH 43615

Dear Ms. Ballas:

Thank you for your January 21 letter to the Occupational Safety and Health Administration (OSHA) regarding the Occupational Noise standard. In your letter, you requested a clarification about how baseline audiograms should be revised. You also pointed out that two of our letters of interpretation provide contradictory guidance and are causing confusion among hearing associates. A corrected response appears below.

The Occupational Noise Standard, 29 CFR 1910.95, requires employers to establish and maintain an audiometric testing program for all employees whose exposures equal or exceed an 8-hour time-weighted average (TWA) of 85 decibels on the "A" scale (dBA). Annual audiograms are compared to the baseline audiogram to determine if hearing loss is occurring.

If a standard threshold shift (STS), defined as an average of 10 dBA or more at 2000, 3000, and 4000 Hz, occurs in either ear, the employer must follow certain procedures outlined in the standard, including notifying the affected employee in writing. Hearing loss cases that meet specific criteria must be recorded on the OSHA 300 log according to the recordkeeping requirements of 1904.10.

With regard to your request for a clarification as to how to revise the baseline, OSHA allows employers to revise the baseline by substituting the annual audiogram for the baseline audiogram when the reviewing professional determines that an STS is persistent. Such a revision would serve to prevent the same STS from being identified repeatedly for an employee whose hearing has stabilized. As a corollary, an annual audiogram may be substituted for the baseline audiogram when thresholds have significantly improved.

When the professional evaluating the audiogram determines that a baseline revision is appropriate, whether due to a persistent STS or improved thresholds, the baseline must be revised for each ear separately. For example, although an employee's annual audiogram shows hearing thresholds deteriorating in both ears simultaneously, occasionally an audiogram will show that an employee is suffering an STS in only one ear. This can sometimes be attributed to working near a loud noise source that is close to the affected ear. If such a shift is shown to be persistent in the judgment of the professional evaluating the audiogram, then the baseline audiogram may be revised due to the persistent STS. A baseline audiogram that shows a persistent shift for only one ear may be revised for only that ear. The baseline may not be revised for the other unaffected ear. This procedure is required because it provides a clear indication of how each ear is affected by noise.

Thank you for your interest in occupational safety and health and bringing these letters to our attention. The erroneous 1996 letter to Mr. Dean Harris will be removed from our website shortly. We hope you find this information helpful. OSHA requirements are set by statute, standards and regulations. Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. This letter constitutes OSHA's interpretation of the requirements discussed. Note that our enforcement guidance may be affected by changes to OSHA rules. Also, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA's website at <http://www.osha.gov>. If you have any further questions, please feel free to contact the Office of Health Enforcement at (202) 693-2190.

Sincerely,

Richard E. Fairfax, Director
Directorate of Enforcement Programs

Section 1904.11

Recording criteria for work-related tuberculosis cases

(66 FR 6129, Jan. 19, 2001)

REGULATION: Section 1904.11

Subpart C – Recordkeeping forms and recording criteria

(66 FR 6123, Jan. 19, 2001)

Note to Subpart C: This Subpart describes the work-related injuries and illnesses that an employer must enter into the OSHA records and explains the OSHA forms that employers must use to record work-related fatalities, injuries, and illnesses.

Section 1904.11 Recording criteria for work-related tuberculosis cases

(a) Basic requirement.

If any of your employees has been occupationally exposed to anyone with a known case of active tuberculosis (TB), and that employee subsequently develops a tuberculosis infection, as evidenced by a positive skin test or diagnosis by a physician or other licensed health care professional, you must record the case on the OSHA 300 Log by checking the “respiratory condition” column.

(b) Implementation.

(1) *Do I have to record, on the Log, a positive TB skin test result obtained at a pre-employment physical?*

No, you do not have to record it because the employee was not occupationally exposed to a

known case of active tuberculosis in your workplace.

(2) *May I line-out or erase a recorded TB case if I obtain evidence that the case was not caused by occupational exposure?*

Yes, you may line-out or erase the case from the Log under the following circumstances:

- (i) The worker is living in a household with a person who has been diagnosed with active TB;
- (ii) The Public Health Department has identified the worker as a contact of an individual with a case of active TB unrelated to the workplace; or
- (iii) A medical investigation shows that the employee’s infection was caused by exposure to TB away from work, or proves that the case was not related to the workplace TB exposure.

PREAMBLE DISCUSSION: Section 1904.11

(66 FR 6013-6017, Jan. 19, 2001)

The following are selected excerpts from the preamble to the Occupational Injury and Illness Recording and Reporting Requirements, the Recordkeeping rule (66 FR 5916, 29 CFR Parts 1904 and 1952). These excerpts represent some of the key discussions related to the final rule (66 FR 6122, 29 CFR Parts 1904 and 1952).

Section 1904.11 Recording criteria for work-related tuberculosis cases

Section 1904.11 of the final rule being published today addresses the recording of tuberculosis (TB) infections that may occur to workers occupationally exposed to TB.... There are two general stages of TB, tuberculosis infection and active tuberculosis disease.

Individuals with tuberculosis infection and no active disease are not infectious; tuberculosis infections are asymptomatic and are only detected by a positive response to a tuberculin skin test....

The text of Section 1904.11 of the final rule states:

(a) Basic requirement.

If any of your employees has been occupationally

exposed to anyone with a known case of active tuberculosis (TB), and that employee subsequently develops a tuberculosis infection, as evidenced by a positive skin test or diagnosis by a physician or other licensed health care professional, you must record the case on the OSHA 300 Log by checking the “respiratory condition” column.

(b) Implementation.

(1) *Do I have to record, on the Log, a positive TB skin test result obtained at a pre-employment physical?*

No, because the employee was not occupationally exposed to a known case of active tuberculosis in your workplace.

(2) May I line-out or erase a recorded TB case if I obtain evidence that the case was not caused by occupational exposure?

Yes. You may line-out or erase the case from the Log under the following circumstances:

- (i) The worker is living in a household with a person who has been diagnosed with active TB;
- (ii) The Public Health Department has identified the worker as a contact of an individual with a case of active TB unrelated to the workplace; or
- (iii) A medical investigation shows that the employee's infection was caused by exposure to TB away from work, or proves that the case was not related to the workplace TB exposure.

Positive Skin Tests

...A positive tuberculin skin test indicates that the employee has been exposed to *Mycobacterium tuberculosis* and has been infected with the bacterium. Although the worker may or may not have active tuberculosis disease, the worker has become infected. Otherwise, his or her body would not have formed antibodies against these pathogens. (OSHA is aware that, in rare situations, a positive skin test result may indicate a prior inoculation against TB rather than an infection.)

OSHA believes that TB infection is a significant change in the health status of an individual, and, if occupational in origin, is precisely the type of illness Congress envisioned including in the OSHA injury and illness statistics. Contracting a TB infection from a patient, client, detainee, or other person in the workplace would cause serious concern, in OSHA's view, in any reasonable person. Once a worker has contracted the TB infection, he or she will harbor the infection for life. At some time in the future, the infection can progress to become active disease, with pulmonary infiltration, cavitation, and fibrosis, and may lead to permanent lung damage and death. An employee harboring TB infection is particularly likely to develop the full-blown disease if he or she must undergo chemotherapy, contracts another disease, or experiences poor health....

When an employee is exposed to an infectious agent in the workplace, such as TB, chicken pox, etc., either by a co-worker, client, patient, or any other person, and the employee becomes ill, workplace conditions have either caused or contributed to the illness and it is therefore work-related. Since, as discussed above, TB infection is clearly a serious condition, it is non-minor and must be recorded.

Employee-to-Employee Transmission

...OSHA believes that non-minor illnesses resulting from an exposure in the work environment are work-related and therefore recordable unless a specific exemption to the presumption applies. Infection from exposure to another employee at work is no different, in terms of the geographic presumption, from infection resulting from exposure to a client, patient, or any other person who is present in the workplace. The transmission of TB infection from one employee to another person at work, including a co-worker, clearly is non-minor and is squarely within the presumption.

...OSHA agrees that a case of TB should be recorded only when an employee has been exposed to TB in the workplace (*i.e.*, that the positional theory of causation applies to these cases just as it does to all others). OSHA has added an additional recording criterion in this case: for a TB case occurring in an employee to be recordable, that employee must have been exposed at work to someone with a known case of active tuberculosis.

...Under the final rule, if a worker reports a case of TB but the worker has not been exposed to an active case of the disease at work, the case is not recordable. However, OSHA sees no need for the employer to document such workplace exposure, or for the Agency to require a higher level of proof that workplace exposure has occurred in these compared with other cases. Further, OSHA knows of no justification for excluding cases simply because they are the first or only case discovered in the workplace. If a worker contracted the disease from contact with a co-worker, patient, client, customer or other work contact, the case would be work-related, even though it was the first case detected. Many work-related injury and illness cases would be excluded from the recordkeeping system if cases were only considered to be work-related when they occurred in clusters or epidemics. This was clearly not Congress's intent.

The final rule's criteria for recording TB cases include three provisions designed to help employers rule out cases where occupational exposure is not the cause of the infection in the employee (*i.e.*, where the infection was caused by exposure outside the work environment). An employer is not required to record a case involving an employee who has a positive skin test and who is exposed at work if (1) the worker is living in a household with a person who has been diagnosed with active TB, (2) the Public Health Department has identified the worker as a contact of a case of active TB unrelated to the workplace, or (3) a medical investigation shows that the

employee's infection was caused by exposure to TB away from work or proves that the case was not related to the workplace TB exposure.

...OSHA has added an implementation question to the final rule to make sure that employers understand that pre-employment skin test results for TB are not work-related and do not have to be recorded. These results are not considered work-related for the purposes of the current employer's Log because the test result cannot be the result of an event or exposure in the current employer's work environment.

...[T]he final rule allows employers to rebut the presumption of work-relatedness if a medical evalua-

tion concludes that the TB infection did not arise as a result of occupational exposure, a physician or other licensed health care professional could use the CDC Guidelines or another method to investigate the origin of the case. If such an investigation resulted in information that demonstrates that the case is not related to a workplace exposure, for example, the employer need not record the case. For example, such an investigation might reveal that the employee had been vaccinated in childhood with the BCG vaccine. The employer may wish, in such cases, to keep records of the investigation and determination.

FREQUENTLY ASKED QUESTIONS: Section 1904.11 (OSHA Instruction, CPL 2-0.135, Chap. 5)

Section 1904.11 Recording criteria for work-related tuberculosis cases

This section will be developed as letters of interpretation become available.

LETTERS OF INTERPRETATION: Section 1904.11

Section 1904.11 Recording criteria for work-related tuberculosis cases

This section will be developed as letters of interpretation become available.

Section 1904.12

Recording criteria for cases involving work-related musculoskeletal disorders

(66 FR 6123, Jan. 19, 2001)

Deletion of 29 CFR 1904.12

(68 FR 38601-38607, June 30, 2003)

Recording criteria for cases involving work-related musculoskeletal disorders.

After lengthy consideration, OSHA decided not to include a separate column for musculoskeletal disorders (MSDs) on the OSHA 300 Log. Consequently,

there are no special recording criteria for musculoskeletal disorders. An MSD case is recorded using the same process used for any other injury or illness. If a musculoskeletal disorder is work-related, is a new case, and meets one or more of the general recording criteria, the employer must record the MSD on the OSHA 300 Log.

Section 1904.29 Forms

(66 FR 6130, Jan. 19, 2001)

REGULATION: Section 1904.29

Subpart C – Recordkeeping forms and recording criteria

(66 FR 6123, Jan. 19, 2001)

Note to Subpart C: This Subpart describes the work-related injuries and illnesses that an employer must enter into the OSHA records and explains the OSHA forms that employers must use to record work-related fatalities, injuries, and illnesses. Forms are available at www.osha.gov/pls/publications/pubindex.list

Section 1904.29 Forms

(a) Basic requirement.

You must use OSHA 300, 300-A, and 301 forms, or equivalent forms, for recordable injuries and illnesses. The OSHA 300 form is called the Log of Work-Related Injuries and Illnesses, the 300-A is the Summary of Work-Related Injuries and Illnesses, and the OSHA 301 form is called the Injury and Illness Incident Report.

(b) Implementation.

(1) What do I need to do to complete the OSHA 300 Log?

You must enter information about your business at the top of the OSHA 300 Log, enter a one or two line description for each recordable injury or illness, and summarize this information on the OSHA 300-A at the end of the year.

(2) What do I need to do to complete the OSHA 301 Incident Report?

You must complete an OSHA 301 Incident Report form, or an equivalent form, for each recordable injury or illness entered on the OSHA 300 Log.

(3) How quickly must each injury or illness be recorded?

You must enter each recordable injury or illness on the OSHA 300 Log and 301 Incident Report within seven (7) calendar days of receiving information that a recordable injury or illness has occurred.

(4) What is an equivalent form?

An equivalent form is one that has the same information, is as readable and understandable, and is completed using the same instructions as the OSHA form it replaces. Many employers use an insurance form instead of the OSHA 301 Incident Report, or

supplement an insurance form by adding any additional information required by OSHA.

(5) May I keep my records on a computer?

Yes, if the computer can produce equivalent forms when they are needed, as described under Sections 1904.35 and 1904.40, you may keep your records using the computer system.

(6) Are there situations where I do not put the employee's name on the forms for privacy reasons?

Yes, if you have a "privacy concern case," you may not enter the employee's name on the OSHA 300 Log. Instead, enter "privacy case" in the space normally used for the employee's name. This will protect the privacy of the injured or ill employee when another employee, a former employee, or an authorized employee representative is provided access to the OSHA 300 Log under Section 1904.35(b)(2). You must keep a separate, confidential list of the case numbers and employee names for your privacy concern cases so you can update the cases and provide the information to the government if asked to do so.

(7) How do I determine if an injury or illness is a privacy concern case?

You must consider the following injuries or illnesses to be privacy concern cases:

- (i) An injury or illness to an intimate body part or the reproductive system;
- (ii) An injury or illness resulting from a sexual assault;
- (iii) Mental illnesses;
- (iv) HIV infection, hepatitis, or tuberculosis;
- (v) Needlestick injuries and cuts from sharp objects that are contaminated with another per-

son's blood or other potentially infectious material (see Section 1904.8 for definitions); and

(vi) Other illnesses, if the employee independently and voluntarily requests that his or her name not be entered on the log.

(8) *May I classify any other types of injuries and illnesses as privacy concern cases?*

No, this is a complete list of all injuries and illnesses considered privacy concern cases for Part 1904 purposes.

(9) *If I have removed the employee's name, but still believe that the employee may be identified from the information on the forms, is there anything else that I can do to further protect the employee's privacy?*

Yes, if you have a reasonable basis to believe that information describing the privacy concern case may be personally identifiable even though the employee's name has been omitted, you may use discretion in describing the injury or illness on both the OSHA 300 and 301 forms. You must enter enough information to identify the cause of the incident and the general severity of the injury or illness, but you do not need to include details of an intimate or private nature. For example, a sexual assault case could be described as "injury from assault," or an injury to a reproductive organ could be described as "lower abdominal injury."

(10) *What must I do to protect employee privacy if I wish to provide access to the OSHA Forms 300 and 301 to persons other than government representatives, employees, former employees or authorized representatives?*

If you decide to voluntarily disclose the Forms to persons other than government representatives, employees, former employees or authorized representatives (as required by Sections 1904.35 and 1904.40), you must remove or hide the employees' names and other personally identifying information, except for the following cases. You may disclose the Forms with personally identifying information only:

- (i) to an auditor or consultant hired by the employer to evaluate the safety and health program;
- (ii) to the extent necessary for processing a claim for workers' compensation or other insurance benefits; or
- (iii) to a public health authority or law enforcement agency for uses and disclosures for which consent, an authorization, or opportunity to agree or object is not required under Department of Health and Human Services Standards for Privacy of Individually Identifiable Health Information, 45 CFR 164.512.

PREAMBLE DISCUSSION: Section 1904.29

(66 FR 6022-6032, Jan. 19, 2001)

The following are selected excerpts from the preamble to the Occupational Injury and Illness Recording and Reporting Requirements, the Recordkeeping rule (66 FR 5916, 29 CFR Parts 1904 and 1952). These excerpts represent some of the key discussions related to the final rule (66 FR 6122, 29 CFR Parts 1904 and 1952).

Section 1904.29 Forms.

Section 1904.29, titled "Forms," establishes the requirements for the forms (OSHA 300 Log, OSHA 300A Annual Summary, and OSHA 301 Incident Report) an employer must use to keep OSHA Part 1904 injury and illness records, the time limit for recording an injury or illness case, the use of substitute forms, the use of computer equipment to keep the records, and privacy protections for certain information recorded on the OSHA 300 Log.

Paragraph 1904.29(a) sets out the basic requirements of this section. It directs the employer to use the OSHA 300 (Log), 300A (Summary), and 301 (Incident Report) forms, or equivalent forms, to record all recordable occupational injuries and illnesses. Paragraph 1904.29(b) contains requirements in the form of questions and answers to explain how employers are to implement this basic requirement.

Paragraph 1904.29(b)(1) states the requirements for: (1) Completing the establishment information at the top of the OSHA 300 Log, (2) making a one- or two-line entry for each recordable injury and illness case, and (3) summarizing the data at the end of the year. Paragraph 1904.29(b)(2) sets out the requirements for employers to complete the OSHA 301 Incident Report form (or equivalent) for each recordable case entered on the OSHA 300 Log. The requirements for completing the annual summary on the Form 300A are found at Section 1904.32 of the final rule.

Required Forms

...In addition to establishing the basic requirements for employers to keep records on the OSHA 300 Log and OSHA 301 Incident Report and providing basic instructions on how to complete these forms, this section of the rule states that employers may use

two lines of the OSHA 300 Log to describe an injury or illness, if necessary....

Deadline for Entering a Case

Paragraph 1904.29(b)(3) establishes the requirement for how quickly each recordable injury or illness must be recorded into the records. It states that the employer must enter each case on the OSHA 300 Log and OSHA 301 Form within 7 calendar days of receiving information that a recordable injury or illness has occurred.

...[T]he Agency believes that the 7 calendar-day rule will provide employers sufficient time to receive information and record the case. In addition, a simple “within a week” rule will be easy for employers to remember and apply, and is consistent with OSHA’s decision, in this rule, to move from workdays to calendar days whenever possible. The Agency believes that 7 calendar days is ample time for recording, particularly since the final rule, like the former rule, allows employers to revise an entry simply by lining it out or amending it if further information justifying the revision becomes available. The final rule does contain one exception for the 7 day recording period: if an employee experiences a recordable hearing loss, and the employer elects to retest the employee’s hearing within 30 days, the employer can wait for the results of the retest before recording.

Equivalent Forms and Computerized Records

...[P]aragraphs 1904.29(b)(4) and (b)(5) of the final rule make clear that employers are permitted to record the required information on electronic media or on paper forms that are different from the OSHA 300 Log, provided that the electronic record or paper forms are equivalent to the OSHA 300 Log. A form is deemed to be “equivalent” to the OSHA 300 Log if it can be read and understood as easily as the OSHA form and contains at least as much information as the OSHA 300 Log. In addition, the equivalent form must be completed in accordance with the instructions used to complete the OSHA 300 Log. These provisions are intended to balance OSHA’s obligation, as set forth in Section 8(d) of the OSH Act, to reduce information collection burdens on employers as much as possible, on the one hand, with the need, on the other hand, to maintain uniformity of the data recorded and provide employers flexibility in meeting OSHA’s recordkeeping requirements. These provisions also help to achieve one of OSHA’s goals for this rulemaking: to allow employers to take full advantage of modern technology and computers to meet their OSHA recordkeeping obligations....

...[P]aragraph Section 1904.29(b)(5) of the final rule allows the employer to keep records on computer equipment only if the computer system can produce paper copies of equivalent forms when access to them is needed by a government representative, an employee or former employee, or an employee representative, as required by Section 1904.35 or 1904.40, respectively. Of course, if the employee requesting access to the information agrees to receive it by e-mail, this is acceptable under the 1904 rule....

The final rule does not include a requirement that certain questions on an equivalent form be asked in the same order and be phrased in language identical to that used on the OSHA 301 form. Instead, OSHA has decided that employers may use any substitute form that contains the same information and follows the same recording directions as the OSHA 301 form, and the final rule clearly allows this. Although the consistency of the data on the OSHA 301 form might be improved somewhat if the questions asking for further details were phrased and positioned in an identical way on all employers’ forms, OSHA has concluded that the additional burden such a requirement would impose on employers and workers’ compensation agencies outweighs this consideration.

OSHA has revised the wording of these three questions on the final OSHA 301 form to match the phraseology used by the Bureau of Labor Statistics (BLS) in its Annual Survey of Occupational Injuries and Illnesses. By ensuring consistency across both the BLS and OSHA forms, this change will help those employers who respond both to the BLS Annual Survey and keep OSHA records.

Handling of Privacy Concern Cases

Paragraph 1904.29(b)(6) requires the employer to withhold the injured or ill employee’s name from the OSHA 300 Log for injuries and illnesses defined by the rule as “privacy concern cases” and instead to enter “privacy concern case” in the space where the employee’s name would normally be entered if an injury or illness meeting the definition of a privacy concern case occurs. This approach will allow the employer to provide OSHA 300 Log data to employees, former employees and employee representatives, as required by Section 1904.35, while at the same time protecting the privacy of workers who have experienced occupational injuries and illnesses that raise privacy concerns. The employer must also keep a separate, confidential list of these privacy concern cases, and the list must include the employee’s

name and the case number from the OSHA 300 Log. This separate listing is needed to allow a government representative to obtain the employee's name during a workplace inspection in case further investigation is warranted and to assist employers to keep track of such cases in the event that future revisions to the entry become necessary.

Paragraph 1904.29(b)(7) defines "privacy concern cases" as those involving: (i) An injury or illness to an intimate body part or the reproductive system; (ii) an injury or illness resulting from a sexual assault; (iii) a mental illness; (iv) a work-related HIV infection, hepatitis case, or tuberculosis case; (v) needlestick injuries and cuts from sharp objects that are contaminated with another person's blood or other potentially infectious material, or (vi) any other illness, if the employee independently and voluntarily requests that his or her name not be entered on the log. Paragraph 1904.29(b)(8) establishes that these are the only types of occupational injuries and illnesses that the employer may consider privacy concern cases for recordkeeping purposes.

Paragraph 1904.29(b)(9) permits employers discretion in recording case information if the employer believes that doing so could compromise the privacy of the employee's identity, even though the employee's name has not been entered. This clause has been added because OSHA recognizes that, for specific situations, coworkers who are allowed to access the log may be able to deduce the identity of the injured or ill worker and obtain inappropriate knowledge of a privacy-sensitive injury or illness. OSHA believes that these situations are relatively infrequent, but still exist. For example, if knowing the department in which the employee works would inadvertently divulge the person's identity, or recording the gender of the injured employee would identify that person because, for example, only one woman works at the plant, the employer has discretion to mask or withhold this information both on the Log and Incident Report.

The rule requires the employer to enter enough information to identify the cause of the incident and the general severity of the injury or illness, but allows the employer to exclude details of an intimate or private nature. The rule includes two examples; a sexual assault case could be described simply as "injury from assault," or an injury to a reproductive organ could be described as "lower abdominal injury." Likewise, a work-related diagnosis of post traumatic stress disorder could be described as "emotional difficulty." Reproductive disorders, certain cancers, contagious diseases and other disorders that are inti-

mate and private in nature may also be described in a general way to avoid privacy concerns. This allows the employer to avoid overly graphic descriptions that may be offensive, without sacrificing the descriptive value of the recorded information.

Paragraph 1904.29(b)(10) protects employee privacy if the employer decides voluntarily to disclose the OSHA 300 and 301 forms to persons other than those who have a mandatory right of access under the final rule. The paragraph requires the employer to remove or hide employees' names or other personally identifying information before disclosing the forms to persons other than government representatives, employees, former employees or authorized representatives, as required by paragraphs 1904.40 and 1904.35, except in three cases. The employer may disclose the forms, complete with personally identifying information, [] only: (i) to an auditor or consultant hired by the employer to evaluate the safety and health program; (ii) to the extent necessary for processing a claim for workers' compensation or other insurance benefits; or (iii) to a public health authority or law enforcement agency for uses and disclosures for which consent, an authorization, or opportunity to agree or object is not required under section 164.512 of the final rule on Standards for Privacy of Individually Identifiable Health Information, 45 CFR 164.512.

These requirements have been included in Section 1904.29 rather than in Section 1904.35, which establishes requirements for records access, because waiting until access is requested to remove identifying information from the OSHA 300 Log could unwittingly compromise the injured or ill worker's privacy and result in unnecessary delays. The final rule's overall approach to handling privacy issues is discussed more fully in the preamble discussion of the employee access provisions in Section 1904.35.

The Treatment of Occupational Illness and Injury Data on the Forms

The treatment of occupational injury and illness data on the OSHA forms is a key issue in this rulemaking. Although the forms themselves are not printed in the Code of Federal Regulations (CFR), they are the method OSHA's recordkeeping regulation uses to meet the Agency's goal of tracking and reporting occupational injury and illness data. As such, the forms are a central component of the recordkeeping system and mirror the requirements of the Part 1904 regulation. The final Part 1904 rule requires employers to use three forms to track occupational injuries and illnesses: the OSHA 300, 300A, and 301 forms, which replace the OSHA 200 and 101 forms called for

under the former recordkeeping rule, as follows:

1. *The OSHA Form 300, Log of Work-Related Injuries and Illnesses*, replaces the Log portion of the former OSHA Form 200 Log and Summary of Occupational Injuries and Illnesses. The OSHA 300 Log contains space for a description of the establishment name, city and state, followed by a one-line space for the entry for each recordable injury and illness.

2. *The OSHA Form 300A, Summary of Work-Related Injuries and Illnesses*, replaces the Summary portion of the former OSHA Form 200 Log and Summary of Occupational Injuries and Illnesses. The Form 300A is used to summarize the entries from the Form 300 Log at the end of the year and is then posted from February 1 through April 30 of the following year so that employees can be aware of the occupational injury and illness experience of the establishment in which they work. The form contains space for entries for each of the columns from the Form 300, along with information about the establishment, and the average number of employees who worked there the previous year, and the recordkeeper's and corporate officer's certification of the accuracy of the data recorded on the summary. (These requirements are addressed further in Section 1904.32 of the final rule and its associated preamble.)

3. *The OSHA Form 301, Injury and Illness Report*, replaces the former OSHA 101 Form. Covered employers are required to fill out a one-page form for each injury and illness recorded on the Form 300. The form contains space for more detailed information about the injured or ill employee, the physician or other health care professional who cared for the employee (if medical treatment was necessary), the treatment (if any) of the employee at an emergency room or hospital, and descriptive information telling what the employee was doing when injured or ill, how the incident occurred, the specific details of the injury or illness, and the object or substance that harmed the employee. (Most employers use a workers' compensation form as a replacement for the OSHA 301 Incident Report.)

The use of a three-form system for recordkeeping is not a new concept. The OSHA recordkeeping system used a separate summary form from 1972 to 1977, when the Log and Summary forms were combined into the former OSHA Form 200 (42 FR 65165). OSHA has decided that the three-form system (the 300 Log, the 300A summary, and the 301 Incident

Report) has several advantages. First, it provides space for more cases to be entered on the Log but keeps the Log to a manageable size. Second, it helps to ensure that an injured or ill employee's name is not posted in a public place. When the forms were combined in 1977 into a single form, employers occasionally neglected to shield an employee's name on the final sheet of the 200 Log, even though the annual summary form was designed to mask personal identifiers. The use of a separate 300A summary form precludes this possibility. Third, the use of a separate summary form (the final rule's Form 300A) allows the data to be posted in a user-friendly format that will be easy for employees and employers to use. Fourth, a separate 300A Form provides extra space for information about an employee's right to access the Log, information about the establishment and its employees, and the dual certifications required by Section 1904.32 of the rule. Finally, a separate 300A Form makes it easier to attach to the reverse side of the form worksheets that are designed to help the employer calculate the average number of employees and hours worked by all employees during the year.

The forms have been incorporated into an information package that provides individual employers with several copies of the OSHA 300, 300A, and 301 forms; general instructions for filling out the forms and definitions of key terms; an example showing how to fill out the 300 Log; a worksheet to assist employers in computing the average number of employees and the total number of hours worked by employees at the establishment in the previous year; a non-mandatory worksheet to help the employer compute an occupational injury and illness rate; and instructions telling an employer how to get additional help by (1) accessing the OSHA Internet home page, or (2) by calling the appropriate Federal OSHA regional office or the OSHA approved State-Plan with jurisdiction.

The Size of the OSHA Recordkeeping Forms

The OSHA recordkeeping forms required by the final Part 1904 recordkeeping rule are printed on legal size paper (8½" x 14")....

Accordingly, OSHA has redesigned the OSHA 300 Log to fit on a legal size (8½ x 14 inches) piece of paper and to clarify that employers may use two lines to enter a case if the information does not fit easily on one line. The OSHA forms 300A and 301, and the remainder of the recordkeeping package, have also been designed to fit on the same-size paper as the OSHA 300 Log. For those employers

who use computerized systems (where handwriting space is not as important) equivalent computer-generated forms can be printed out on 8½ x 11 sheets of paper if the printed copies are legible and are as readable as the OSHA forms....

Defining Lost Workdays

OSHA proposed to eliminate the term “lost workdays,” by replacing it with “days away from work” (61 FR 4033). The OSHA recordkeeping system has historically defined lost workdays as including both days away from work and days of restricted work activity, and the *Recordkeeping Guidelines* discussed how to properly record lost workday cases with days away from work and lost workday cases with days of restricted work activity (Ex. 2, p. 47, 48). However, many use the term “lost workday” in a manner that is synonymous with “day away from work,” and the term has been used inconsistently for many years....

In the final rule, OSHA has eliminated the term “lost workdays” on the forms and in the regulatory text. The use of the term has been confusing for many years because many people equated the terms “lost workday” with “days away from work” and failed to recognize that the former OSHA term included restricted days. OSHA finds that deleting this term from the final rule and the forms will improve clarity and the consistency of the data.

The 300 Log has four check boxes to be used to classify the case: death, day(s) away from work, day(s) of restricted work or job transfer; and case meeting other recording criteria. The employer must check the single box that reflects the most severe outcome associated with a given injury or illness. Thus, for an injury or illness where the injured worker first stayed home to recuperate and then was assigned to restricted work for several days, the employer is required only to check the box for days away from work (column I). For a case with only job transfer or restriction, the employer must check the box for days of restricted work or job transfer (Column H). However, the final Log still allows employers to calculate the incidence rate formerly referred to as a “lost workday injury and illness rate” despite the fact that it separates the data formerly captured under this heading into two separate categories. Because the OSHA Form 300 has separate check boxes for days away from work cases and cases where the employee remained at work but was temporarily transferred to another job or assigned to restricted duty, it is easy to add the totals from these two columns together to obtain a single total to use in calculating an injury and illness incidence rate for

total days away from work and restricted work cases.

Counting Days of Restricted Work or Job Transfer

Although the final rule does not use the term “lost workday” (which formerly applied both to days away from work and days of restricted or transferred work), the rule continues OSHA’s longstanding practice of requiring employers to keep track of the number of days on which an employee is placed on restricted work or is on job transfer because of an injury or illness....

In the final rule, OSHA has decided to require employers to record the number of days of restriction or transfer on the OSHA 300 Log. From the comments received, and based on OSHA’s own experience, the Agency finds that counts of restricted days are a useful and needed measure of injury and illness severity. OSHA’s decision to require the recording of restricted and transferred work cases on the Log was also influenced by the trend toward restricted work and away from days away from work....

The final rule thus carries forward OSHA’s longstanding requirement for employers to count and record the number of restricted days on the OSHA Log. On the Log, restricted work counts are separated from days away from work counts, and the term “lost workday” is no longer used. OSHA believes that the burden on employers of counting these days will be reduced somewhat by the simplified definition of restricted work, the counting of calendar days rather than work days, capping of the counts at 180 days, and allowing the employer to stop counting restricted days when the employee’s job has been permanently modified to eliminate the routine job functions being restricted (see the Preamble Discussion for 1904.7 General Recording Criteria).

Separate 300 Log Data on Occupational Injury and Occupational Illness

The Agency finds that there is a continuing need for separately identifiable information on occupational illnesses and injuries, as well as on certain specific categories of occupational illnesses. The published BLS statistics have included separate estimates of the rate and number of occupational injuries and illnesses for many years, as well as the rate and number of different types of occupational illnesses, and employers, employees, the government, and the public have found this information useful and worthwhile. Separate illness and injury data are particularly useful at the establishment level, where employers and employees can use them to evaluate the establishment’s health experience and compare it to the

national experience or to the experience of other employers in their industry or their own prior experience. The data are also useful to OSHA personnel performing worksite inspections, who can use this information to identify potential health hazards at the establishment.

Under the final rule, the OSHA 300 form has therefore been modified specifically to collect information on [four] types of occupational health conditions:...skin diseases or disorders, respiratory conditions, poisoning, and hearing loss. There is also an “all other illness” column on the Log. To record cases falling into one of these categories, the employer simply enters a check mark in the appropriate column, which will allow these cases to be separately counted to generate establishment-level summary information at the end of the year....

In the final rule, two of the illness case columns on the OSHA 300 Log are identical to those on the former OSHA Log: a column to capture cases of skin diseases or disorders and one to capture cases of systemic poisoning. The single column for respiratory conditions on the new OSHA Form 300 will capture data on respiratory conditions that were formerly captured in two separate columns, *i.e.*, the columns for respiratory conditions due to toxic agents (formerly column 7c) and for dust diseases of the lungs (formerly column 7b). Column 7g of the former OSHA Log provided space for data on all other occupational illnesses, and that column has also been continued on the new OSHA 300 Log. On the other hand, column 7e from the former OSHA Log, which captured cases of disorders due to physical agents, is not included on the new OSHA Log form. The cases recorded in former column 7e primarily addressed heat and cold disorders, such as heat stroke and hypothermia; hyperbaric effects, such as caisson disease; and the effects of radiation, including occupational illnesses caused by x-ray exposure, sun exposure and welder’s flash. Because space on the form is at a premium, and because column 7e was not used extensively in the past (recorded column 7e cases accounted only for approximately five percent of all occupational illness cases), OSHA has not continued this column on the new OSHA 300 Log.

OSHA has, however, added a new column specifically to capture hearing loss cases on the OSHA 300 Log. The former Log included a column devoted to repeated trauma cases, which were defined as including noise-induced hearing loss cases as well as cases involving a variety of other conditions, including certain musculoskeletal disorders. Dedicating a column to occupational hearing loss cases will pro-

vide a valuable new source of information on this prevalent and often disabling condition. Although precise estimates of the number of noise-exposed workers vary widely by industry and the definition of noise dose used, the EPA estimated in 1981 that about 9 million workers in the manufacturing sector alone were occupationally exposed to noise levels above 85 dBA. Recent risk estimates suggest that exposure to this level of noise over a working lifetime would cause material hearing impairment in about 9 percent, or approximately 720,000, U.S. workers (NIOSH, 1998). A separate column for occupational hearing loss is also appropriate because the BLS occupational injury and illness statistics only report detailed injury characteristics information for those illness cases that result in days away from work. Because most hearing loss cases do not result in time off the job, the extent of occupational hearing loss has not previously been accurately reflected in the national statistics. By creating a separate column for occupational hearing loss cases, and clearly articulating in section 1904.10 of the final rule the level of hearing loss that must be recorded, OSHA believes that the recordkeeping system will, in the future, provide accurate estimates of the incidence of work-related loss of hearing among America’s workers....

Miscellaneous 300 Form Issues

...OSHA has not added the fields or columns suggested by commenters to the final 300 or 301 forms because the available space on the form has been allocated to other data that OSHA considers more valuable. In addition, there is no requirement in the final rule for employers to enter any part of an employee’s social security number because of the special privacy concerns that would be associated with that entry and employee access to the forms. However, employers are, of course, free to collect additional data on occupational injury and illness beyond the data required by the Agency’s Part 1904 regulation.

The OSHA 301 Form

Although the final OSHA 300 Log presents information on injuries and illnesses in a condensed format, the final OSHA 301 Incident Record allows space for employers to provide more detailed information about the affected worker, the injury or illness, the workplace factors associated with the accident, and a brief description of how the injury or illness occurred. Many employers use an equivalent workers’ compensation form or internal reporting form for the purpose of recording more detailed information on each

case, and this practice is allowed under paragraph 1904.29(b)(4) of the final rule.

The OSHA Form 301 differs in several ways from the former OSHA 101 form it replaces, although much of the information is the same as the information on the former 101 Form, although it has been reworded and reformatted for clarity and simplicity. The final Form 301 does not require the following data items that were included on the former OSHA 101 to be recorded:

- The employer name and address;
- Employee social security number;
- Employee occupation;
- Department where employee normally works;
- Place of accident;
- Whether the accident occurred on the employer's premises; and
- Name and address of hospital.

OSHA's reasons for deleting these data items from the final 301 form is that most are included on the OSHA Form 300 and are therefore not necessary on the 301 form. Eliminating duplicate information between the two forms decreases the redundancy of the data collected and the burden on employers of recording the data twice. The employee social security number has been removed for privacy reasons. OSHA believes that the information found in several other data fields on the 301 Form (*e.g.*, the employee's name, address, and date of birth) provides sufficient information to identify injured or ill individuals while protecting the confidentiality of social security numbers.

OSHA has also added several items to the OSHA Form 301 that were not on the former OSHA No. 101:

- The date the employee was hired;
- The time the employee began work;
- The time the event occurred;
- Whether the employee was treated at an emergency room; and
- Whether the employee was hospitalized overnight as an in-patient (the form now requires a check box entry rather than the name and address of the hospital)....

Rewording of the Proposed Case Detail Questions (questions 9, 10, 16, 17 and 18)

...As discussed above, final Form 301 no longer requires the employer to include these questions on any equivalent form in the same format or language as that used by the OSHA 301 form....

The final form solicits information only on the object or substance that directly harmed the employee. The final 301 form contains four questions eliciting

case detail information (*i.e.*, what was the employee doing just before the incident occurred?, what happened?, what was the injury or illness?, and what object or substance directly harmed the employee?). The language of these questions on the final 301 form has been modified slightly from that used in the proposed questions to be consistent with the language used on the BLS Survey of Occupational Injuries and Illnesses collection form. The BLS performed extensive testing of the language used in these questions while developing its survey form and has subsequently used these questions to collect data for many years. The BLS has found that the order in which these questions are presented and the wording of the questions on the survey form elicit the most complete answers to the relevant questions. OSHA believes that using the time-tested language and ordering of these four questions will have the same benefits for employers using the OSHA Form 301 as they have had for employers responding to the BLS Annual Survey. Matching the BLS wording and order will also result in benefits for those employers selected to participate in the BLS Annual Survey. To complete the BLS survey forms, employers will only need to copy information from the OSHA Injury and Illness Incident Report to the BLS survey form. This should be easier and less confusing than researching and rewording responses to the questions on two separate forms.

The Data Fields OSHA Proposed to Change on the Proposed 301 Form

...OSHA continues to believe that the data gathered by means of the "date hired" field will have value for analyzing occupational injury and illness data and has therefore included this data field on the final OSHA 301 form. These data are useful for analyzing the incidence of occupational injury and illness among newly hired workers and those with longer tenure. OSHA is aware that the data collected are not a perfect measure of job experience because, for example, an employee may have years of experience doing the same type of work for a previous employer, and that prior experience will not be captured by this data field. Another case where this data field may fail to capture perfect data could occur in the case of an employee who has worked for the same employer for many years but was only recently reassigned to new duties. Despite cases such as these, inclusion of this data field on the Form 301 will allow the Agency to collect valid data on length of time on the job for most employment situations.

For the relatively infrequent situation where

employees are hired, terminated, and then rehired, the employer can, at his or her discretion, enter the date the employee was originally hired, or the date of rehire....

OSHA has decided to continue to collect information on final Form 301 concerning the treatment provided to the employee (proposed data field 7). OSHA's experience indicates that employers have not generally had difficulty in providing this information, either in the longshoring or any other industry. The data in this field is particularly useful to an OSHA inspector needing additional information about the medical condition of injured or ill employees. (OSHA does not request this medical information without first obtaining a medical access order under the provisions of 29 CFR part 1913, Rules Concerning OSHA Access to Employee Medical Records.) The final OSHA 301 Form therefore includes a data field for information on the off-site treating facility.

The final 301 Form also includes a data field requesting the name of the health care professional seen by the injured or ill employee. The employer may enter the name either of the physician or other health care professional who provided the initial treatment or the off-site treatment. If OSHA needs additional data on this point, the records of the healthcare professional listed will include both the name of the referring physician or other health care professional as well as the name of the health care professional to whom the employee was referred for specialized treatment....

OSHA has included on the final 301 form the two questions asking for data on the time of the event and the time the employee began work so that employers, employees and the government can obtain information on the role fatigue plays in occupational injuries and illness. Both questions (*i.e.*, on time of event and time employee began work) must be included to conduct this analysis. Thus, OSHA has included both fields on the final Form 301. In addi-

tion, the form has been designed so that the employer can simply circle the a.m. or p.m. designation....

The final OSHA Form 301 permits the employer to include the name and title in either field, as long as the information is available. As to the phone number, the employer may use whatever number is appropriate that would allow a government representative accessing the data to contact the individual who prepared the form....

OSHA continues to believe that easy linkage of the Forms 300 and 301 will be beneficial to all users of these data. Thus, the final Form 301 contains a space for the case file number. The file/case number is required on both forms to allow persons reviewing the forms to match an individual OSHA Form 301 with a specific entry on the OSHA Form 300. Access by authorized employee representatives to the information contained on the OSHA Form 301 is limited to the information on the right side of the form (see Section 1904.35(b)(2)(v)(B) of the final rule). The case/file number is the data element that makes a link to the OSHA Form 300 possible. OSHA believes that this requirement will add very little burden to the recordkeeping process, because the OSHA Log has always required a unique file or case number. The final Form 301 requirement simply requires the employer to place the same number on the OSHA 301 form....

Summary

The final forms employers will use to keep the records of those occupational injuries and illnesses required by the final rule to be recorded have been revised to reflect the changes made to the final rule, the record evidence gathered in the course of this rulemaking, and a number of changes designed to simplify recordkeeping for employers. In addition, the forms have been revised to facilitate the use of equivalent forms and employers' ability to computerize their records.

FREQUENTLY ASKED QUESTIONS: Section 1904.29 (OSHA Instruction, CPL 2-0.135, Chap. 5)

Section 1904.29 Forms

Question 29-1. *How do I determine whether or not a case is an occupational injury or one of the occupational illness categories in Section M of the OSHA 300 Log?*

The instructions that accompany the OSHA 300 Log contain examples of occupational injuries and the various types of occupational illnesses listed on the Log. If the case you are dealing with is on one of those lists, then check that injury or illness category. If the case you are dealing with is not listed, then you may check the injury or illness category that you believe best fits the circumstances of the case.

Question 29-2. *Does the employer decide if an injury or illness is a privacy concern case?*

Yes. The employer must decide if a case is a privacy concern case, using 1904.29(b)(7), which lists the six types of injuries and illnesses the employer must consider privacy concern cases. If the case meets any of these criteria, the employer must consider it a privacy concern case. This is a complete list of all injuries and illnesses considered privacy concern cases.

Question 29-3. *Under paragraph 1904.29(b)(9), the employer may use some discretion in describing a privacy concern case on the log so the employee cannot be identified. Can the employer also leave off the job title, date, or where the event occurred?*

Yes. OSHA believes that this would be an unusual circumstance and that leaving this information off the log will rarely be needed. However, if the employer has reason to believe that the employee's name can be identified through this information, these fields can be left blank.

Question 29-4. *May employers attach missing information to their accident investigation or workers' compensation forms to make them an acceptable*

substitute form for the OSHA 301 for recordkeeping purposes?

Yes, the employer may use a workers' compensation form or other form that does not contain all the required information, provided the form is supplemented to contain the missing information and the supplemented form is as readable and understandable as the OSHA 301 form and is completed using the same instructions as the OSHA 301 form.

Question 29-5. *If an employee reports an injury or illness and receives medical treatment this year, but states that the symptoms first arose at some unspecified date last year, on which year's log do I record the case?*

Ordinarily, the case should be recorded on the Log for the year in which the injury or illness occurred. Where the date of injury or illness cannot be determined, the date the employee reported the symptoms or received treatment must be used. In the case in question, the injury or illness would be recorded on this year's Log because the employee cannot specify the date when the symptoms occurred.

Question 29-6. *Since the new system proposes to do away with the distinction between injuries and illnesses, is there guidance on how to classify cases to complete column M on the OSHA 300 Log?*

An injury or illness is an abnormal condition or disorder. Employers should look at the examples of injuries and illnesses in the "Classifying Injuries and Classifying Illnesses" section of the Recordkeeping Forms Package for guidance. If still unsure about the classification, employers could use the longstanding distinction between injuries that result from instantaneous events or those from exposures in the work environment. Cases resulting from anything other than an instantaneous event or exposure are considered illnesses.

LETTERS OF INTERPRETATION: Section 1904.29

Section 1904.29 Forms

OSHA requirements are set by statute, standards and regulations. Letters of interpretation explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. These letters constitute OSHA's interpretation of the requirements discussed. Note that OSHA enforcement guidance may be affected by changes to OSHA rules. Also, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA's website at <http://www.osha.gov>.

Letters of Interpretation constitute OSHA's interpretation only of the requirements discussed and may not be applicable to any situation not delineated within the original correspondence.

Letter of interpretation related to sections 1904.26(b)(6), 1904.29(b)(10), 1904.32(a)(4) and 1904.32(b)(6) – **Posting requirements for the OSHA 300 Log and OSHA 300-A Summary Form.**

December 18, 2003

Ms. Alana Greer
American Civil Liberties Union of Florida
4500 Biscayne Boulevard, Suite 340
Miami, FL 33137-3227

Dear Ms. Greer:

This is in response to your letter dated July 9, 2003. Please excuse the delay in our response. Thank you for your comments pertaining to the Occupational Safety and Health Administration's (OSHA) Injury and Illness Recording and Reporting requirements contained in 29 CFR Part 1904. You state that your office has received several complaints regarding the medical privacy of employees regarding the recordkeeping requirements. Specifically, you ask OSHA to clarify the appropriateness of posting the entire OSHA 300 form (the Log of Work-Related Injuries and Illnesses) at the employer's establishment.

You are correct in your understanding that, while employers are required to complete both OSHA Form 300 Log of Work-Related Injuries and Illnesses and OSHA Form 300-A Summary of Work-Related Injuries and Illnesses, only the latter, Form 300-A, is required to be posted in the workplace.

Despite the fact that only the Summary Form 300-A is required to be posted, some employers apparently have posted both the Form 300 and Form 300-A in the workplace. You suggest that further clarification is needed with the recordkeeping forms or elsewhere, making clear to employers that the Form 300 should not be posted along with the Summary Form 300-A.

The instructions that accompany the OSHA recordkeeping forms do include the following Question and Answer: "When must you post the Summary? You must post the Summary only--not the Log--by February 1 of the year following the year covered by the form and keep it posted until April 30 of that year."

We will take additional steps to emphasize the distinction between the Form 300 and the Form 300-A and the fact that only the latter is required to be posted in the workplace, through News Releases that we issue that remind employers of the posting requirement, and including this issue under the Frequently Asked Questions on the Recordkeeping Section of our website. Your assistance in also making employers aware of this distinction is appreciated.

I do want to make one further point of clarification. While our rules do not require the Form 300 to be posted (and we will attempt to communicate that more clearly, as described above), the regulation also does not prohibit an employer from posting the Form 300 along with the Form 300-A. However, if the employer does choose to post the full Form 300 Log, they should post the Log in an area only accessible by those granted access under the rule (*i.e.*, employees, former employees, employee representatives, and an authorized employee representative). If the posting area is accessible by others (*e.g.*, members of the public) the employer must remove or hide all names of the injured or ill employees as set out in

Section 1904.29(b)(10). In addition, 1910.29 prohibits the employer from including the employee's name for "privacy concern" cases whenever the Form 300 Log is made available to coworkers, former employees, or employee representatives.

Thank you for your interest in occupational safety and health. We hope you find this information helpful. OSHA requirements are set by statute, standards, and regulations. Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. This letter constitutes OSHA's interpretation of the requirements discussed. Note that our enforcement guidance may be affected by changes to OSHA rules. Also, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA's website at <http://www.osha.gov>. If you have any further questions, please contact the Division of Recordkeeping Requirements, at 202-693-1702.

Sincerely,

John L. Henshaw
Assistant Secretary

Letter of interpretation related to sections 1904.29, 1904.29(a), 1904.29(b), 1904.29(b)(2), 1904.31, 1904.33, 1904.35, 1904.40 and 1904.46 –

Recording criteria for cases involving workers from a temporary help service, employee leasing service, or personnel supply service.

June 23, 2003

Mr. Edwin G. Foulke, Jr.
Jackson Lewis LLP
2100 Landmark Building
301 North Main Street
Greenville, SC 29601-2122

Dear Mr. Foulke:

Thank you for your April 3, 2003 facsimile and April 10, 2003 letter to the Occupational Safety and Health Administration (OSHA) regarding the Injury and Illness Recording and Reporting Requirements contained in 29 CFR Part 1904. Specifically, you ask OSHA to clarify the recording criteria for cases involving workers from a temporary help service, employee leasing service, or personnel supply service. Your questions have been outlined below followed by OSHA's response.

Question 1: Under 29 CFR Section 1904.31, employers who supervise temporary or leased employees at their facility are required to maintain the OSHA 300 Logs for those employees. With respect to those injuries, can the employer keep a separate 300 Log for the company employees and one log for the temporary or leased employees?

Response: The log is to be kept for an establishment. Under Section 1904.46 Definitions, an establishment is a single physical location where business is conducted or where services or industrial operations are performed. The controlling employer (using firm) may sub-divide the OSHA 300 Log to provide separate listings of temporary workers, but must consider the separate listings to be one record for all recordkeeping purposes, including access by government representatives, employees, former employees and employee representatives as required by Section 1904.35 and 1904.40 in the Recordkeeping regulation.

OSHA's view is that a given establishment should have one OSHA Log. Injuries and illnesses for all the covered employees at the establishment are then entered into that record to create a single OSHA 300-A Summary form at the end of the year.

Question 2: Under 29 CFR Section 1904.31, while the standard clearly indicates the 300 Logs must be maintained for supervised temporary or leased employees, it does not indicate who maintains the 301 documents or the first report of injuries, as well as the medical records on those employees. Also, if a temporary or leased employee has days away from work, it is normally the temporary or leased employee provider's contractual responsibility to handle the medical treatment of the employee. The temporary or leased employee provider is the only person/entity to have the information on days away from work. Who is responsible for maintaining the 301 logs or the first report of injury forms as well as the medical records for these employees, assuming that the employee provider can produce the required documents to the employer for production in the time periods set forth in the standard?

Response: Section 1904.29(a) says: "You must use OSHA 300, 300-A and 301 forms, or equivalent forms, for recordable injuries and illnesses." In addition, 1904.29(b)(2) says: "You must complete an OSHA 301 Incident Report form, or an equivalent form, for each recordable injury or illness entered on the OSHA 300 Log." Therefore, when the workers from a temporary help service or leasing firm are under the day-to-day supervision of the controlling party (using firm) the entire OSHA injury and illness recordkeeping responsibility belongs to the using firm.

Question 3: Using the facts in Question 2, it is also important to note that an injured temporary or leased employee, who requires days away from work, may be replaced by another leased or temporary employee at the work site. From time of the injury, the employer has no information about the return to work status of the injured employee. In fact, the injured employee may be assigned to another employer once he or she is able to return to work. How can the original employer keep accurate 300 Logs when the employee provider has sole access to information on days away from work and return to work status?

Response: The controlling employer has the ultimate responsibility for making good-faith recordkeeping determinations regarding an injury and illness to any of those temporary employees they supervise on a day-to-day basis. Although controlling employers ultimately decide if and how a particular case should be recorded, their decision must not be an arbitrary one, but should be made in accordance with the requirements of the Act, regulation, and the instructions on the forms. Therefore, the controlling employer must make reasonable efforts to acquire the necessary information in order to satisfy its Part 1904 recordkeeping requirements. However, if the controlling employer is not able to obtain information from the employer of the leased or temporary employee, the controlling employer should record the injury based on whatever information is available to the controlling employer. The preamble contains a brief reference about OSHA's expectation that the employers share information to produce accurate records, stating that "the two employers have shared responsibilities and may share information when there is a need to do so." (Federal Register p. 6041)

Finally, the last question you raised is whether your client or contractor has any requirements under the recordkeeping standard to provide the new contractor the current OSHA 300 Logs for that facility covering those employees who now work for that contractor. Since there was no change of your client's business ownership, he or she needs only to retain the records as per 1904.33 and provide access under 1904.35 and 1904.40.

Thank you for your interest in occupational safety and health. We hope you find this information helpful. OSHA requirements are set by statute, standards, and regulations. Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. This letter constitutes OSHA's interpretation of the requirements discussed. Note that our enforcement guidance may be affected by changes to OSHA rules. Also, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA's website at <http://www.osha.gov>. If you have any further questions, please contact the Division of Recordkeeping Requirements, at 202-693-1702.

Sincerely,

John L. Henshaw
Assistant Secretary

Section 1904.30 Multiple business establishments

(66 FR 6130, Jan. 19, 2001)

REGULATION: Section 1904.30

Subpart D – Other OSHA injury and illness recordkeeping requirements

(66 FR 6123, Jan. 19, 2001)

Section 1904.30 Multiple business establishments

(a) Basic requirement.

You must keep a separate OSHA 300 Log for each establishment that is expected to be in operation for one year or longer.

(b) Implementation.

(1) *Do I need to keep OSHA injury and illness records for short-term establishments (i.e., establishments that will exist for less than a year)?*

Yes, however, you do not have to keep a separate OSHA 300 Log for each such establishment. You may keep one OSHA 300 Log that covers all of your short-term establishments. You may also include the short-term establishments' recordable injuries and illnesses on an OSHA 300 Log that covers short-term establishments for individual company divisions or geographic regions.

(2) *May I keep the records for all of my establishments at my headquarters location or at some other central location?*

Yes, you may keep the records for an establishment at your headquarters or other central location if you can:

- (i) Transmit information about the injuries and illnesses from the establishment to the central location within seven (7) calendar days of receiving information that a recordable injury or illness has occurred; and
- (ii) Produce and send the records from the central

location to the establishment within the time frames required by Section 1904.35 and Section 1904.40 when you are required to provide records to a government representative, employees, former employees or employee representatives.

(3) *Some of my employees work at several different locations or do not work at any of my establishments at all. How do I record cases for these employees?*

You must link each of your employees with one of your establishments, for recordkeeping purposes. You must record the injury and illness on the OSHA 300 Log of the injured or ill employee's establishment, or on an OSHA 300 Log that covers that employee's short-term establishment.

(4) *How do I record an injury or illness when an employee of one of my establishments is injured or becomes ill while visiting or working at another of my establishments, or while working away from any of my establishments?*

If the injury or illness occurs at one of your establishments, you must record the injury or illness on the OSHA 300 Log of the establishment at which the injury or illness occurred. If the employee is injured or becomes ill and is not at one of your establishments, you must record the case on the OSHA 300 Log at the establishment at which the employee normally works.

PREAMBLE DISCUSSION: Section 1904.30

(66 FR 6035-6037, Jan. 19, 2001)

The following are selected excerpts from the preamble to the Occupational Injury and Illness Recording and Reporting Requirements, the Recordkeeping rule (66 FR 5916, 29 CFR Parts 1904 and 1952). These excerpts represent some of the key discussions related to the final rule (66 FR 6122, 29 CFR Parts 1904 and 1952).

Section 1904.30 Multiple establishments.

Section 1904.30 covers the procedures for recording injuries and illnesses occurring in separate establishments operated by the same business. ...[T]his section applies to businesses where separate work sites

create confusion as to where injury and illness records should be kept and when separate records must be kept for separate work locations, or establishments. OSHA recognizes that the recordkeeping system must accommodate operations of this type,

and has adopted language in the final rule to provide some flexibility for employers in the construction, transportation, communications, electric and gas utility, and sanitary services industries, as well as other employers with geographically dispersed operations. The final rule provides, in part, that operations are not considered separate establishments unless they continue to be in operation for a year or more....

In the final rule, the definition of establishment is included in Subpart G, Definitions.

The basic requirement of Section 1904.30(a) is that employers are required to keep separate OSHA 300 Logs for each establishment that is expected to be in business for one year or longer. Paragraph 1904.30(b)(1) states that for short-term establishments, *i.e.*, those that will exist for less than a year, employers are required to keep injury and illness records, but are not required to keep separate OSHA 300 Logs. They may keep one OSHA 300 Log covering all short-term establishments, or may include the short-term establishment records in logs that cover individual company divisions or geographic regions. For example, a construction company with multi-state operations might have separate OSHA 300 Logs for each state to show the injuries and illnesses of its employees engaged in short-term projects, as well as a separate OSHA 300 Log for each construction project expected to last for more than one year. If the same company had only one office location and none of its projects lasted for more than one year, the company would only be required to have one OSHA 300 Log.

Paragraph 1904.30(b)(2) allows the employer to keep records for separate establishments at the business' headquarters or another central location, provided that information can be transmitted from the establishment to headquarters or the central location within 7 days of the occurrence of the injury or illness, and provided that the employer is able to produce and send the OSHA records to each establishment when Section 1904.35 or Section 1904.40 requires such transmission....

Paragraph 1904.30(b)(3) states that each employee must be linked, for recordkeeping purposes, with one of the employer's establishments. Any injuries or illnesses sustained by the employee must be recorded on his or her home establishment's OSHA 300 Log, or on a general OSHA 300 Log for short-term establishments. This provision ensures that all employees are included in a company's records. If the establishment is in an industry classification partially exempted under Section 1904.2 of the final rule, records are not required. Under paragraph 1904.30(b)(4), if an

employee is injured or made ill while visiting or working at another of the employer's establishments, then the injury or illness must be recorded on the 300 Log of the establishment at which the injury or illness occurred.

How Long Must an Establishment Exist to Have a Separate OSHA Log

...[T]he final rule provides that an establishment must be one that is expected to exist for a year or longer before a separate OSHA log is required. Employers are permitted to keep separate OSHA logs for shorter term establishments if they wish to do so, but the rule does not require them to do so....

...Sections 1904.30(b)(1) and (b)(3) have been added to make it clear that records (but not a *separate* log) must be kept for short-term establishments lasting less than one year, and that each employee must be linked to an establishment....

Centralized Recordkeeping

...OSHA does not believe that centralization of the records will compromise timely employee or government representative access to the records. To ensure that this is the case, centralization under Section 1904.30(b)(2) is allowed only if the employer can produce copies of the forms when access to them is needed by a government representative, an employee or former employee, or an employee representative, as required by Sections 1904.35 and 40.

Recording Injuries and Illnesses Where They Occur

...For the vast majority of cases, the place where the injury or illness occurred is the most useful recording location. The events or exposures that caused the case are most likely to be present at that location, so the data are most useful for analysis of that location's records. If the case is recorded at the employee's home base, the injury or illness data have been disconnected from the place where the case occurred, and where analysis of the data may help reveal a workplace hazard. Therefore, OSHA finds that it is most useful to record the injury or illness at the location where the case occurred. Of course, if the injury or illness occurs at another employer's workplace, or while the employee is in transit, the case would be recorded on the OSHA 300 Log of the employee's home establishment.

For cases of illness, two types of cases must be considered. The first is the case of an illness condition caused by an acute, or short term workplace exposure, such as skin rashes, respiratory ailments, and heat disorders. These illnesses generally mani-

fest themselves quickly and can be linked to the workplace where they occur, which is no different than most injury cases. For illnesses that are caused by long-term exposures or which have long latency periods, the illness will most likely be detected during a visit to a physician or other health care professional, and the employee is most likely to report it to his or her supervisor at the home work location.

Recording these injuries and illnesses could potentially present a problem with incidence rate cal-

culations. In many situations, visiting employees are a minority of the workforce, their hours worked are relatively inconsequential, and rates are thus unaffected to any meaningful extent. However, if an employer relies on visiting labor to perform a larger amount of the work, rates could be affected. In these situations, the hours of these personnel should be added to the establishment's hours of work for rate calculation purposes.

FREQUENTLY ASKED QUESTIONS: Section 1904.30 (OSHA Instruction, CPL 2-0.135, Chap. 5)

Section 1904.30 Multiple business establishments

This section will be developed as letters of interpretation become available.

LETTERS OF INTERPRETATION: Section 1904.30

Section 1904.30 Multiple business establishments

This section will be developed as letters of interpretation become available.

Section 1904.31 Covered employees

(66 FR 6131, Jan. 19, 2001)

REGULATION: Section 1904.31

Subpart D – Other OSHA injury and illness recordkeeping requirements

(66 FR 6130, Jan. 19, 2001)

Section 1904.31 Covered employees

(a) Basic requirement.

You must record on the OSHA 300 Log the recordable injuries and illnesses of all employees on your payroll, whether they are labor, executive, hourly, salary, part-time, seasonal, or migrant workers. You also must record the recordable injuries and illnesses that occur to employees who are not on your payroll if you supervise these employees on a day-to-day basis. If your business is organized as a sole proprietorship or partnership, the owner or partners are not considered employees for recordkeeping purposes.

(b) Implementation.

(1) *If a self-employed person is injured or becomes ill while doing work at my business, do I need to record the injury or illness?*

No, self-employed individuals are not covered by the OSH Act or this regulation.

(2) *If I obtain employees from a temporary help service, employee leasing service, or personnel supply service, do I have to record an injury or illness occurring to one of those employees?*

You must record these injuries and illnesses if you supervise these employees on a day-to-day basis.

(3) *If an employee in my establishment is a contractor's employee, must I record an injury or illness occurring to that employee?*

If the contractor's employee is under the day-to-day supervision of the contractor, the contractor is responsible for recording the injury or illness. If you supervise the contractor employee's work on a day-to-day basis, you must record the injury or illness.

(4) *Must the personnel supply service, temporary help service, employee leasing service, or contractor also record the injuries or illnesses occurring to temporary, leased or contract employees that I supervise on a day-to-day basis?*

No, you and the temporary help service, employee leasing service, personnel supply service, or contractor should coordinate your efforts to make sure that each injury and illness is recorded only once: either on your OSHA 300 Log (if you provide day-to-day supervision) or on the other employer's OSHA 300 Log (if that company provides day-to-day supervision).

PREAMBLE DISCUSSION: Section 1904.31

(66 FR 6037-6042, Jan. 19, 2001)

The following are selected excerpts from the preamble to the Occupational Injury and Illness Recording and Reporting Requirements, the Recordkeeping rule (66 FR 5916, 29 CFR Parts 1904 and 1952). These excerpts represent some of the key discussions related to the final rule (66 FR 6122, 29 CFR Parts 1904 and 1952).

Section 1904.31 Covered employees.

Final Rule Requirements and Legal Background

Section 1904.31 requires employers to record the injuries and illnesses of all their employees, whether classified as labor, executive, hourly, salaried, part-time, seasonal, or migrant workers. The section also requires the employer to record the injuries and illnesses of employees they supervise on a day-to-day basis, even if these workers are not carried on the

employer's payroll.

Implementing these requirements requires an understanding of the Act's definitions of "employer" and "employee." The statute defines "employer," in relevant part, to mean "a person engaged in a business affecting interstate commerce who has employees." 29 U.S.C. 652(5). The term "person" includes "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." 29 U.S.C. 652(4).

The term “employee” means “an employee of an employer who is employed in a business of his employer which affects interstate commerce.” 29 U.S.C. 652(6). Thus, any individual or entity having an employment relationship with even one worker is an employer for purposes of this final rule, and must fulfill the recording requirements for each employee.

The application of the coverage principles in this section presents few issues for employees who are carried on the employer’s payroll, because the employment relationship is usually well established in these cases. However, issues sometimes arise when an individual or entity enters into a temporary relationship with a worker. The first question is whether the worker is an employee of the hiring party. If an employment relationship exists, even if temporary in duration, the employee’s injuries and illnesses must be recorded on the OSHA 300 Log and 301 form. The second question, arising in connection with employees provided by a temporary help service or leasing agency, is which employer—the host firm or the temporary help service—is responsible for recordkeeping.

Whether an employment relationship exists under the Act is determined in accordance with established common law principles of agency. At common law, a self-employed “independent contractor” is not an employee; therefore, injuries and illnesses sustained by independent contractors are not recordable under the final Recordkeeping rule. To determine whether a hired party is an employee or an independent contractor under the common law test, the hiring party must consider a number of factors, including the degree of control the hiring party asserts over the manner in which the work is done, and the degree of skill and independent judgment the hired party is expected to apply. *Loomis Cabinet Co. v. OSHRC*, 20 F.3d 938, 942 (9th Cir. 1994).

Other individuals, besides independent contractors, who are not considered to be employees under the OSH Act are unpaid volunteers, sole proprietors, partners, family members of farm employers, and domestic workers in a residential setting. See 29 CFR Section 1975.4(b)(2) and Section 1975.6 for a discussion of the latter two categories of workers. As is the case with independent contractors, no employment relationship exists between these individuals and the hiring party, and consequently, no recording obligation arises.

A related coverage question sometimes arises when an employer obtains labor from a temporary help service, employee leasing firm or other personnel supply service. Frequently the temporary workers

are on the payroll of the temporary help service or leasing firm, but are under the day-to-day supervision of the host party. In these cases, Section 1904.31 places the recordkeeping obligation upon the host, or utilizing, employer. The final rule’s allocation of recordkeeping responsibility to the host employer in these circumstances is consistent with the Act for several reasons.

First, the host employer’s exercise of day-to-day supervision of the temporary workers and its control over the work environment demonstrates a high degree of control over the temporary workers consistent with the presence of an employment relationship at common law. See *Loomis Cabinet Co.*, 20 F.3d at 942. Thus, the temporary workers will ordinarily be the employees of the party exercising day-to-day control over them, and the supervising party will be their employer.

Even if daily supervision is not sufficient alone to establish that the host party is the employer of the temporary workers, there are other reasons for the final rule’s allocation of recordkeeping responsibility. Under the OSH Act, an employer’s duties and responsibilities are not limited only to his own employees. Cf. *Universal Constr. Co. v. OSHRC*, 182 F.3d 726, 728-731 (10th Cir. 1999). Assuming that the host is an employer under the Act (because it has an employment relationship with someone) it reasonably should record the injuries of all employees, whether or not its own, that it supervises on a daily basis. This follows because the supervising employer is in the best position to obtain the necessary injury and illness information due to its control over the worksite and its familiarity with the work tasks and the work environment....

...[T]he proposal did not alter the long-standing meanings of the terms employee, employer or employment relationship. The day-to-day supervision test for identifying the employer who is responsible for compliance with Part 1904 is a continuation of OSHA’s former policy, and is consistent with the common law test. The comments indicate that many employers are not aware that they need to keep records for leased workers, temporary workers, and workers who are inaccurately labeled “independent contractors” but are in fact employees. However, these workers are employees under both the former rule and the final rule. Incorporating these requirements into the regulatory text can only help to improve the consistency of the data by clarifying the employer’s responsibilities.

The 1904 rule does not require an employer to record injuries and illnesses that occur to workers

supervised by independent contractors. However, the label assigned to a worker is immaterial if it does not reflect the economic realities of the relationship. For example, an employment contract that labels a hired worker as an independent contractor will have no legal significance for Part 1904 purposes if in fact the hiring employer exercises day-to-day supervision over that worker, including directing the worker as to the manner in which the details of the work are to be performed. If the contractor actually provides day-to-day supervision for the employee, then the contractor is responsible for compliance with Part 1904 as to that employee....

OSHA has rejected the suggestions that either the payroll or workers' compensation employer keep the OSHA 1904 records. The Agency believes that in the majority of circumstances the payroll employer will also be the workers' compensation employer and there is no difference in the two suggestions. Temporary help services typically provide the workers' compensation insurance coverage for the employees they provide to other employers. Therefore, our reasons for rejecting these suggestions are the same. OSHA agrees that there are good arguments for both scenarios: 1. Including injuries and illnesses in the records of the leasing employer (the payroll or workers' compensation employer and 2. For including these cases in the records of the controlling employer. Requiring the payroll or workers' compensation employer to keep the OSHA records would certainly be a simple and objective method. There would be no doubt about who keeps the records. However, including the cases in the records of the temporary help agency erodes the value of the injury and illness records for statistical purposes, for administering safety and health programs at individual worksites, and for government inspectors conducting safety and health inspections or consultations. The benefits of simplification and clarity do not outweigh the potential damage to the informational value of the records, for the reasons discussed below.

First, the employer who controls the workers and the work environment is in the best position to learn about all the injuries and illnesses that occur to those workers. Second, when the data are collected for enforcement and research use and for priority setting, the injury and illness data are clearly linked to the industrial setting that gave rise to them. Most important, transferring the recording/reporting function from the supervising employer to the leasing firm would undermine rather than facilitate one of the most important goals of Part 1904--to assure that

work-related injury and illness information gets to the employer who can use it to abate work-related hazards. If OSHA were to shift the recordkeeping responsibility from the controlling employer to the leasing firm, the records would not be readily available to the employer who can make best use of them. OSHA would need to require the leasing firm to provide the controlling employer with copies of the injury and illness logs and other reports to meet this purpose. This would be both burdensome and duplicative.

Requiring the controlling (host) employer to record injuries and illnesses for employees that they control has several advantages. First, it assigns the injuries and illnesses to the individual workplace with the greatest amount of control over the working conditions that led to the worker's injury or illness. Although both the host employer and the payroll employer have safety and health responsibilities, the host employer generally has more control over the safety and health conditions where the employee is working. To the extent that the records connect the occupational injuries and illnesses to the working conditions in a given workplace, the host employer must include these cases to provide a full and accurate safety and health record for that workplace.

If this policy were not in place, industry-wide statistics would be skewed. Two workplaces with identical numbers of injuries and illnesses would report different statistics if one relied on temporary help services to provide workers, while the other did not. Under OSHA's policy, when records are collected to generate national injury and illness statistics, the cases are properly assigned to the industry where they occurred. Assigning these injuries and illnesses to temporary help services would not accurately reflect the type of workplace that produced the injuries and illnesses. It would also be more difficult to compare industries. To illustrate this point, consider a hypothetical industry that relies on temporary help services to provide 10% of its labor force. Assuming that the temporary workers experience workplace injury and illness at the same rate as traditional employees, the Nation's statistics would underrepresent that industry's injury and illness numbers by 10%. If another industry only used temporary help services for 1% of the labor force, its statistics would be closer to the real number, but comparisons to the 10% industry would be highly suspect.

The policy also makes it easier to use an industry's data to measure differences that occur in that industry over time. Over the last 20 years, the business community has relied increasingly on workers

from temporary help services, employee leasing companies, and other temporary employees. If an industry sector as a whole changed its practices to include either more or fewer temporary workers over time, comparisons of the statistics over several years might show trends in injury and illness experience that simply reflected changing business practices rather than real changes in safety and health conditions....

OSHA agrees with these commenters that there is a potential for double counting of injuries and illnesses for workers provided by a personnel supply service. We do not intend to require both employers to record each injury or illness. To solve this problem, the rule, at Section 1904.31(b)(4), specifically states that both employers are not required to record the case, and that the employers may coordinate their efforts so that each case is recorded only once--by the employer who provides day-to-day supervision. When the employers involved choose to work with each other, or when both employers understand the Part 1904 regulations as to who is required to record the cases and who is not, there will not be duplicative recording and reporting....

OSHA believes that many employers already share information about these injuries and illnesses to help each other with their own respective safety and health responsibilities. For example, personnel service employers need information to process workers' compensation claims and to determine how well their safety and health efforts are working, especially those involving training and the use of personal protective equipment. The host employer needs information on conditions in the workplace that may have caused the injuries or illnesses....

...The personnel leasing firm will not necessarily have better information than the host employer about the worker's exposures or accidents in previous assignments, previously recorded injuries or illnesses, or the aftermath of an injury or illness. And the personnel leasing firm will certainly have less knowledge of and control over the work environment that may have caused, contributed to, or significantly aggravated an injury or illness. As described above, the two employers have shared responsibilities and may share information when there is a need to do so.

If Part 1904 records are inaccurate due to lack of reasonably reliable data about leased employees, there are ways for OSHA to address the problem. First, the OSH Act does not impose absolutely strict liability on employers. The controlling employer must make reasonable efforts to acquire necessary

information in order to satisfy Part 1904, but may be able to show that it is not feasible to comply with an OSHA recordkeeping requirement. If entries for temporary workers are deficient in some way, the employer can always defend against citation by showing that it made the efforts that a reasonable employer would have made under the particular circumstances to obtain more complete or accurate data....

OSHA has decided not to base recording obligations on the temporary employee's length of employment. Recording the injuries and illnesses of some temporary employees and not others would not improve the value or accuracy of the statistics, and would make the system even more inconsistent and complex. In OSHA's view, the duration of the relationship is much less important than the element of control. In the example of the temporary nurse's aide, for OSHA recordkeeping purposes the worker would be considered an employee of the facility for the days he or she works under the day-to-day supervision of the host facility....

Because OSHA is using the common law concepts to determine which workers are to be included in the records, a worker who is covered in terms of recording an injury or illness is also covered for counting purposes and for the annual summary. If a given worker is an employee under the common law test, he or she is an employee for all OSHA recordkeeping purposes. Therefore, an employer must consider all of its employees when determining its eligibility for the small employer exemption, and must provide reasonable estimates for hours worked and average employment on the annual summary. OSHA has included instructions on the back of the annual summary to help with these calculations.

...OSHA's view is that a given establishment should have one OSHA Log and only one Log. Injuries and illnesses for all the employees at the establishment are entered into that record to create a single summary at the end of the year. OSHA does not require temporary workers or any other types of workers to be identified with special titles in the job title column, but also does not prohibit the practice. This column is used to list the occupation of the injured or ill worker, such as laborer, machine operator, or nursing aide. However, OSHA does encourage employers to analyze their injury and illness data to improve safety and health at the establishment. In some cases, identifying temporary or contract workers may help an employer to manage safety and health more effectively. Thus an employer may supplement the OSHA Log to identify temporary or con-

tract workers, although the rule does not require it...

These workers should be evaluated just as any other worker. If a student or intern is working as an unpaid volunteer, he or she would not be an employee under the OSH Act and an injury or illness of that employee would not be entered into the Part 1904

records. If the worker is receiving compensation for services, and meets the common law test discussed earlier, then there is an employer-employee relationship for the purposes of OSHA recordkeeping. The employer in that relationship must evaluate any injury or illness at the establishment and enter it into the records if it meets the recording criteria.

FREQUENTLY ASKED QUESTIONS: Section 1904.31 (OSHA Instruction, CPL 2-0.135, Chap. 5)

Section 1904.31 Covered employees

Question 31-1. How is the term “supervised” in section 1904.31 defined for the purpose of determining whether the host employer must record the work-related injuries and illnesses of employees obtained from a temporary help service?

The host employer must record the recordable injuries and illnesses of employees not on its payroll if it supervises them on a day-to-day basis. Day-to-day supervision occurs when “in addition to specifying the output, product or result to be accomplished by the person’s work, the employer supervises the details, means, methods and processes by which the work is to be accomplished.”

Question 31-2. If a temporary personnel agency sends its employees to work in an establishment that is not required to keep OSHA records, does the agency have to record the recordable injuries and illnesses of these employees?

A temporary personnel agency need not record injuries and illnesses of those employees that are supervised on a day-to-day basis by another employer. The temporary personnel agency must record the recordable injuries and illnesses of those employees it supervises on a day to day basis, even if these employees perform work for an employer who is not covered by the recordkeeping rule.

LETTERS OF INTERPRETATION: Section 1904.31

Section 1904.31 Covered employees

OSHA requirements are set by statute, standards and regulations. Letters of interpretation explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. These letters constitute OSHA’s interpretation of the requirements discussed. Note that OSHA enforcement guidance may be affected by changes to OSHA rules. Also, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA’s website at <http://www.osha.gov>.

Letters of Interpretation constitute OSHA’s interpretation only of the requirements discussed and may not be applicable to any situation not delineated within the original correspondence.

Evaluation of seven scenarios for work-relatedness and recordkeeping requirements.

January 15, 2004

Ms. Leann M. Johnson-Koch
1200 Nineteenth Street, N.W.
Washington, D.C. 20036-2412

Dear Ms. Johnson-Koch:

Thank you for your E-mail to the Occupational Safety and Health Administration (OSHA) regarding the Injury and Illness Recording and Reporting Requirements contained in 29 CFR Part 1904. Your letter was forwarded to my office by Richard Fairfax, Director, Directorate of Enforcement Programs. The Division of Recordkeeping Requirements is responsible for the administration of the OSHA injury and illness recordkeeping system nationwide. Please excuse the delay in responding to your request.

In your letter, you ask OSHA to clarify the following scenarios to ensure accurate and consistent guidance to your members for purposes of OSHA Recordkeeping requirements. I will address your scenarios by first restating each one and then answering it.

Scenario 1:

- An employee reported to work at 7:00 a.m.
- At 12:15 p.m. the employee reported that his toes on his left foot had started swelling and his foot had started hurting.
- The employee wanted to go to a doctor for evaluation.
- On the First Report of Injury, that the employee completed before he went to the doctor, the employee indicated that the cause of the illness was “unknown (feet wet at cooling tower).”
- When answering the doctor’s question: “How did injury occur?” the employee answered that the only thing he could think of was that his feet were wet all the previous day due to work in the morning at a cooling tower. The cooling tower water is treated to remove bacteria and then used in process operations in the plant.
- The doctor described the illness/injury as foot edema/cellulitis.
- The doctor also described the injury as an occupational disease, prescribed an antibiotic, and the employee missed one day of work.
- The company sent the employee to a second doctor who said to continue using the antibiotic.
- Neither doctor could state conclusively that the foot edema/cellulitis was or was not due to the employee’s feet being wet due to work at the cooling tower.
- Neither doctor is a specialist in skin disorders.
- During an incident review at the site, the employee again said he did not know if his feet being wet all day the previous day caused the injury/illness.
- The employee also stated that he had not worn the personal protective equipment, rubber boots, prescribed for this task.

The company determined that this injury/illness is not work-related (did not occur in the course of or as a result of employment), since neither physician nor the employee can state with certainty that the injury/illness was caused by the employee’s feet being wet all day due to work at the cooling tower. Since the injury/illness was determined to not be work-related, then the company deemed the incident non-recordable.

Response: A case is work-related if it is more likely than not that an event or exposure in the work environment was a cause of the injury or illness. The work event or exposure need only be one of the causes; it does not need to be the sole or predominant cause. In this case, the fact that neither the physician nor the employee could state with certainty that the employee's edema was caused by working with wet feet is not dispositive. The physician's description of the edema as an "occupational disease," and the employee's statement that working with wet feet was "the only thing he could think of" as the cause, indicate that it is more likely than not that working with wet feet was a cause. The case should be recorded on the OSHA 300 Log.

Scenario 2:

An employee must report to work by 8:00 a.m.

- The employee drove into the company parking lot at 7:30 a.m. and parked the car.
- The employee exited the car and proceeded to the office to report to work.
- The parking lot and sidewalks are privately owned by the facility and both are within the property line, but not the controlled access points (i.e., fence, guards).
- The employee stepped onto the sidewalk and slipped on the snow and ice.
- The employee suffered a back injury and missed multiple days of work.

The company believes that the employee was still in the process of the commute to work since the employee had not yet checked in at the office. Since a work task was not being performed, the site personnel deemed the incident not work-related and therefore not recordable.

Response: Company parking lots and sidewalks are part of the employer's establishment for record-keeping purposes. Here, the employee slipped on an icy sidewalk while walking to the office to report for work. In addition, the event or exposure that occurred does not meet any of the work-related exceptions contained in 1904.5(b)(2). The employee was on the sidewalk because of work; therefore, the case is work-related regardless of the fact that he had not actually checked in.

Scenario 3:

The employee described in Scenario 2 missed 31 days of work due to the back injury.

- On day 31, the doctor provided a release for returning to work.
- The next morning (day 32), when the employee was due to report to work, the employee stated that his back was hurting, and the employee did not report to work.
- The employee scheduled a doctor's appointment, with the same doctor, and visited the doctor on day 33.
- The doctor issued a statement stating that the employee was not able to return to work.

Since the employee was released to return to work, the company does not believe it has to count the intervening two days on the OSHA log.

Response: The employer would have to enter the additional days away from work on the OSHA 300 log based on receiving information from the physician or other licensed health care professional that the employee was unable to work.

Scenario 4:

- An employee reports to work.
- Several hours later, the employee goes outside for a "smoke break."
- The employee slips on the ice and injures his back.

Since the employee was not performing a task related to the employee's work, the company has deemed this incident non-work related and therefore not recordable.

Response: Under Section 1904.5(b)(2)(v), an injury or illness is not work-related if it is solely the result of an employee doing personal tasks (unrelated to their employment) at the establishment outside of the employee's assigned working hours. In order for this exception to apply, the case must meet both of the stated conditions. The exception does not apply here because the injury or illness occurred within normal working hours. Therefore, your case in question is work-related, and if it meets the general recording criteria under Section 1904.7 the case must be recorded.

Scenario 5:

- An employee drives into the company parking lot at 7:30 a.m., exits his car, and proceeds to cross the parking lot to clock-in to work.
- A second employee, also on the way to work, approaches the first employee, and the two individuals get into a physical altercation in the parking lot. The first employee breaks an arm during the altercation.
- The employee goes to the doctor and receives medical treatment for his injury.

The company deems this non-work related, and therefore non-recordable, since the employees had not yet reported to work and a work task was not being performed at the time of the altercation.

Response: The recordkeeping regulation contains no general exception for purposes of determining work-relationship for cases involving acts of violence in the work environment. Company parking lots/access roads are part of the employer's premises and therefore part of the employer's establishment. Whether the employee had not clocked in to work does not affect the outcome for determining work-relatedness. The case is recordable on the OSHA log, because the injury meets the general recording criteria contained in Section 1904.7.

Scenario 6:

- An employee injured a knee performing work-related activities in 2001.
- The accident was OSHA recordable and subject to worker's compensation.
- The employee had arthroscopic knee surgery eleven months later and was released to full duty a month and a half after the arthroscopic surgery.
- The employee had a second knee injury three months after the return to work release (after the first surgery).
- Post-surgery (second surgery), the doctor prescribed Vioxx® as an anti-inflammatory.
- Approximately one and one-half months after the second knee surgery, the employee was given another full release to return to work full duty and returned to work.
- However, the doctor told the employee to continue to take Vioxx® as prescribed (as needed) and to return to the doctor as needed.
- The employee scheduled a follow-up appointment with the doctor.
- The day before the appointment, the employee bumped his knee at work.
- During his scheduled doctor's appointment (was to be the last follow-up visit) the employee mentioned the latest incident (bumping the knee) to the doctor and showed him where the pain was occurring due to bumping his knee.
- The doctor stated that the employee had an inflamed tendon (Grade 1 lateral collateral ligament sprain) that was not part of the initial surgery (patellar tendonitis).
- The doctor stated in the diagnosis that the original injury that required knee surgery was resolved.
- The doctor told the employee to continue taking Vioxx® for the inflamed tendon.

Since the employee was already taking the medication prescribed (Vioxx®), the site does not believe this is recordable as a second incident.

Response: In the recordkeeping regulation, the employer is required to follow any determination a physician or other licensed health care professional has made about the status of a new case. The inflamed tendon is a new case because the employee had completely recovered from the previous injury and illness and a new event or exposure had occurred in the work environment. Therefore, for purposes of OSHA recordkeeping, the employer would enter the case on the OSHA 300 log as appropriate.

Scenario 7:

- A site hired numerous temporary workers at its plant.
- Three temporary workers were injured.
- They each received injuries that were recordable on the OSHA 300 Log.
- The employees were under the direct supervision of the site.

Is it correct that these injuries were recordable on the site log or should they have been recordable on the temp agency log? What are the criteria related to temporary workers that need to be reviewed to determine which OSHA log is appropriate for recording the injury/illness?

Response: Section 1904.31 states that the employer must record the injuries and illnesses that occur to employees not on its payroll if it supervises them on a day-to-day basis. Day-to-day supervision generally exists when the employer “supervises not only the output, product, or result to be accomplished by the person’s work, but also the details, means, methods, and processes by which the work objective is accomplished.”

Thank you for your interest in occupational safety and health. We hope you find this information helpful. OSHA requirements are set by statute, standards and regulations. Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. This letter constitutes OSHA’s interpretation of the requirements discussed. Note that our enforcement guidance may be affected by changes to OSHA rules. In addition, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA’s website at <http://www.osha.gov>. If you have any further questions, please contact the Division of Recordkeeping Requirements, at 202-693-1702.

Sincerely,

Frank Frodyma
Acting Director

Letter of interpretation related to sections 1904.29, 1904.29(a), 1904.29(b), 1904.29(b)(2), 1904.31, 1904.33, 1904.35, 1904.40 and 1904.46 –

Recording criteria for cases involving workers from a temporary help service, employee leasing service, or personnel supply service.

June 23, 2003

Mr. Edwin G. Foulke, Jr.
Jackson Lewis LLP
2100 Landmark Building
301 North Main Street
Greenville, SC 29601-2122

Dear Mr. Foulke:

Thank you for your April 3, 2003 facsimile and April 10, 2003 letter to the Occupational Safety and Health Administration (OSHA) regarding the Injury and Illness Recording and Reporting Requirements contained in 29 CFR Part 1904. Specifically, you ask OSHA to clarify the recording criteria for cases involving workers from a temporary help service, employee leasing service, or personnel supply service. Your questions have been outlined below followed by OSHA’s response.

Question 1: Under 29 CFR Section 1904.31, employers who supervise temporary or leased employees at their facility are required to maintain the OSHA 300 Logs for those employees. With respect to those injuries, can the employer keep a separate 300 Log for the company employees and one log for the temporary or leased employees?

Response: The log is to be kept for an establishment. Under Section 1904.46 Definitions, an establishment is a single physical location where business is conducted or where services or industrial operations are performed. The controlling employer (using firm) may sub-divide the OSHA 300 Log to provide separate listings of temporary workers, but must consider the separate listings to be one record for all recordkeeping purposes, including access by government representatives, employees, former employees and employee representatives as required by Section 1904.35 and 1904.40 in the Recordkeeping regulation. OSHA's view is that a given establishment should have one OSHA Log. Injuries and illnesses for all the covered employees at the establishment are then entered into that record to create a single OSHA 300-A Summary form at the end of the year.

Question 2: Under 29 CFR Section 1904.31, while the standard clearly indicates the 300 Logs must be maintained for supervised temporary or leased employees, it does not indicate who maintains the 301 documents or the first report of injuries, as well as the medical records on those employees. Also, if a temporary or leased employee has days away from work, it is normally the temporary or leased employee provider's contractual responsibility to handle the medical treatment of the employee. The temporary or leased employee provider is the only person/entity to have the information on days away from work. Who is responsible for maintaining the 301 logs or the first report of injury forms as well as the medical records for these employees, assuming that the employee provider can produce the required documents to the employer for production in the time periods set forth in the standard?

Response: Section 1904.29(a) says: "You must use OSHA 300, 300-A and 301 forms, or equivalent forms, for recordable injuries and illnesses." In addition, 1904.29(b)(2) says: "You must complete an OSHA 301 Incident Report form, or an equivalent form, for each recordable injury or illness entered on the OSHA 300 Log." Therefore, when the workers from a temporary help service or leasing firm are under the day-to-day supervision of the controlling party (using firm) the entire OSHA injury and illness recordkeeping responsibility belongs to the using firm.

Question 3: Using the facts in Question 2, it is also important to note that an injured temporary or leased employee, who requires days from work, may be replaced by another leased or temporary employee at the work site. From time of the injury, the employer has no information about the return to work status of the injured employee. In fact, the injured employee may be assigned to another employer once he or she is able to return to work. How can the original employer keep accurate 300 Logs when the employee provider has sole access to information on days away from work and return to work status?

Response: The controlling employer has the ultimate responsibility for making good-faith recordkeeping determinations regarding an injury and illness to any of those temporary employees they supervise on a day-to-day basis. Although controlling employers ultimately decide if and how a particular case should be recorded, their decision must not be an arbitrary one, but should be made in accordance with the requirements of the Act, regulation, and the instructions on the forms. Therefore, the controlling employer must make reasonable efforts to acquire the necessary information in order to satisfy its Part 1904 recordkeeping requirements. However, if the controlling employer is not able to obtain information from the employer of the leased or temporary employee, the controlling employer should record the injury based on whatever information is available to the controlling employer. The preamble contains a brief reference about OSHA's expectation that the employers share information to produce accurate records, stating that "the two employers have shared responsibilities and may share information when there is a need to do so." (Federal Register p. 6041)

Finally, the last question you raised is whether your client or contractor has any requirements under the recordkeeping standard to provide the new contractor the current OSHA 300 Logs for that facility covering those employees who now work for that contractor? Since there was no change of your client's business ownership, he or she needs only to retain the records as per 1904.33 and provide access under 1904.35 and 1904.40.

Thank you for your interest in occupational safety and health. We hope you find this information helpful. OSHA requirements are set by statute, standards, and regulations. Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. This letter constitutes OSHA's interpretation of the requirements discussed. Note that our enforcement guidance may be affected by changes to OSHA rules. Also, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA's website at <http://www.osha.gov>. If you have any further questions, please contact the Division of Recordkeeping Requirements, at 202-693-1702.

Sincerely,

John L. Henshaw
Assistant Secretary

Section 1904.32 Annual summary

(66 FR 6131, Jan. 19, 2001)

REGULATION: Section 1904.32

Subpart D – Other OSHA injury and illness recordkeeping requirements

(66 FR 6130, Jan. 19, 2001)

(a) Basic requirement.

At the end of each calendar year, you must:

- (1) Review the OSHA 300 Log to verify that the entries are complete and accurate, and correct any deficiencies identified;
- (2) Create an annual summary of injuries and illnesses recorded on the OSHA 300 Log;
- (3) Certify the summary; and
- (4) Post the annual summary.

(b) Implementation.

(1) How extensively do I have to review the OSHA 300 Log entries at the end of the year?

You must review the entries as extensively as necessary to make sure that they are complete and correct.

(2) How do I complete the annual summary?

You must:

- (i) Total the columns on the OSHA 300 Log (if you had no recordable cases, enter zeros for each column total); and
- (ii) Enter the calendar year covered, the company's name, establishment name, establishment address, annual average number of employees covered by the OSHA 300 Log, and the total hours worked by all employees covered by the OSHA 300 Log.
- (iii) If you are using an equivalent form other than the OSHA 300-A summary form, as permitted under Section 1904.6(b)(4), the summary you use

must also include the employee access and employer penalty statements found on the OSHA 300-A Summary form.

(3) How do I certify the annual summary?

A company executive must certify that he or she has examined the OSHA 300 Log and that he or she reasonably believes, based on his or her knowledge of the process by which the information was recorded, that the annual summary is correct and complete.

(4) Who is considered a company executive?

The company executive who certifies the log must be one of the following persons:

- (i) An owner of the company (only if the company is a sole proprietorship or partnership);
 - (ii) An officer of the corporation;
 - (iii) The highest ranking company official working at the establishment; or
 - (iv) The immediate supervisor of the highest ranking company official working at the establishment.
- (5) How do I post the annual summary?*

You must post a copy of the annual summary in each establishment in a conspicuous place or places where notices to employees are customarily posted. You must ensure that the posted annual summary is not altered, defaced or covered by other material.

(6) When do I have to post the annual summary?

You must post the summary no later than February 1 of the year following the year covered by the records and keep the posting in place until April 30.

PREAMBLE DISCUSSION: Section 1904.32

(66 FR 6042-6048, Jan. 19, 2001)

The following are selected excerpts from the preamble to the Occupational Injury and Illness Recording and Reporting Requirements, the Recordkeeping rule (66 FR 5916, 29 CFR Parts 1904 and 1952). These excerpts represent some of the key discussions related to the final rule (66 FR 6122, 29 CFR Parts 1904 and 1952).

Section 1904.32 Annual summary.

At the end of each calendar year, section 1904.32 of the final rule requires each covered employer to review his or her OSHA 300 Log for completeness and accuracy and to prepare an Annual Summary of

the OSHA 300 Log using the form OSHA 300-A, Summary of Work-Related Injuries and Illnesses, or an equivalent form. The summary must be certified for accuracy and completeness and be posted in the workplace by February 1 of the year following the

year covered by the summary. The summary must remain posted until April 30 of the year in which it was posted.

Preparing the Annual Summary requires four steps: reviewing the OSHA 300 log, computing and entering the summary information on the Form 300-A, certification, and posting. First, the employer must review the Log as extensively as necessary to make sure it is accurate and complete. Second, the employer must total the columns on the Log; transfer them to the summary form; and enter the calendar year covered, the name of the employer, the name and address of the establishment, the average number of employees on the establishment's payroll for the calendar year, and the total hours worked by the covered employees. If there were no recordable cases at the establishment for the year covered, the summary must nevertheless be completed by entering zeros in the total for each column of the OSHA 300 Log. If a form other than the OSHA 300-A is used, as permitted by paragraph 1904.29(b)(4), the alternate form must contain the same information as the OSHA 300-A form and include identical statements concerning employee access to the Log and Summary and employer penalties for falsifying the document as are found on the OSHA 300-A form.

Third, the employer must certify to the accuracy and completeness of the Log and Summary, using a two-step process. The person or persons who supervise the preparation and maintenance of the Log and Summary (usually the person who keeps the OSHA records) must sign the certification statement on the form, based on their direct knowledge of the data on which it was based. Then, to ensure greater awareness and accountability of the recordkeeping process, a company executive, who may be an owner, a corporate officer, the highest ranking official working at the establishment, or that person's immediate supervisor, must also sign the form to certify to its accuracy and completeness. Certification of the summary attests that the individual making the certification has a reasonable belief, derived from his or her knowledge of the process by which the information in the Log was reported and recorded, that the Log and summary are "true" and "complete."

Fourth, the Summary must be posted no later than February 1 of the year following the year covered in the Summary and remain posted until April 30 of that year in a conspicuous place where notices are customarily posted. The employer must ensure that the Summary is not defaced or altered during the 3 month posting period.

1. Company Executive Certification of the Annual Summary.

The final rule carries forward the proposed rule's requirement for certification by a higher ranking company official, with minor revision. OSHA concludes that the company executive certification process will ensure greater completeness and accuracy of the Summary by raising accountability for OSHA recordkeeping to a higher managerial level than existed under the former rule. OSHA believes that senior management accountability is essential if the Log and Annual Summary are to be accurate and complete. The integrity of the OSHA recordkeeping system, which is relied on by the BLS for national injury and illness statistics, by OSHA and employers to understand hazards in the workplaces, by employees to assist in the identification and control of the hazards identified, and by safety and health professionals everywhere to analyze trends, identify emerging hazards, and develop solutions, is essential to these objectives. Because OSHA cannot oversee the preparation of the Log and Summary at each establishment and cannot audit more than a small sample of all covered employers' records, this goal is accomplished by requiring employers or company executives to certify the accuracy and completeness of the Log and Summary.

The company executive certification requirement imposes different obligations depending on the structure of the company. If the company is a sole proprietorship or partnership, the certification may be made by the owner. If the company is a corporation, the certification may be made by a corporate officer. For any management structure, the certification may be made by the highest ranking company official working at the establishment covered by the Log (for example, the plant manager or site supervisor), or the latter official's supervisor (for example, a corporate or regional director who works at a different establishment, such as company headquarters).

The company executive certification is intended to ensure that a high ranking company official with responsibility for the recordkeeping activity and the authority to ensure that the recordkeeping function is performed appropriately has examined the records and has a reasonable belief, based on his or her knowledge of that process, that the records are accurate and complete.

The final rule does not specify how employers are to evaluate their recordkeeping systems to ensure their accuracy and completeness or what steps an employer must follow to certify the accuracy and completeness of the Log and Summary with confi-

dence. However, to be able to certify that one has a reasonable belief that the records are complete and accurate would suggest, at a minimum, that the certifier is familiar with OSHA's recordkeeping requirements, and the company's recordkeeping practices and policies, has read the Log and Summary, and has obtained assurance from the staff responsible for maintaining the records (if the certifier does not personally keep the records) that all of OSHA's requirements have been met and all practices and policies followed. In most if not all cases, the certifier will be familiar with the details of some of the injuries and illnesses that have occurred at the establishment and will therefore be able to spot check the OSHA 300 Log to see if those cases have been entered correctly. In many cases, especially in small to medium establishments, the certifier will be aware of all of the injuries and illnesses that have been reported at the establishment and will thus be able to inspect the forms to make sure all of the cases that should have been entered have in fact been recorded.

The certification required by the final rule may be made by signing and dating the certification section of the OSHA 300-A form, which replaces the summary portion of the former OSHA 200 form, or by signing and dating a separate certification statement and appending it to the OSHA Form 300-A. A separate certification statement must contain the identical penalty warnings and employee access information as found on the OSHA Form 300-A. A separate statement may be needed when the certifier works at another location and the certification is mailed or faxed to the location where the Summary is posted....

...The criminal penalties referred to in paragraph 1904.9(a) of the former rule are authorized by section 17(g) of the OSH Act and do not need to be repeated in the final rule to be enforced. Similarly, the administrative citations and penalties referred to in paragraph 1904.9(b) of the former rule are authorized by sections 9 and 17 of the OSH Act. The warning statement on the final OSHA 300-A form or its equivalent should be sufficient to remind those who certify the forms of their legal obligations under the Act....

Although OSHA believes that the final rule has many features that will enhance the accuracy and completeness of reporting, the Agency has included a company executive level of certification in the final rule. OSHA believes that company executive certification will raise employer awareness of the importance of the OSHA records, improve their accuracy and completeness (and thus utility), and decrease any underreporting incentive.

The final rule therefore requires a higher level

company official to certify to their accuracy and completeness. Thus the final rule reflects OSHA's agreement with those commenters who stated that the Log and Summary must be actively overseen by higher level management and that certification by such an official would make management's responsibility for the accuracy and completeness of the system clear....

...In the final rule, the person who must perform the certification must be a company executive. OSHA does not believe that an industrial hygienist or a safety officer is likely to have sufficient authority to ensure the integrity of a company's recordkeeping process. Therefore, the final rule requires that the certification be provided by an owner of a sole proprietorship or partnership, an officer of the corporation, the highest-ranking official at the establishment, or that person's supervisor....

The certification required by the final rule must be based on the official's "reasonable belief" that the Log and Summary are accurate and complete. Certification thus means that the certifying official has a general understanding of the OSHA recordkeeping requirements, is familiar with the company's recordkeeping process, and knows that the company has effective recordkeeping procedures and uses those procedures to produce accurate and complete records. The precise meaning of "reasonable belief" will be determined on a case-by-case basis because circumstances vary from establishment to establishment and decisions about the recordability of individual cases may differ, depending upon case-specific details.

2. Number of employees and hours worked.

...The final rule requires employers to include in the Annual Summary (the OSHA Form 300-A) the annual average number of employees covered by the Log and the total hours worked by all covered employees....

OSHA's view is that the value of the total hours worked and average number of employees information requires its inclusion in the Summary, and the final rule reflects this determination. Having this information will enable employers and employees to calculate injury and illness incidence rates, which are widely regarded as the best statistical measure for the purpose of comparing an establishment's injury and illness experience with national statistics, the records of other establishment, or trends over several years. Having the data available on the Form 300-A will also make it easier for the employer to respond to government requests for the data, which occurs when the BLS and OSHA collect the data by mail,

and when an OSHA or State inspector visits the facility. In particular, it will be easier for the employer to provide the OSHA inspector with the hours worked and employment data for past years....

...[T]he rule does not require employers to use any particular method of calculating the totals, thus providing employers who do not maintain certain records—for example the total hours worked by salaried employees—or employers without sophisticated computer systems, the flexibility to obtain the information in any reasonable manner that meets the objectives of the rule. Employers who do not have the ability to generate precise numbers can use various estimation methods. For example, employers typically must estimate hours worked for workers who are paid on a commission or salary basis. Additionally, the instructions for the OSHA 300-A Summary form include a worksheet to help the employer calculate the total number of hours worked and the average number of employees covered by the log.

3. Extended posting period.

The final rule's requirement increasing the summary Form 300-A posting period from one month to three months is intended to raise employee awareness of the recordkeeping process (especially that of new employees hired during the posting period) by providing greater access to the previous year's summary without having to request it from management....

...OSHA has decided to adopt a 3-month posting period. The additional posting period will provide employees with additional opportunity to review the summary information, raise employee awareness of the records and their right to access them, and generally improve employee participation in the recordkeeping system without creating a "wallpaper" posting of untimely data. In addition, OSHA has concluded that any additional burden on employers will be minimal at best and, in most cases, insignificant. All the final rule requires the employer to do is to leave the posting on the bulletin board instead of removing it at the end of the one-month period.

The final rule thus requires that the Summary be posted from February 1 until April 30, a period of three months; OSHA believes that the 30 days in January will be ample, as it has been in the past, for preparing the current year's Summary preparatory to posting.

4. Review of the records.

The provisions of the final rule requiring the employer to review the Log entries before totaling them for the Annual Summary are intended as an additional quality control measure that will improve the accuracy of the information in the Annual Summary, which is posted to provide information to employees and is also used as a data source by OSHA and the BLS. Depending on the size of the establishment and the number of injuries and illnesses on the OSHA 300 Log, the employer may wish to cross-check with any other relevant records to make sure that all the recordable injuries and illnesses have been included on the Summary. These records may include workers' compensation injury reports, medical records, company accident reports, and/or time and attendance records.

In the final rule, OSHA has not adopted regulatory language that requires formal audits of the OSHA Part 1904 records. However, the final rule does require employers to review the OSHA records as extensively as necessary to ensure their accuracy. The Agency believes that including audit provisions is not necessary because the high-level certification requirement will ensure that recordkeeping receives the appropriate level of management attention....

...OSHA has not required records audits in the final rule because the Agency believes that the combination of final rule requirements providing for employee participation (section 1904.35), protecting employees against discrimination for reporting work-related injuries and illnesses to their employer (section 1904.36), requiring review by employers of the records at the end of the year, and mandating two level certification of the records will provide the quality control mechanisms needed to improve the quality of the OSHA records.

FREQUENTLY ASKED QUESTIONS: Section 1904.32 (OSHA Instruction, CPL 2-0.135, Chap. 5) **Section 1904.32 Annual summary**

Question 32-1. *How do I calculate the "total hours worked" on my annual summary when I have both hourly and temporary workers?*

To calculate the total hours worked by all employees, include the hours worked by salaried, hourly, part-

time and seasonal workers, as well as hours worked by other workers you supervise (e.g., workers supplied by a temporary help service). Do not include vacation, sick leave, holidays, or any other non-work time even if employees were paid for it. If your establishment keeps records of only the hours paid or if

you have employees who are not paid by the hour, you must estimate the hours that the employees actually worked.

Question 32-2. *If an employer has no recordable cases for the year, is an OSHA 300-A, Annual Summary, still required to be completed, certified and posted?*

Yes. After the end of the year, employers must review the Log to verify its accuracy, summarize the 300 Log information on the 300A summary form, and certify the summary (a company executive must sign the certification). This information must then be posted for three months, from February 1 to April 30.

Question 32-3. *If employers electronically post the OSHA 300-A Summary of Work-related Injuries and Illnesses, are they in compliance with the posting requirements of 1904.32(b)(5)?*

No. The recordkeeping rule allows all forms to be kept on computer equipment or at an alternate location, as long as the employer can produce the data when needed. Section 1904.32(b)(5), requires employers to post a copy of the Annual Summary in each establishment, where notices are normally posted [see 1903.2(a)], no later than February 1 of the year following the year covered by the records and kept in place until April 30. Only the OSHA 300-A Summary form should be posted.

LETTERS OF INTERPRETATION: Section 1904.32

Section 1904.32 Annual summary

OSHA requirements are set by statute, standards and regulations. Letters of interpretation explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. These letters constitute OSHA's interpretation of the requirements discussed. Note that OSHA enforcement guidance may be affected by changes to OSHA rules. Also, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA's website at <http://www.osha.gov>.

Letters of Interpretation constitute OSHA's interpretation only of the requirements discussed and may not be applicable to any situation not delineated within the original correspondence.

Letter of interpretation related to sections 1904.26(b)(6), 1904.29(b)(10), 1904.32(a)(4) and 1904.32(b)(6) – **Posting requirements for the OSHA 300 Log and OSHA 300-A Summary Form.**

December 18, 2003

Ms. Alana Greer
American Civil Liberties Union of Florida
4500 Biscayne Boulevard, Suite 340
Miami, FL 33137-3227

Dear Ms. Greer:

This is in response to your letter dated July 9, 2003. Please excuse the delay in our response. Thank you for your comments pertaining to the Occupational Safety and Health Administration's (OSHA) Injury and Illness Recording and Reporting requirements contained in 29 CFR Part 1904. You state that your office has received several complaints regarding the medical privacy of employees regarding the recordkeeping requirements. Specifically, you ask OSHA to clarify the appropriateness of posting the entire OSHA 300 form (the Log of Work-Related Injuries and Illnesses) at the employer's establishment.

You are correct in your understanding that, while employers are required to complete both OSHA Form 300 Log of Work-Related Injuries and Illnesses and OSHA Form 300-A Summary of Work-Related Injuries and Illnesses, only the latter, Form 300-A, is required to be posted in the workplace.

Despite the fact that only the Summary Form 300-A is required to be posted, some employers apparently have posted both the Form 300 and Form 300-A in the workplace. You suggest that further clarification is needed with the recordkeeping forms or elsewhere, making clear to employers that the Form 300 should not be posted along with the Summary Form 300-A.

The instructions that accompany the OSHA recordkeeping forms do include the following Question and Answer: "When must you post the Summary? You must post the Summary only--not the Log--by February 1 of the year following the year covered by the form and keep it posted until April 30 of that year."

We will take additional steps to emphasize the distinction between the Form 300 and the Form 300-A and the fact that only the latter is required to be posted in the workplace, through News Releases that we issue that remind employers of the posting requirement, and including this issue under the Frequently Asked Questions on the Recordkeeping Section of our website. Your assistance in also making employers aware of this distinction is appreciated.

I do want to make one further point of clarification. While our rules do not require the Form 300 to be posted (and we will attempt to communicate that more clearly, as described above), the regulation also does not prohibit an employer from posting the Form 300 along with the Form 300-A. However, if the employer does choose to post the full Form 300 Log, they should post the Log in an area only accessible by those granted access under the rule (*i.e.*, employees, former employees, employee representatives, and an authorized employee representative). If the posting area is accessible by others (*e.g.*, members of the public) the employer must remove or hide all names of the injured or ill employees as set out in Section 1904.29(b)(10). In addition, 1910.29 prohibits the employer from including the employee's name for "privacy concern" cases whenever the Form 300 Log is made available to coworkers, former employees, or employee representatives.

Thank you for your interest in occupational safety and health. We hope you find this information helpful. OSHA requirements are set by statute, standards, and regulations. Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. This letter constitutes OSHA's interpretation of the requirements discussed. Note that our enforcement guidance may be affected by changes to OSHA rules. Also, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA's website at <http://www.osha.gov>. If you have any further questions, please contact the Division of Recordkeeping Requirements, at 202-693-1702.

Sincerely,

John L. Henshaw
Assistant Secretary

Section 1904.33 Retention and updating

(66 FR 6131, Jan. 19, 2001)

REGULATION: Section 1904.33

Subpart D – Other OSHA injury and illness recordkeeping requirements

(66 FR 6130, Jan. 19, 2001)

(a) Basic requirement.

You must save the OSHA 300 Log, the privacy case list (if one exists), the annual summary, and the OSHA 301 Incident Report forms for five (5) years following the end of the calendar year that these records cover.

(b) Implementation.

(1) *Do I have to update the OSHA 300 Log during the five-year storage period?*

Yes, during the storage period, you must update your stored OSHA 300 Logs to include newly discovered recordable injuries or illnesses and to show any

changes that have occurred in the classification of previously recorded injuries and illnesses. If the description or outcome of a case changes, you must remove or line out the original entry and enter the new information.

(2) *Do I have to update the annual summary?*

No, you are not required to update the annual summary, but you may do so if you wish.

(3) *Do I have to update the OSHA 301 Incident Reports?*

No, you are not required to update the OSHA 301 Incident Reports, but you may do so if you wish.

PREAMBLE DISCUSSION: Section 1904.33

(66 FR 6048-6050, Jan. 19, 2001)

The following are selected excerpts from the preamble to the Occupational Injury and Illness Recording and Reporting Requirements, the Recordkeeping rule (66 FR 5916, 29 CFR Parts 1904 and 1952). These excerpts represent some of the key discussions related to the final rule (66 FR 6122, 29 CFR Parts 1904 and 1952).

Section 1904.33 Retention and updating.

Section 1904.33 of the final rule deals with the retention and updating of the OSHA Part 1904 records after they have been created and summarized. The final rule requires the employer to save the OSHA 300 Log, the Annual Summary, and the OSHA 301 Incident Report forms for five years following the end of the calendar year covered by the records. The final rule also requires the employer to update the entries on the OSHA 300 Log to include newly discovered cases and show changes that have occurred to previously recorded cases. The provisions in section 1904.33 state that the employer is not required to update the 300A Annual Summary or the 301 Incident Reports, although the employer is permitted to update these forms if he or she wishes to do so.

The final rule requires employers to retain their OSHA 300 and 301 records for five years following the end of the year to which the records apply. Additionally, employers must update their OSHA 300

Logs under two circumstances. First, if the employer discovers a recordable injury or illness that has not previously been recorded, the case must be entered on the forms. Second, if a previously recorded injury or illness turns out, based on later information, not to have been recorded properly, the employer must modify the previous entry. For example, if the description or outcome of a case changes (a case requiring medical treatment becomes worse and the employee must take days off work to recuperate), the employer must remove or line out the original entry and enter the new information. The employer also has a duty to enter the date of an employee's return to work or the date of an injured worker's death on the Form 301; OSHA considers the entering of this information an integral part of the recordkeeping for such cases. The Annual Summary and the Form 301 need not be updated, unless the employer wishes to do so. The requirements in this section 1904.33 do not affect or supersede any longer retention periods

specified in other OSHA standards and regulations, *e.g.*, in OSHA health standards such as Cadmium, Benzene, or Lead (29 CFR 1910.1027, 1910.1028, and 1910.1025, respectively)....

In this final rule, OSHA has decided to retain the five-year retention requirement for OSHA injury and illness records because the longer time period will enable employers, employees, and researchers to obtain sufficient data to discover patterns and trends of illnesses and injuries and, in many cases, to demonstrate the statistical significance of such data.

In addition, OSHA has concluded that the five-year retention period will add little additional cost or administrative burden, since relatively few cases will surface more than three years after the injury and illness occurred, and the vast majority of cases are resolved in a short time and do not require updating. In addition, OSHA believes that other provisions of the final rule (*e.g.*, computerization of records, centralized recordkeeping, and the capping of day counts) will significantly reduce the recordkeeping costs and administrative burden associated with the tracking of long-term cases....

...The final rule requires Log updates to be made on a continuing basis, *i.e.*, as new information is discovered. For example, if a new case is discovered

during the retention period, it must be recorded within 7 calendar days of discovery, the same interval required for the recording of any new case. If new information about an existing case is discovered, it should be entered within 7 days of receiving the new information. OSHA has also decided to require updating over the entire five-year retention period....

OSHA has decided not to require the updating of annual summaries. Eliminating this requirement from the final rule will minimize employers' administrative burdens and costs, avoid duplication, and avoid the complications associated with the certification of updated summaries, the replacement of posted summaries, and the transmission of summaries to remote sites. The Agency concludes that updating the OSHA Form 300 or its equivalent for a period of five years will provide a sufficient amount of accurate information for recordkeeping purposes. OSHA is persuaded that updating the year-end summary would provide little benefit as long as the information from which the summaries are derived (the OSHA Form 300) is updated for a full five-year period....

...[T]he final rule makes it clear that employers may, if they choose, update either the Summary or the Form 301.

FREQUENTLY ASKED QUESTIONS: Section 1904.33 (OSHA Instruction, CPL 2-0.135, Chap. 5)

Section 1904.33 Retention and updating

This section will be developed as letters of interpretation become available.

LETTERS OF INTERPRETATION: Section 1904.33

Section 1904.33 Retention and updating

This section will be developed as letters of interpretation become available.

Section 1904.34 Change in business ownership

(66 FR 6132, Jan. 19, 2001)

REGULATION: Section 1904.34

Subpart D – Other OSHA injury and illness recordkeeping requirements

(66 FR 6130, Jan. 19, 2001)

If your business changes ownership, you are responsible for recording and reporting work-related injuries and illnesses only for that period of the year during which you owned the establishment. You must transfer the Part 1904 records to the new owner. The new

owner must save all records of the establishment kept by the prior owner, as required by Section 1904.33 of this Part, but need not update or correct the records of the prior owner.

PREAMBLE DISCUSSION: Section 1904.34

(66 FR 6050, Jan. 19, 2001)

The following are selected excerpts from the preamble to the Occupational Injury and Illness Recording and Reporting Requirements, the Recordkeeping rule (66 FR 5916, 29 CFR Parts 1904 and 1952). These excerpts represent some of the key discussions related to the final rule (66 FR 6122, 29 CFR Parts 1904 and 1952).

Section 1904.34 Change in business ownership

Section 1904.34 of the final rule addresses the situation that arises when a particular employer ceases operations at an establishment during a calendar year, and the establishment is then operated by a new employer for the remainder of the year. The phrase “change of ownership,” for the purposes of this section, is relevant only to the transfer of the responsibility to make and retain OSHA-required injury and illness records. In other words, if one employer, as defined by the OSH Act, transfers ownership of an establishment to a different employer, the new entity becomes responsible for retaining the previous employer’s past OSHA-required records and for creating all new records required by this rule.

The final rule requires the previous owner to

transfer these records to the new owner, and it limits the recording and recordkeeping responsibilities of the previous employer only to the period of the prior owner. Specifically, section 1904.34 provides that if the business changes ownership, each employer is responsible for recording and reporting work-related injuries and illnesses only for that period of the year during which each employer owned the establishment. The selling employer is required to transfer his or her Part 1904 records to the new owner, and the new owner must save all records of the establishment kept by the prior owner. However, the new owner is not required to update or correct the records of the prior owner, even if new information about old cases becomes available....

FREQUENTLY ASKED QUESTIONS: Section 1904.34 (OSHA Instruction, CPL 2-0.135, Chap. 5)

Section 1904.34 Change in business ownership

This section will be developed as letters of interpretation become available.

LETTERS OF INTERPRETATION: Section 1904.34

Section 1904.34 Change in business ownership

This section will be developed as letters of interpretation become available.

Section 1904.35 Employee involvement

(66 FR 6132, Jan. 19, 2001)

REGULATION: Section 1904.35

Subpart D – Other OSHA injury and illness recordkeeping requirements

(66 FR 6132, Jan. 19, 2001)

(a) Basic requirement.

Your employees and their representatives must be involved in the recordkeeping system in several ways.

(1) You must inform each employee of how he or she is to report an injury or illness to you.

(2) You must provide limited access to your injury and illness records for your employees and their representatives.

(b) Implementation.

(1) *What must I do to make sure that employees report work-related injuries and illnesses to me?*

(i) You must set up a way for employees to report work-related injuries and illnesses promptly; and

(ii) You must tell each employee how to report work-related injuries and illnesses to you.

(2) *Do I have to give my employees and their representatives access to the OSHA injury and illness records?*

Yes, your employees, former employees, their personal representatives, and their authorized employee representatives have the right to access the OSHA injury and illness records, with some limitations, as discussed below.

(i) *Who is an authorized employee representative?*

An authorized employee representative is an authorized collective bargaining agent of employees.

(ii) *Who is a “personal representative” of an employee or former employee?*

A personal representative is:

(A) Any person that the employee or former employee designates as such, in writing; or

(B) The legal representative of a deceased or legally incapacitated employee or former employee.

(iii) *If an employee or representative asks for access to the OSHA 300 Log, when do I have to provide it?*

When an employee, former employee, personal representative, or authorized employee representative asks for copies of your current or stored OSHA 300 Log(s) for an establishment the employ-

ee or former employee has worked in, you must give the requester a copy of the relevant OSHA 300 Log(s) by the end of the next business day.

(iv) *May I remove the names of the employees or any other information from the OSHA 300 Log before I give copies to an employee, former employee, or employee representative?*

No, you must leave the names on the 300 Log. However, to protect the privacy of injured and ill employees, you may not record the employee’s name on the OSHA 300 Log for certain “privacy concern cases,” as specified in paragraphs 1904.29(b)(6) through 1904.29(b)(9).

(v) *If an employee or representative asks for access to the OSHA 301 Incident Report, when do I have to provide it?*

(A) When an employee, former employee, or personal representative asks for a copy of the OSHA 301 Incident Report describing an injury or illness to that employee or former employee, you must give the requester a copy of the OSHA 301 Incident Report containing that information by the end of the next business day.

(B) When an authorized employee representative asks for copies of the OSHA 301 Incident Reports for an establishment where the agent represents employees under a collective bargaining agreement, you must give copies of those forms to the authorized employee representative within 7 calendar days. You are only required to give the authorized employee representative information from the OSHA 301 Incident Report section titled “Tell us about the case.” You must remove all other information from the copy of the OSHA 301 Incident Report or the equivalent substitute form that you give to the authorized employee representative.

(vi) *May I charge for the copies?*

No, you may not charge for these copies the first time they are provided. However, if one of the designated persons asks for additional copies, you may assess a reasonable charge for retrieving and copying the records.

PREAMBLE DISCUSSION: Section 1904.35

(66 FR 6050-6060, Jan. 19, 2001)

The following are selected excerpts from the preamble to the Occupational Injury and Illness Recording and Reporting Requirements, the Recordkeeping rule (66 FR 5916, 29 CFR Parts 1904 and 1952). These excerpts represent some of the key discussions related to the final rule (66 FR 6122, 29 CFR Parts 1904 and 1952).

Section[s] 1904.35 Employee Involvement....

One of the goals of the final rule is to enhance employee involvement in the recordkeeping process. OSHA believes that employee involvement is essential to the success of all aspects of an employer's safety and health program. This is especially true in the area of recordkeeping, because free and frank reporting by employees is the cornerstone of the system. If employees fail to report their injuries and illnesses, the "picture" of the workplace that the employer's OSHA forms 300 and 301 reveal will be inaccurate and misleading. This means, in turn, that employers and employees will not have the information they need to improve safety and health in the workplace.

Section 1904.35 of the final rule therefore establishes an affirmative requirement for employers to involve their employees and employee representatives in the recordkeeping process. The employer must inform each employee of how to report an injury or illness, and must provide limited access to the injury and illness records for employees and their representatives....

Under the employee involvement provisions of the final rule, employers are required to let employees know how and when to report work-related injuries and illnesses. This means that the employer must establish a procedure for the reporting of work-related injuries and illnesses and train its employees to use that procedure. The rule does not specify how the employer must accomplish these objectives. The size of the workforce, employees' language proficiency and literacy levels, the workplace culture, and other factors will determine what will be effective for any particular workplace.

...The prominent employee involvement issues in the rulemaking were thus not whether employee involvement should be strengthened but to what extent and in what ways employees should be brought into the process.

...OSHA has strengthened the final rule to promote better injury and illness information by increasing employees' knowledge of their employers' recordkeeping program and by removing barriers

that may exist to the reporting of work-related injuries and illnesses. To achieve this goal, the final rule establishes a simple two-part process for each employer who is required to keep records, as follows:

- Set up a way for employees to report work-related injuries and illnesses promptly; and
- Inform each employee of how to report work-related injuries and illnesses.

OSHA agrees with commenters that employees must know and understand that they have an affirmative obligation to report injuries and illnesses. Additionally, OSHA believes that many employers already take these actions as a common sense approach to discovering workplace problems, and that the rule will thus, to a large extent, be codifying current industry practice, rather than breaking new ground.

OSHA is convinced that a performance requirement, rather than specific requirements, will achieve this objective effectively, while still giving employers the flexibility they need to tailor their programs to the needs of their workplaces. The Agency finds that employee awareness and participation in the recordkeeping process is best achieved by such provisions of the final rule as the requirement to extend the posting period for the OSHA 300 summary, the addition of accessibility statements on the OSHA Summary, and requirements designed to facilitate employee access to records....

Employee access to OSHA injury and illness records

The Part 1904 final rule continues OSHA's long-standing policy of allowing employees and their representatives access to the occupational injury and illness information kept by their employers, with some limitations. However, the final rule includes several changes to improve employees' access to the information, while at the same time implementing several measures to protect the privacy interests of injured and ill employees. Section 1904.35 requires an employer covered by the Part

1904 regulation to provide limited access to the OSHA recordkeeping forms to current and former employees, as well as to two types of employee representatives. The first is a personal representative of an employee or former employee, who is a person that the employee or former employee designates, in writing, as his or her personal representative, or is the legal representative of a deceased or legally incapacitated employee or former employee. The second is an authorized employee representative, which is defined as an authorized collective bargaining agent of one or more employees working at the employer's establishment.

Section 1904.35 accords employees and their representatives three separate access rights. First, it gives any employee, former employee, personal representative, or authorized employee representative the right to a copy of the current OSHA 300 Log, and to any stored OSHA 300 log(s), for any establishment in which the employee or former employee has worked. The employer must provide one free copy of the OSHA 300 Log(s) by the end of the next business day. The employee, former employee, personal representative or authorized employee representative is not entitled to see, or to obtain a copy of, the confidential list of names and case numbers for privacy cases. Second, any employee, former employee, or personal representative is entitled to one free copy of the OSHA 301 Incident Report describing an injury or illness to that employee by the end of the next business day. Finally, an authorized employee representative is entitled to copies of the right-hand portion of all OSHA 301 forms for the establishment(s) where the agent represents one or more employees under a collective bargaining agreement. The right-hand portion of the 301 form contains the heading ["Information about the case,"] and elicits information about how the injury occurred, including the employee's actions just prior to the incident, the materials and tools involved, and how the incident occurred, but does not contain the employee's name. No information other than that on the right-hand portion of the form may be disclosed to an authorized employee representative. The employer must provide the authorized employee representative with one free copy of all the 301 forms for the establishment within 7 calendar days.

Employee privacy is protected in the final rule in paragraphs 1904.29(b)(7) to (10). Paragraph 1904.29(b)(7) requires the employer to enter the words "privacy case" on the OSHA 300 Log, in lieu

of the employee's name, for recordable privacy concern cases involving the following types of injuries and illnesses: (i) an injury from a needle or sharp object contaminated by another person's blood or other potentially infectious material; (ii) an injury or illness to an intimate body part or to the reproductive system; (iii) an injury or illness resulting from a sexual assault; (iv) a mental illness; (v) an illness involving HIV, hepatitis; or tuberculosis, or (vi) any other illness, if the employee independently and voluntarily requests that his or her name not be entered on the log....

The employer may take additional action in privacy concern cases if warranted. Paragraph 1904.29(b)(9) allows the employer to use discretion in describing the nature of the injury or illness in a privacy concern case, if the employer has a reasonable basis to believe that the injured or ill employee may be identified from the records even though the employee's name has been removed. Only the six types of injuries and illnesses listed in Paragraph 1904.29(b)(7) may be considered privacy concern cases, and thus the additional protection offered by paragraph 1904.29(b)(9) applies only to such cases.

Paragraph 1904.29(b)(10) protects employee privacy if the employer decides voluntarily to disclose the OSHA 300 and 301 forms to persons other than those who have a mandatory right of access under the final rule. The paragraph requires the employer to remove or hide employees' names or other personally identifying information before disclosing the forms to persons other than government representatives, employees, former employees or authorized representatives, as required by paragraphs 1904.40 and 1904.35, except in three cases. The employer may disclose the forms, complete with personally identifying information, only: (i) to an auditor or consultant hired by the employer to evaluate the safety and health program; (ii) to the extent necessary for processing a claim for workers' compensation or other insurance benefits; or (iii) to a public health authority or law enforcement agency for uses and disclosures for which consent, an authorization, or opportunity to agree or object is not required under section 164.512 of the final rule on Standards for Privacy of Individually Identifiable Health Information, 45 CFR 164.512....

Balancing the Interests of Privacy and Access

OSHA historically has recognized that the Log and Incident Report (Forms 300 and 301, respectively)

may contain information of a sufficiently intimate and personal nature that a reasonable person would wish it to remain confidential. In its 1978 records access regulation (29 CFR 1910.1020), OSHA addressed the privacy implications of its decision to grant employee access to the Log. The agency noted that while Log entries are intended to be brief, they may contain medical information, including diagnoses of specific illnesses, and that disclosure to other employees, former employees or their representatives raised a sensitive privacy issue. 43 FR 31327 (1978). However, OSHA concluded that disclosure of the Log to current and former employees and their representatives benefits these employees generally by increasing their awareness and understanding of the health and safety hazards to which they are, or have been, exposed.

OSHA found that this knowledge “will help employees to protect themselves from future occurrences,” and that “[i]n such cases, the right of privacy must be tempered by the obvious exigencies of informing employees about the effects of workplace hazards.”...

OSHA continues to believe that granting employees a broad right of access to injury and illness records serves important public interests. There is persuasive evidence that access by employees and their representatives to the Log and the Incident Report serves as a useful check on the accuracy of the employer’s recordkeeping and promotes greater employee involvement in prevention programs that contribute to safer, more healthful workplaces....

There exist at present no mechanisms to protect against unwarranted disclosure of private information contained in OSHA records. While Agency policy is that employees and their representatives with access to records should treat the information contained therein as confidential except as necessary to further the purposes of the Act, the Secretary lacks statutory authority to enforce such a policy against employees and representatives (*e.g.*, 29 U.S.C. Sections 658, 659) (Act’s enforcement mechanisms directed solely at employers)....

OSHA has concluded that the disclosure of occupational injury and illness records to employees and their representatives serves important public policy interests. These interests support a requirement for access by employees and their representatives to personally identifiable information for all but a limited number of cases recorded on the Log, and to all information on the right-

hand side of the Form 301. However, OSHA also concludes that prior Agency access policies may not have given adequate consideration to the harm which could result from disclosure of intimate medical information. In the absence of effective safeguards against unwarranted use or disclosure of private information in the injury and illness records, confidentiality must be preserved for particularly sensitive cases. These “privacy concern cases” listed in paragraph 1904.29 (b)(7) of the final rule involve diseases, such as AIDS and hepatitis, other illnesses if the employee voluntarily requests confidentiality, as well as certain types of injuries, the disclosure of which could be particularly damaging or embarrassing to the affected employee....

...[T]he final rule requires that the employer withhold the employee’s name from the OSHA 300 Log for each “privacy concern case,” and maintain a separate confidential list of employee names and case numbers. In all other respects, the final rule ensures full access to the OSHA Log by employees, former employees, personal representatives and authorized employee representatives.

Protections Against Broad Public Access

...OSHA agrees that confidentiality of injury and illness records should be maintained except for those persons with a legitimate need to know the information. This is a logical extension of the agency’s position that a balancing test is appropriate in determining the scope of access to be granted employees and their representatives. Under this test, “the fact that protected information must be disclosed to a party who has need for it* * * does not strip the information of its protection against disclosure to those who have no similar need.” *Fraternal Order of Police*, 812 F2d at 118.

OSHA has determined that employees, former employees and authorized employee representatives have a need for the information that justifies their access to records, including employee names, for all except privacy concern cases. While the possibility exists that employees and their representatives with access to the records could disclose the information to the general public, OSHA does not believe that this risk is sufficient to justify restrictions on the use of the records by persons granted access under sections 1904.40 and 1904.35. Strong policy and legal considerations militate against placing restrictions on employees’ and employee representatives’ use of the injury and illness infor-

mation.

There is also a concern that employers may voluntarily grant access to OSHA records to persons outside their organization, who do not need the information for safety and health purposes. To protect employee confidentiality in these circumstances, paragraph 1904.29(b)(10) requires employers generally to remove or shield employee names and other personally identifying information when they disclose the OSHA forms to persons other than government representatives, employees, former employees or authorized employee representatives. Employers remain free to disclose unredacted records for purposes of evaluating a safety and health program or safety and health conditions at the workplace, processing a claim for workers' compensation or insurance benefits, or carrying out the public health or law enforcement functions described in section 164.512 of the final rule on Standards for Privacy of Individually Identifiable Health Information.

OSHA believes that this provision protects employee privacy to a reasonable degree consistent with the legitimate business needs of employers and sound public policy considerations....

Misuse of the Records by Employees and Their Representatives

...While there may be instances where employees share the data with third parties who normally would not be allowed to access the data directly, the final rule contains no enforceable restrictions on use by employees or their representatives. Employees and their representatives might reasonably fear that they could be found personally liable for violations of such restrictions. This would have a chilling effect on employees' willingness to use the records for safety and health purposes, since few employees would voluntarily risk such liability. Moreover, despite the concerns of commenters about abuse problems, OSHA has not noted any significant problems of this type in the past. This suggests that, if such problems exist, they are infrequent. In addition, as noted in the privacy discussion above, a prohibition on the use of the data by employees or their representatives is beyond the scope of OSHA's enforcement authority. For these reasons, the employer may not require an employee, former employee or designated employee representative to agree to limit the use of the records as a condition for viewing or obtaining copies of records.

OSHA has added a statement to the Log and Incident Report forms indicating that these records contain information related to employee health and must be used in a manner that protects the confidentiality of employees to the extent possible while the information is used for occupational safety and health purposes. This statement is intended to inform employees and their representatives of the potentially sensitive nature of the information in the OSHA records and to encourage them to maintain employee confidentiality if compatible with the safety and health uses of the information. Encouraging parties with access to the forms to keep the information confidential where possible is reasonable and should not discourage the use of the information for safety and health purposes. OSHA stresses, however, that the statement does not reflect a regulatory requirement limiting the use of records by those with access under sections 1904.35 and 1904.40.

The Records Access Requirement and the ADA

...Section 12112(d)(3)(B) of the ADA permits an employer to require a job applicant to submit to a medical examination after an offer of employment has been made but before commencement of employment duties, provided that medical information obtained from the examination is kept in a confidential medical file and not disclosed except as necessary to inform supervisors, first aid and safety personnel, and government officials investigating compliance with the ADA. Section 12112(d)(4)(C) requires that the same confidentiality protection be accorded health information obtained from a voluntary medical examination that is part of an employee health program.

By its terms, the ADA requires confidentiality for information obtained from medical examinations given to prospective employees, and from medical examinations given as part of a voluntary employee health program. The OSHA injury and illness records are not derived from pre-employment or voluntary health programs. The information in the OSHA injury and illness records is similar to that found in workers' compensation forms, and may be obtained by employers by the same process used to record needed information for workers' compensation and insurance purposes. The Equal Employment Opportunity Commission (EEOC) recognizes a partial exception to the ADA's strict confidentiality requirements for medical information regarding an employee's occupational injury or

workers' compensation claim. See *EEOC Enforcement Guidance: Workers' Compensation and the ADA*, 5 (September 3, 1996). Therefore, it is not clear that the ADA applies to the OSHA injury and illness records.

Even assuming that the OSHA injury and illness records fall within the literal scope of the ADA's confidentiality provisions, it does not follow that a conflict arises. The ADA states that "nothing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law. * * *" 29 U.S.C. 12201(b). In enacting the ADA, Congress was aware that other federal standards imposed requirements for testing an employee's health, and for disseminating information about an employee's medical condition or history, determined to be necessary to preserve the health and safety of employees and the public. See H.R. Rep. No. 101-485 pt. 2, 101st Cong., 2d Sess. 74-75 (1990), *reprinted in* 1990 U.S.C.C.A.N. 356, 357 (noting, *e.g.*, medical surveillance requirements of standards promulgated under OSH Act and Federal Mine Safety and Health Act, and stating "[t]he Committee does not intend for [the ADA] to override any medical standard or requirement established by Federal * * * law * * * that is job-related and consistent with business necessity"). See also 29 CFR part 1630 App. p. 356. The ADA recognizes the primacy of federal safety and health regulations; therefore such regulations, including mandatory OSHA recordkeeping requirements, pose no conflict with the ADA. Cf. *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555, (1999) ("When Congress enacted the ADA, it recognized that federal safety and health rules would limit application of the ADA as a matter of law.")

The EEOC, the agency responsible for administering the ADA, has recognized both in the implementing regulations at 29 CFR part 1630, and in interpretive guidelines, that the ADA yields to the requirements of other federal safety and health standards. The implementing regulation codified at 29 CFR 1630.15(e) explicitly states that an employer's compliance with another federal law or regulation may be a defense to a charge of violating the ADA:

(e) Conflict with other Federal laws. It may be a defense to a charge of discrimination under this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular rea-

sonable accommodation) that would otherwise be required by this part.

Interpretive guidance provided by the EEOC further underscores this point. The 1992 Technical Assistance Manual on Title I of the ADA states as follows:

4.6 Health and Safety Requirements of Other Federal or State Laws

The ADA recognizes employers' obligations to comply with requirements of other laws that establish health and safety standards. However, the [ADA] gives greater weight to Federal than to state or local law.

1. Federal Laws and Regulations

The ADA does not override health and safety requirements established under other Federal laws. If a standard is required by another Federal law, an employer must comply with it and does not have to show that the standard is job related and consistent with business necessity (emphasis added).

U.S. Equal Employment Opportunity Commission, *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans With Disabilities Act*, IV-16 (1992) (Technical Assistance Manual). The Technical Assistance Manual also states that, while medical-related information about employees must generally be kept confidential, an exception applies where "[o]ther Federal laws and regulations * * * require disclosure of relevant medical information." Assistance Manual at VI-12. See also Assistance Manual at VI-14-15 (actions taken by employers to comply with requirements imposed under the OSH Act are job related and consistent with business necessity). For these reasons, OSHA does not believe that the mandatory employee access provisions of the final recordkeeping rule conflict with the provisions of the ADA.

Times Allowed To Provide Records

...Under the final rule, an employer must provide a copy of the 300 Log to an employee, former employee, personal representative or authorized employee representative on the business day following the day on which an oral or written request for records is received. Likewise, when an employee, former employee or personal representative asks for copies of the 301 form for an injury or illness to that employee, the employer must provide a copy by the

end of the next business day. OSHA finds that these are appropriate time frames for supplying a copy of the existing forms, which in the case of the Form 301 is a single page. The average 300 Log is also only one page, although employers who have a larger number of occupational injuries and illnesses will have more than one page.

The final rule allows the employer seven business days to provide copies of the OSHA 301 forms for all occupational injuries and illnesses that occur at the establishment.

...[A]s stated in the final rule, the employer may not provide the authorized employee representative with the information on the left side of the 301 form, so the employer needs additional time to redact this information. Because the final rule only provides a right of access to an authorized employee representative (authorized collective bargaining agent), the number of requests should not exceed the number of unions representing employees at the establishment.

...[T]he employer must provide only one free copy. If additional copies are requested, the employer may charge for the copies.

Charging Employees for Copies of the OSHA Records

...In the final rule, OSHA has implemented the proposed provision requiring employers to provide copies free of charge to employees who ask for the records.

...OSHA agrees that there are some circumstances where employers should have the option of charging for records. After receiving an initial, free copy of requested records, an employee, former employee, or designated representative may be charged a reasonable search and copying fee for duplicate copies of the records. However, no fee may be charged for an update of a previously requested record.

FREQUENTLY ASKED QUESTIONS: Section 1904.35 (OSHA Instruction, CPL 2-0.135, Chap. 5) **Section 1904.35 Employee involvement**

Question 35-1. *How does an employer inform each employee on how he or she is to report an injury or illness?*

Employers are required to let employees know how and when to report work-related injuries and illnesses. This means that the employer must set up a way for the employees to report work-related injuries and illnesses and tell its employees how to use it. The Recordkeeping rule does not specify how the employer must accomplish these objectives, so employers have flexibility to set up systems that are appropriate to their workplace. The size of the workforce, employee's language proficiency and literacy levels, the workplace culture, and other factors will determine what will be effective for any particular workplace.

Question 35-2. *Do I have to give my employees and their representatives access to the OSHA injury and illness records?*

Yes, your employees, former employees, their personal representatives, and their authorized employee representatives have the right to access the OSHA 300 Log Form and the OSHA 300-A Summary Form. The employer must give the requester a copy of the OSHA 300 Form and the OSHA 300-A Form by the end of the next business day. In addition, employees and their representatives have the right to access the OSHA 301 Incident Form with some limitations, in section 1904.35(b)(2)(v)(B) of the recordkeeping regulation

LETTERS OF INTERPRETATION: Section 1904.35

Section 1904.35 Employee involvement

OSHA requirements are set by statute, standards and regulations. Letters of interpretation explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. These letters constitute OSHA's interpretation of the requirements discussed. Note that OSHA enforcement guidance may be affected by changes to OSHA rules. Also, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA's website at <http://www.osha.gov>.

Letters of Interpretation constitute OSHA's interpretation only of the requirements discussed and may not be applicable to any situation not delineated within the original correspondence.

Letter of interpretation related to section 1904.35(b)(2)(iv)

OSHA 300 Log requirements versus HIPAA privacy requirements.

August 2, 2004

Mr. Bill Kojola
Industrial Hygienist
Department of Safety and Health
AFL-CIO
815 Sixteenth St., NW
Washington, DC 20006

Dear Mr. Kojola:

Thank you for your February 27, 2004 letter to the Occupational Safety and Health Administration (OSHA) regarding the Injury and Illness Recording and Reporting Requirements contained in 29 CFR Part 1904. Your letter was forwarded to my office by Richard Fairfax, Director, Directorate of Enforcement Programs. The Division of Recordkeeping Requirements, within my Directorate, is responsible for the administration of the OSHA injury and illness recordkeeping system nationwide. Please excuse the delay in responding to your request.

You state that employers are claiming they must remove all the names from the OSHA 300 Log before providing access in order to comply with the privacy requirements contained in the Health Insurance Portability and Accountability Act (HIPAA). Specifically, you ask OSHA to clarify the recordkeeping requirements contained in 29 CFR Part 1904 vs. the HIPAA requirements.

We do not believe that HIPAA provides a basis for employers to remove employees' names from the Log before providing access. Even if HIPAA is implicated by the employer's disclosure of the OSHA Log, the statute and implementing regulation expressly permit the disclosure of protected health information to the extent required by law. See 45 CFR 164.512(a). This exception for disclosures required by law applies here because the Recordkeeping rule requires that employees, former employees, and employee representatives have access to the complete Log, including employee names, except for privacy concern cases. See 29 CFR 1904.35(b)(2)(iv).

Thank you for your interest in occupational safety and health. We hope you find this information helpful. OSHA requirements are set by statute, standards, and regulations. Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. This letter constitutes OSHA's interpretation of the requirements discussed. Note that our enforcement guidance may be affected by changes to OSHA rules. Also, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA's website at <http://www.osha.gov>. If you have any further questions please contact the Division of Recordkeeping Requirements at (202) 693-1702.

Sincerely,

Keith Goddard, Director
Directorate of Evaluation and Analysis

November 7, 2003

LaMont Byrd
Director Safety and Health Department
International Brotherhood of Teamsters
25 Louisiana Avenue, N.W.
Washington, D.C. 20001-2198

Dear Mr. Byrd:

Thank you for your April 4, 2003 letter to the Occupational Safety and Health Administration (OSHA) regarding the Injury and Illness Recording and Reporting Requirements contained in 29 CFR Part 1904. Your letter was forwarded to my office by Richard Fairfax, Director, Directorate of Enforcement Programs. The Division of Recordkeeping Requirements is responsible for the administration of the OSHA injury and illness recordkeeping system nationwide. Please excuse the delay in responding to your request.

In your letter, you ask OSHA to clarify the requirements under the access provisions for the OSHA injury and illness records, 29 CFR 1904.35, specifically the OSHA 300-A, the Summary of Work-related Injuries and Illnesses. Under section 1904.35(b)(2), employees, former employees, their personal representatives, and their authorized employee representatives have the right to access the OSHA 300 Log Form and the OSHA 300-A Summary Form. The employer must give the requester a copy of the OSHA 300 Form and the OSHA 300-A Form by the end of the next business day. In addition, employees, former employees, and their representatives have the right to access the OSHA 301 Incident Form with some limitations and provision time frame differences, as set out in Section 1904.35(b)(2)(v) of the recordkeeping regulation.

Thank you for your interest in occupational safety and health. We hope you find this information helpful. OSHA requirements are set by statute, standards, and regulations. Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. This letter constitutes OSHA's interpretation of the requirements discussed. Note that our enforcement guidance may be affected by changes to OSHA rules. In addition, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA's website at <http://www.osha.gov>. If you have any further questions, please contact the Division of Recordkeeping Requirements, at 202-693-1702.

Sincerely,

Frank Frodyma, Acting Director
Directorate of Evaluation and Analysis

Section 1904.36 Prohibition against discrimination

(66 FR 6132, Jan. 19, 2001)

REGULATION: Section 1904.36

Subpart D – Other OSHA injury and illness recordkeeping requirements

(66 FR 6130, Jan. 19, 2001)

Section 1904.36 Prohibition against discrimination

Section 11(c) of the Act prohibits you from discriminating against an employee for reporting a work-related fatality, injury or illness. That provision of the Act also protects the employee who files a safety and

health complaint, asks for access to the Part 1904 records, or otherwise exercises any rights afforded by the OSH Act.

PREAMBLE DISCUSSION: Section 1904.36

(66 FR 6050, Jan. 19, 2001)

The following are selected excerpts from the preamble to the Occupational Injury and Illness Recording and Reporting Requirements, the Recordkeeping rule (66 FR 5916, 29 CFR Parts 1904 and 1952). These excerpts represent some of the key discussions related to the final rule (66 FR 6122, 29 CFR Parts 1904 and 1952).

Section 1904.36 Prohibition against discrimination

...Section 1904.36 of the final rule makes clear that Section 11(c) of the Act prohibits employers from discriminating against employees for reporting work-related injuries and illnesses. Section 1904.36 does not create a new obligation on employers. Instead, it clarifies that the OSH Act's anti-discrimination protection applies to employees who seek to participate in the recordkeeping process....

OSHA has also included in the final rule, in section 1904.36, a statement that section 11(c) of the OSH Act protects workers from employer retaliation

for filing a complaint, reporting an injury or illness, seeking access to records to which they are entitled, or otherwise exercising their rights under the rule. This section of the rule does not impose any new obligations on employers or create new rights for employees that did not previously exist. In view of the evidence that retaliation against employees for reporting injuries is not uncommon and may be "growing," this section is intended to serve the informational needs of employees who might not otherwise be aware of their rights and to remind employers of their obligation not to discriminate....

FREQUENTLY ASKED QUESTIONS: Section 1904.36 (OSHA Instruction, CPL 2-0.135, Chap. 5)

Section 1904.36 Prohibition against discrimination

This section will be developed as letters of interpretation become available.

LETTERS OF INTERPRETATION: Section 1904.36

Section 1904.36 Prohibition against discrimination

This section will be developed as letters of interpretation become available.

Section 1904.37 State recordkeeping regulations

(66 FR 6132, Jan. 19, 2001)

REGULATION: Section 1904.37

Subpart D – Other OSHA injury and illness recordkeeping requirements

(66 FR 6130, Jan. 19, 2001)

Section 1904.37 State recordkeeping regulations

(a) Basic requirement.

Some States operate their own OSHA programs, under the authority of a State Plan approved by OSHA. States operating OSHA-approved State Plans must have occupational injury and illness recording and reporting requirements that are substantially identical to the requirements in this Part (see 29 CFR 1902.3(k), 29 CFR 1952.4 and 29 CFR 1956.10(i)).

(b) Implementation.

(1) State-Plan States must have the same requirements as Federal OSHA for determining which injuries and illnesses are recordable and how they are recorded.

(2) For other Part 1904 provisions (for example, industry exemptions, reporting of fatalities and hospitalizations, record retention, or employee involvement), State-Plan State requirements may be more stringent than or supplemental to the Federal re-

quirements, but because of the unique nature of the national recordkeeping program, States must consult with and obtain approval of any such requirements.

(3) Although State and local government employees are not covered Federally, all State-Plan States must provide coverage, and must develop injury and illness statistics, for these workers. State Plan recording and reporting requirements for State and local government entities may differ from those for the private sector but must meet the requirements of paragraphs 1904.37(b)(1) and (b)(2).

(4) A State-Plan State may not issue a variance to a private sector employer and must recognize all variances issued by Federal OSHA.

(5) A State Plan State may only grant an injury and illness recording and reporting variance to a State or local government employer within the State after obtaining approval to grant the variance from Federal OSHA.

PREAMBLE DISCUSSION: Section 1904.37

(66 FR 6060, Jan. 19, 2001)

The following are selected excerpts from the preamble to the Occupational Injury and Illness Recording and Reporting Requirements, the Recordkeeping rule (66 FR 5916, 29 CFR Parts 1904 and 1952). These excerpts represent some of the key discussions related to the final rule (66 FR 6122, 29 CFR Parts 1904 and 1952).

Section 1904.37 State recordkeeping regulations

Section 1904.37 addresses the consistency of the recordkeeping and reporting requirements between Federal OSHA and those States where occupational safety and health enforcement is provided by an OSHA-approved State Plan. Currently, in 21 States and 2 territories, the State government has been granted authority to operate a State OSHA Plan covering both the private and public (State and local government) sectors under section 18 of the OSH Act (see the State Plan section of this preamble for a listing of these States). Two additional States currently operate programs limited in scope to State and local government employees only. State Plans, once

approved, operate under authority of State law and provide programs of standards, regulations and enforcement which must be “at least as effective” as the Federal program. (State Plans must extend their coverage to State and local government employees, workers not otherwise covered by Federal OSHA regulations.) Section 1904.37 of the final rule describes what State Plan recordkeeping requirements must be identical to the Federal requirements, which State regulations may be different, and provides cross references to the State Plan regulations codified in Section 1902.3(k), 1952.4, and 1956.10(i). The provisions of Subpart A of 29 CFR part 1952 specify the regulatory discretion of the State Plans in general,

and section 1952.4 spells out the regulatory discretion of the State Plans specifically for the recordkeeping regulation.

In the final rule, OSHA has rewritten the text of the corresponding proposed section and moved it into Subpart D of the final rule. Under Section 18 of the OSH Act, a State Plan must require employers in the State to make reports to the Secretary in the same manner and to the same extent as if the Plan were not in effect. Final section 1904.37 makes clear that States with approved State Plans must promulgate new regulations that are substantially identical to the final Federal rule. State Plans must have recording and reporting regulations that impose identical requirements for the recordability of occupational injuries and illnesses and the manner in which they are entered. These requirements must be the same for employers in all the States, whether under Federal or State Plan jurisdiction, and for State and local government employers covered only through State Plans, to ensure that the occupational injury and illness data for the entire nation are uniform and consistent so that statistics that allow comparisons between the States and between employers located in different States are created.

For all of the other requirements of the Part 1904 regulations, the regulations adopted by the State Plans may be more stringent than or supplemental to the Federal regulations, pursuant to paragraph 1952.4(b). This means that the States' recording and reporting regulations could differ in several ways from their Federal Part 1904 counterparts. For example, a State Plan could require employers to keep records for the State, even though those employers

are within an industry exempted by the Federal rule. A State Plan could also require employers to keep additional supplementary injury and illness information, require employers to report fatality and multiple hospitalization incidents within a shorter timeframe than Federal OSHA does, require other types of incidents to be reported as they occur, or impose other requirements. While a State Plan must assure that all employee participation and access rights are assured, the State may provide broader access to records by employees and their representatives. However, because of the unique nature of the national recordkeeping program, States must secure Federal OSHA approval for these enhancements....

Because Federal OSHA does not provide coverage to State and local government employees, the State-Plan States may grant State recordkeeping variances to the State and local governments under their jurisdiction. However, the State must obtain concurrence from Federal OSHA prior to issuing any such variances. In addition, the State-Plan States may not grant variances to any other employers and must recognize all 1904 variances granted by Federal OSHA. These steps are necessary to ensure that the injury and illness data requirements are consistent from State to State....

Accordingly, the Part 1904 rules impose identical requirements where they are needed to create consistent injury and illness statistics for the nation and allows the States to impose supplemental or more stringent requirements where doing so will not interfere with the maintenance of comprehensive and uniform national statistics on workplace fatalities, injuries and illnesses.

FREQUENTLY ASKED QUESTIONS: Section 1904.37 (OSHA Instruction, CPL 2-0.135, Chap. 5) **Section 1904.37 State recordkeeping regulations**

Question 37-1. *Do I have to follow these rules if my State has an OSHA-approved State Plan?*

If your workplace is located in a State that operates an OSHA-approved State Plan, you must follow the regulations of the State. However, these States must adopt occupational injury and illness recording and reporting requirements that are substantially identical to the requirements in Part 1904. State Plan States must have the same requirements as Federal OSHA for determining which injuries and illnesses are recordable and how they are recorded.

Question 37-2. *How may state regulations differ from the Federal requirements?*

For Part 1904 provisions other than recording and reporting, State requirements may be more stringent than or supplemental to the Federal requirements. For example, a State Plan could require employers to keep records for the State, even though those employers have 10 or fewer employees (1904.1) or are within an industry exempted by the Federal rule. A State Plan could also require employers to keep additional supplementary injury and illness informa-

tion, require employers to report fatality and multiple hospitalization incidents within a shorter time frame than Federal OSHA does (1904.39), require other types of incidents to be reported as they occur, require hearing loss to be recorded at a lower threshold level or impose other requirements.

Question 37-3. *Are State and local government employers covered by this rule?*

No, but they are covered under the equivalent State rule in States that operate OSHA-approved State Plans. State rules must cover these workplaces and require the recording and reporting of work-related

injuries and illnesses.

Question 37-4. *How can I find out if my State has an OSHA-approved plan?*

The following States have OSHA-approved plans: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. Connecticut, New Jersey, New York and the Virgin Islands have plans that cover State and local government employees only.

LETTERS OF INTERPRETATION: Section 1904.37

Section 1904.37 State recordkeeping regulations

This section will be developed as letters of interpretation become available.

Section 1904.38

Variations from the recordkeeping rule

(66 FR 6132, Jan. 19, 2001)

REGULATION: Section 1904.38

Subpart D – Other OSHA injury and illness recordkeeping requirements

(66 FR 6130, Jan. 19, 2001)

Section 1904.38 Variations from the recordkeeping rule

(a) Basic requirement.

If you wish to keep records in a different manner from the manner prescribed by the Part 1904 regulations, you may submit a variance petition to the Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, Washington, DC 20210. You can obtain a variance only if you can show that your alternative recordkeeping system:

- (1) Collects the same information as this Part requires;
- (2) Meets the purposes of the Act; and
- (3) Does not interfere with the administration of the Act.

(b) Implementation.

(1) What do I need to include in my variance petition?

You must include the following items in your petition:

- (i) Your name and address;
- (ii) A list of the State(s) where the variance would be used;
- (iii) The address(es) of the business establishment(s) involved;
- (iv) A description of why you are seeking a variance;
- (v) A description of the different recordkeeping procedures you propose to use;
- (vi) A description of how your proposed procedures will collect the same information as would be collected by this Part and achieve the purpose of the Act; and
- (vii) A statement that you have informed your employees of the petition by giving them or their authorized representative a copy of the petition and by posting a statement summarizing the petition in the same way as notices are posted under Section 1903.2(a).

(2) How will the Assistant Secretary handle my variance petition?

The Assistant Secretary will take the following steps to process your variance petition.

(i) The Assistant Secretary will offer your employees and their authorized representatives an opportunity to submit written data, views, and arguments about your variance petition.

(ii) The Assistant Secretary may allow the public to comment on your variance petition by publishing the petition in the **Federal Register**. If the petition is published, the notice will establish a public comment period and may include a schedule for a public meeting on the petition.

(iii) After reviewing your variance petition and any comments from your employees and the public, the Assistant Secretary will decide whether or not your proposed recordkeeping procedures will meet the purposes of the Act, will not otherwise interfere with the Act, and will provide the same information as the Part 1904 regulations provide. If your procedures meet these criteria, the Assistant Secretary may grant the variance subject to such conditions as he or she finds appropriate.

(iv) If the Assistant Secretary grants your variance petition, OSHA will publish a notice in the **Federal Register** to announce the variance. The notice will include the practices the variance allows you to use, any conditions that apply, and the reasons for allowing the variance.

(3) If I apply for a variance, may I use my proposed recordkeeping procedures while the Assistant Secretary is processing the variance petition?

No, alternative recordkeeping practices are only allowed after the variance is approved. You must comply with the Part 1904 regulations while the Assistant Secretary is reviewing your variance petition.

(4) If I have already been cited by OSHA for not following the Part 1904 regulations, will my variance petition have any effect on the citation and penalty?

No, in addition, the Assistant Secretary may elect not to review your variance petition if it includes an element for which you have been cited and the citation is still under review by a court, an Administrative Law Judge (ALJ), or the OSH Review Commission.

(5) *If I receive a variance, may the Assistant Secretary revoke the variance at a later date?*

Yes, the Assistant Secretary may revoke your variance if he or she has good cause. The procedures revoking a variance will follow the same process as OSHA uses for reviewing variance petitions, as outlined in paragraph 1904.38(b)(2). Except in cases of

willfulness or where necessary for public safety, the Assistant Secretary will:

- (i) Notify you in writing of the facts or conduct that may warrant revocation of your variance; and
- (ii) Provide you, your employees, and authorized employee representatives with an opportunity to participate in the revocation procedures.

PREAMBLE DISCUSSION: Section 1904.38

(66 FR 6061-6062, Jan. 19, 2001)

The following are selected excerpts from the preamble to the Occupational Injury and Illness Recording and Reporting Requirements, the Recordkeeping rule (66 FR 5916, 29 CFR Parts 1904 and 1952). These excerpts represent some of the key discussions related to the final rule (66 FR 6122, 29 CFR Parts 1904 and 1952).

Section 1904.38 Variances from the recordkeeping rule.

Section 1904.38 explains the procedures employers must follow in those rare instances where they request that OSHA grant them a variance or exception to the recordkeeping rules in Part 1904. The rule contains these procedures to allow an employer who wishes to maintain records in a manner that is different from the approach required by the rules in Part 1904 to petition the Assistant Secretary. Section 1904.8 allows the employer to apply to the Assistant Secretary for OSHA and request a Part 1904 variance if he or she can show that the alternative recordkeeping system: (1) Collects the same information as this Part requires; (2) Meets the purposes of the Act; and (3) Does not interfere with the administration of the Act.

The variance petition must include several items, namely the employer's name and address; a list of the State(s) where the variance would be used; the addresses of the business establishments involved; a description of why the employer is seeking a variance; a description of the different recordkeeping procedures the employer is proposing to use; a description of how the employer's proposed procedures will collect the same information as would be collected by the Part 1904 requirements and achieve the purpose of the Act; and a statement that the employer has informed its employees of the petition by giving them or their authorized representative a copy of the petition and by posting a statement summarizing the petition in the same way notices are posted under paragraph 1903.2(a).

The final rule describes how the Assistant Secretary will handle the variance petition by taking the following steps:

- The Assistant Secretary will offer employees and their authorized representatives an opportunity to

comment on the variance petition. The employees and their authorized representatives will be allowed to submit written data, views, and arguments about the petition.

- The Assistant Secretary may allow the public to comment on the variance petition by publishing the petition in the **Federal Register**. If the petition is published, the notice will establish a public comment period and may include a schedule for a public meeting on the petition.
- After reviewing the variance petition and any comments from employees and the public, the Assistant Secretary will decide whether or not the proposed recordkeeping procedures will meet the purposes of the Act, will not otherwise interfere with the Act, and will provide the same information as the Part 1904 regulations provide. If the procedures meet these criteria, the Assistant Secretary may grant the variance subject to such conditions as he or she finds appropriate.
- If the Assistant Secretary grants the variance petition, OSHA will publish a notice in the **Federal Register** to announce the variance. The notice will include the practices the variance allows, any conditions that apply, and the reasons for allowing the variance.

The final rule makes clear that the employer may not use the proposed recordkeeping procedures while the Assistant Secretary is processing the variance petition and must wait until the variance is approved. The rule also provides that, if the Assistant Secretary denies the petition, the employer will receive notice of the denial within a reasonable time and establishes that a variance petition has no effect on the citation and penalty for a citation that has been previously issued by OSHA and that the Assistant Secretary may elect not to review a variance petition if it includes an element which has been

cited and the citation is still under review by a court, an Administrative Law Judge (ALJ), or the OSH Review Commission.

The final rule also states that the Assistant Secretary may revoke a variance at a later date if the Assistant Secretary has good cause to do so, and that the procedures for revoking a variance will follow the same process as OSHA uses for reviewing variance petitions. Except in cases of willfulness or where necessary for public safety, the Assistant Secretary will: Notify the employer in writing of the facts or conduct that may warrant revocation of a variance and provide the employer, employees, and authorized employee representatives with an opportunity to participate in the revocation procedures....

The final rule adds several provisions to those of the former rule. They include (1) the identification of petitioning employers' pending citations in State plan states, (2) the discretion given to OSHA not to consider a petition if a citation on the same subject matter is pending, (3) the clarification that OSHA may provide additional notice via the **Federal Register** and opportunity for comment, (4) the clarification that variances have only prospective effect, (5) the opportunity of employees and their representatives to participate in revocation procedures, and (6) the voiding of all previous variances and exceptions....

OSHA has decided to continue to include a specific recordkeeping variance section in the final rule, and not to require employers who wish a recordkeeping variance or exception to follow the more rigorous procedures in 29 CFR Part 1905. The procedures in Part 1905, which were developed for rules

issued under sections 6 and 16 of the OSH Act, may not be appropriate for rules issued under section 8 of the Act, such as this recordkeeping rule.

The final rule thus retains a section on variance procedures for the recordkeeping rule. OSHA believes that few variances or exceptions will be granted under the variance procedures of the final rule because other provisions of the final rule already reflect many of the alternative recordkeeping procedures that employers have asked to use over the years, such as electronic storage and transmission of data, centralized record maintenance, and the use of alternative recordkeeping forms. Because these changes have been made to other sections of the final rule, there should be little demand for variances or exceptions....

Paragraph (i) of the final rule supports paragraph (c)(7) from this same section because it provides a mechanism for giving OSHA notice of a citation pending before a state agency. Paragraph (i) also clarifies that variances only apply to future events, not to past practices. Paragraph (j) of section 1904.38 of the final rule nullifies all prior variances and exceptions. OSHA believes that it is important to begin with a "clean slate" when the final recordkeeping rule goes into effect. Employers with existing variances can repetition the agency if the rule does not address their needs. Another addition to the final rule makes explicit that OSHA can provide additional public notice via the **Federal Register** and may offer additional opportunity for public comment. A final addition recognizes and makes clear that employees can participate in variance revocation proceedings.

FREQUENTLY ASKED QUESTIONS: Section 1904.38 (OSHA Instruction, CPL 2-0.135, Chap. 5)

Section 1904.38 Variances from the recordkeeping rule

This section will be developed as letters of interpretation become available.

LETTERS OF INTERPRETATION: Section 1904.38

Section 1904.38 Variances from the recordkeeping rule

This section will be developed as letters of interpretation become available.

Section 1904.39

Reporting fatalities and multiple hospitalization incidents to OSHA

(66 FR 6133, Jan. 19, 2001)

REGULATION: Section 1904.39

Subpart E – Reporting fatality, injury and illness information to the government

(66 FR 6133, Jan. 19, 2001)

Section 1904.39 Reporting fatalities and multiple hospitalization incidents to OSHA

(a) Basic requirement.

Within eight (8) hours after the death of any employee from a work-related incident or the inpatient hospitalization of three or more employees as a result of a work-related incident, you must orally report the fatality/multiple hospitalization by telephone or in person to the Area Office of the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor, that is nearest to the site of the incident. You may also use the OSHA toll-free central telephone number, 1-800-321-OSHA (1-800-321-6742).

(b) Implementation.

(1) *If the Area Office is closed, may I report the incident by leaving a message on OSHA's answering machine, faxing the area office, or sending an e-mail?*

No, if you can't talk to a person at the Area Office, you must report the fatality or multiple hospitalization incident using the 800 number.

(2) *What information do I need to give to OSHA about the incident?*

You must give OSHA the following information for each fatality or multiple hospitalization incident:

- (i) The establishment name;
- (ii) The location of the incident;
- (iii) The time of the incident;
- (iv) The number of fatalities or hospitalized employees;
- (v) The names of any injured employees;
- (vi) Your contact person and his or her phone number; and
- (vii) A brief description of the incident.

(3) *Do I have to report every fatality or multiple hospitalization incident resulting from a motor vehicle accident?*

No, you do not have to report all of these incidents. If the motor vehicle accident occurs on a public street or highway, and does not occur in a construction work zone, you do not have to report the incident to OSHA. However, these injuries must be recorded on your OSHA injury and illness records, if you are required to keep such records.

(4) *Do I have to report a fatality or multiple hospitalization incident that occurs on a commercial or public transportation system?*

No, you do not have to call OSHA to report a fatality or multiple hospitalization incident if it involves a commercial airplane, train, subway or bus accident. However, these injuries must be recorded on your OSHA injury and illness records, if you are required to keep such records.

(5) *Do I have to report a fatality caused by a heart attack at work?*

Yes, your local OSHA Area Office director will decide whether to investigate the incident, depending on the circumstances of the heart attack.

(6) *Do I have to report a fatality or hospitalization that occurs long after the incident?*

No, you must only report each fatality or multiple hospitalization incident that occurs within thirty (30) days of an incident.

(7) *What if I don't learn about an incident right away?*

If you do not learn of a reportable incident at the time it occurs and the incident would otherwise be reportable under paragraphs (a) and (b) of this section, you must make the report within eight (8) hours of the time the incident is reported to you or to any of your agent(s) or employee(s).

PREAMBLE DISCUSSION: Section 1904.39

(66 FR 6062-6065, Jan. 19, 2001)

The following are selected excerpts from the preamble to the Occupational Injury and Illness Recording and Reporting Requirements, the Recordkeeping rule (66 FR 5916, 29 CFR Parts 1904 and 1952). These excerpts represent some of the key discussions related to the final rule (66 FR 6122, 29 CFR Parts 1904 and 1952).

Section 1904.39 Reporting fatalities and multiple hospitalization incidents to OSHA

Paragraph (a) of section 1904.39 of the final rule requires an employer to report work-related events or exposures involving fatalities or the in-patient hospitalization of three or more employees to OSHA. The final rule requires the employer, within 8 hours after the death of any employee from a work-related incident or the in-patient hospitalization of three or more employees as a result of a work-related incident, to orally report the fatality/multiple hospitalization by telephone or in person to the Area Office of the Occupational Safety and Health Administration (OSHA), or to OSHA via the OSHA toll-free central telephone number, 1-800-321-6742.

The rule makes clear in paragraph 1904.39(b)(1) that an employer may not report the incident by leaving a message on OSHA's answering machine, faxing the Area Office, or sending an e-mail, but may report the fatality or multiple hospitalization incident using the OSHA 800 number. The employer is required by paragraph 1904.39(b)(2) to report several items of information for each fatality or multiple hospitalization incident: the establishment name, the location of the incident, the time of the incident, the number of fatalities or hospitalized employees, the names of any injured employees, the employer's contact person and his or her phone number, and a brief description of the incident.

As stipulated in paragraph 1904.39(b)(3), the rule does not require an employer to call OSHA to report a fatality or multiple hospitalization incident if it involves a motor vehicle accident that occurs on a public street or highway and does not occur in a construction work zone. Employers are also not required to report a commercial airplane, train, subway or bus accident (paragraph 1904.39(b)(4)). However, these injuries must still be recorded on the employer's OSHA 300 and 301 forms, if the employer is required to keep such forms. Because employers are often unsure about whether they must report a fatality caused by a heart attack at work, the final rule stipulates, at paragraph 1904.39(b)(5), that such heart attacks must be reported, and states that the local OSHA Area Office director will decide whether to investigate the incident, depending on the circum-

stances of the heart attack.

Paragraph 1904.39(b)(6) of the final rule clarifies that the employer is not required to report a fatality or hospitalization that occurs more than thirty (30) days after an incident, and paragraph 1904.39(b)(7) states that, if the employer does not learn about a reportable incident when it occurs, the employer must make the report within 8 hours of the time the incident is reported to the employer or to any of the employer's agents or employees.

Section 1904.39 of the final rule...clarifies that the report an employer makes to OSHA on a workplace fatality or multiple hospitalization incident must be an oral report. As the regulatory text makes clear, the employer must make such reports to OSHA by telephone (either to the nearest Area Office or to the toll-free 800 number) or in person. Third, the employer may not merely leave a message at the OSHA Area Office; instead, the employer must actually speak to an OSHA representative. Fourth, this section of the rule lists OSHA's 800 number for the convenience of employers and to allow flexibility in the event that the employer has difficulty reaching the OSHA Area Office. Fifth, this section eliminates the former requirement that employers report fatalities or multiple hospitalizations that result from an accident on a commercial or public transportation system, such as an airplane accident or one that occurs in a motor vehicle accident on a public highway or street (except for those occurring in a construction work zone, which must still be reported)....

Making oral reports of fatalities or multiple hospitalization incidents and the OSHA 800 number. The former rule required an employer to "orally report" fatality or multiple hospitalization incidents to OSHA by telephone or in person, although the rule did not specify that messages left on the Area Office answering machine or sent by e-mail would not suffice. Since the purpose of this notification is to alert OSHA to the occurrence of an accident that may warrant immediate investigation, such notification must be made orally to a "live" person....

It is essential for OSHA to speak promptly to any employer whose employee(s) have experienced a fatality or multiple hospitalization incident to determine whether the Agency needs to begin an investi-

gation. Therefore, the final rule does not permit employers merely to leave a message on an answering machine, send a fax, or transmit an e-mail message. None of these options allows an Agency representative to interact with the employer to clarify the particulars of the catastrophic incident. Additionally, if the Area Office were closed for the weekend, a holiday, or for some other reason, OSHA might not learn of the incident for several days if electronic or facsimile transmission were permitted. Paragraph 1904.39(b)(1) of the final rule makes this clear...

...The employer may use whatever method he or she chooses, at any time, as long as he or she is able to speak in person to an OSHA representative or the 800 number operator....

This final rule also includes the 800 number in the text of the regulation. OSHA has decided to include the number in the regulatory text at this time to provide an easy reference for employers. OSHA will also continue to include the 800 number in any interpretive materials, guidelines or outreach materials that it publishes to help employers comply with the reporting requirement....

...OSHA agrees that it would be impractical to impose on one employer a duty to report cases of multiple hospitalizations of employees who work for other employers. Although such a reporting requirement would provide OSHA with information that the Agency could use to inspect some incidents that it might otherwise not know about, OSHA believes that the fatality and catastrophe provisions of the final rule will capture most such incidents. Accordingly, OSHA has not included this proposed provision in the final rule....

OSHA agrees with...commenters that there is no need for an employer to report a fatality or multiple hospitalization incident when OSHA is clearly not going to make an investigation. When a worker is killed or injured in a motor vehicle accident on a public highway or street, OSHA is only likely to investigate the incident if it occurred in a highway construction zone. Likewise, when a worker is killed or injured in an airplane crash, a train wreck, or a subway accident, OSHA does not investigate, and there is thus no need for the employer to report the incident to OSHA. The text of paragraphs 1904.39(b)(3) and (4) of the final rule clarifies that an employer is not required to report these incidents to OSHA. These incidents are normally investigated by other agencies,

including local transit authorities, local or State police, State transportation officials, and the U.S. Department of Transportation.

However, although there is no need to *report* these incidents to OSHA under the 8-hour reporting requirement, any fatalities and hospitalizations caused by motor vehicle accidents, as well as commercial or public transportation accidents, are recordable if they meet OSHA's recordability criteria. These cases should be captured by the Nation's occupational fatality and injury statistics and be included on the employer's injury and illness forms. The statistics need to be complete, so that OSHA, BLS, and the public can see where and how employees are being made ill, injured and killed. Accordingly, the final rule includes a sentence clarifying that employers are still required to record work-related fatalities and injuries that occur as a result of public transportation accidents and injuries....

...[T]he final rule provides provisions that require an employer to report a fatality or multiple hospitalization incident that occurs in a construction zone on a public highway or street....

...If three or more workers are hospitalized overnight, whether for treatment or observation, the accident is clearly of a catastrophic nature, and OSHA needs to learn about it promptly. Additionally, the inpatient distinction provides an easy-to-understand trigger for reporting. In many instances, a patient who is admitted for observation as an inpatient later receives treatment after the true nature and extent of the injury becomes known. At the time of the incident, when reporting is most useful, the employer is unlikely to know the details about the treatment that the worker is receiving (*e.g.*, observation only or medical treatment). However, the employer will probably know that the employee has been admitted to the hospital as an inpatient....

...[T]he final rule requires reporting within 8 hours of the time any agent or employee of the employer becomes aware of the incident. It is the employer's responsibility to ensure that appropriate instructions and procedures are in place so that corporate officers, managers, supervisors, medical/health personnel, safety officers, receptionists, switchboard personnel, and other employees or agents of the company who learn of employee deaths or multiple hospitalizations know that the company must make a timely report to OSHA.

FREQUENTLY ASKED QUESTIONS: Section 1904.39 (OSHA Instruction, CPL 2-0.135, Chap. 5)**Section 1904.39 Reporting fatalities and multiple hospitalization incidents to OSHA**

Question 39-1. *When a work-related heart attack occurs in the workplace and the employee dies one or more days later, how should the case be reported to OSHA?*

The employer must orally report a work-related fatality by telephone or in person to the OSHA Area Office nearest to the site of the incident. The employer must report the fatality within eight hours of the employee's death in cases where the death occurs within 30 days of the incident. The employer need not report a death occurring more than 30 days after a work-related incident.

Question 39-2. *What is considered a "construction work zone" for purposes of section 1904.39(b)(3)?*

A "construction work zone" for purposes of Section 1904.39(b)(3) is an area of a street or highway where construction activities are taking place, and is typically marked by signs, channeling devices, barriers, pavement markings and/or work vehicles. The work zone extends from the first warning sign or rotating/strobe lights on a vehicle to the "END ROAD WORK" sign or the last temporary traffic control device.

LETTERS OF INTERPRETATION: Section 1904.39**Section 1904.39 Reporting fatalities and multiple hospitalization incidents to OSHA**

This section will be developed as letters of interpretation become available.

Section 1904.40

Providing records to government representatives

(66 FR 6134, Jan. 19, 2001)

REGULATION: Section 1904.40

Subpart E – Reporting fatality, injury and illness information to the government

(66 FR 6133, Jan. 19, 2001)

Section 1904.40 Providing records to government representatives

(a) Basic requirement.

When an authorized government representative asks for the records you keep under Part 1904, you must provide copies of the records within four (4) business hours.

(b) Implementation.

(1) *What government representatives have the right to get copies of my Part 1904 records?*

The government representatives authorized to receive the records are:

- (i) A representative of the Secretary of Labor conducting an inspection or investigation under the Act;
- (ii) A representative of the Secretary of Health and Human Services (including the National Institute

for Occupational Safety and Health -- NIOSH) conducting an investigation under section 20(b) of the Act, or

(iii) A representative of a State agency responsible for administering a State plan approved under section 18 of the Act.

(2) *Do I have to produce the records within four (4) hours if my records are kept at a location in a different time zone?*

OSHA will consider your response to be timely if you give the records to the government representative within four (4) business hours of the request. If you maintain the records at a location in a different time zone, you may use the business hours of the establishment at which the records are located when calculating the deadline.

PREAMBLE DISCUSSION: Section 1904.40

(66 FR 6065-6069, Jan. 19, 2001)

The following are selected excerpts from the preamble to the Occupational Injury and Illness Recording and Reporting Requirements, the Recordkeeping rule (66 FR 5916, 29 CFR Parts 1904 and 1952). These excerpts represent some of the key discussions related to the final rule (66 FR 6122, 29 CFR Parts 1904 and 1952).

Section 1904.40 Providing records to government representatives

Under the final rule, employers must provide a complete copy of any records required by Part 1904 to an authorized government representative, including the Form 300 (Log), the Form 300A (Summary), the confidential listing of privacy concern cases along with the names of the injured or ill privacy case workers, and the Form 301 (Incident Report), when the representative asks for the records during a workplace safety and health inspection....

The final regulatory text of paragraph (a) of section 1904.40 requires an employer to provide an authorized government representative with records kept under Part 1904 within four business hours. As stated in paragraph 1904.40(b)(1), the authorized government representatives who have a right to obtain the Part 1904 records are a representative of the

Secretary of Labor conducting an inspection or investigation under the Act, a representative of the Secretary of Health and Human Services (including the National Institute for Occupational Safety and Health (NIOSH)) conducting an investigation under Section 20(b) of the Act, or a representative of a State agency responsible for administering a State plan approved under section 18 of the Act. The government's right to ask for such records is limited by the jurisdiction of that Agency. For example, a representative of an OSHA approved State plan could only ask for the records when visiting an establishment within that state.

The final rule allows the employer to take into account difficulties that may be encountered if the records are kept at a location in a different time zone from the establishment where the government representative has asked for the records. If the employer

maintains the records at a location in a different time zone, OSHA will use the business hours of the establishment at which the records are located when calculating the deadline, as permitted by paragraph 1904.40(b)(2)....

...[T]he text of the rule is silent as to the enforcement mechanism OSHA will use in what OSHA hopes will be the rare case in which an employer does not provide a copy of the records on request. OSHA may proceed by applying for a warrant, or by administrative subpoena, or by citation where doing so is consistent with the Fourth Amendment. OSHA notes that employers have a Fourth Amendment right to require a warrant before an OSHA representative may physically enter a business establishment for an inspection.

The totality of circumstances surrounding a warrantless or “subpoena-less” administrative investigation or investigation program determines its reasonableness. For example, in *McLaughlin v. A.B. Chance*, 842 F.2d at 727 (4th Cir. 1988), the Fourth Circuit upheld a records access citation against an employer who refused an OSHA inspector access to its OSHA Logs and forms on the ground that it had a right to insist on a warrant or subpoena; the Court held that the inspector had such a right because a summary of the information was posted annually on the employee bulletin board and the inspector was lawfully on the premises to investigate a safety complaint. In *New York v. Burger*, 482 U.S. 691, 702-703 (1987), the Supreme Court noted that agencies may gather information without a warrant, subpoena, or consent if the information would serve a substantial governmental interest, a warrantless (or subpoena-less) inspection is necessary to further the regulatory scheme, and the agency acts pursuant to an inspection program that is limited in time, place, and scope. The *Burger* court upheld a warrantless inspection of records during an administrative inspection of business premises. See also *Kings Island* (noting that under *Burger* a warrantless or subpoena-less inspection of records might be reasonable, but concluding that the facts of the case did not satisfy *Burger* analysis); *Emerson Electric* (noting that under *California Bankers* an agency may gain access to information without a subpoena or warrant but concluding that the facts of that case were not comparable to those reviewed in *California Bankers*).

Given that some warrantless and subpoena-less searches during an OSHA inspection may be reasonable while others may not, depending on the circumstances of the individual inspection, OSHA has decided not to include a subpoena or warrant enforcement

mechanism in the text of the rule. However, OSHA will continue to enforce the rule within the parameters of applicable court decisions....

This section of the final rule does not give unfettered access to the records by the public, but simply allows a government inspector to use the records during the course of a safety and health inspection. As discussed above in the section covering access to the records for employees, former employees, and employee representatives (Section 1904.35), OSHA does not consider the Forms 300 and 301 to be medical records, for the following reasons. First, they do not have to be completed by a physician or other licensed health care professional. Second, they do not contain the detailed diagnostic and treatment information usually found in medical records. Finally, the injuries and illnesses found in the records are usually widely known among other employees at the workplace where the injured or ill worker works; in fact, these co-workers may even have witnessed the accident that gave rise to the injury or illness.

OSHA does not agree that its inspectors should be required to obtain permission from all injured or ill employees before accessing the full records. Gaining this permission would make it essentially impossible to obtain full access to the records, which is needed to perform a meaningful workplace investigation. For example, an inspector would not be able to obtain the names of employees who were no longer working for the company to perform follow-up interviews about the specifics of their injuries and illnesses. The names of the injured or ill workers are needed to allow the government inspector to interview the injured and ill workers and determine the hazardous circumstances that led to their injury or illness. The government inspector may also need the employee’s names to access personnel and medical records if needed (medical records can only be accessed after the inspector obtains a medical access order). Additionally, refusing the inspector access to the names of the injured and ill workers would effectively prohibit any audit of the Part 1904 records by the government, a practice necessary to verify the accuracy of employer recordkeeping in general and to identify problems that employers may be having in keeping records under OSHA’s recordkeeping rules...since OSHA inspectors do not allow others to see the medical records they have accessed, the privacy of employees is not compromised by CSHO access to the records.

...Paragraphs 1904.40(a) and (b) of the final rule require records to be made available to a government inspector within 4 business hours of an oral

request for the records, using the business hours of the establishment at which the records are located....

OSHA has concluded that 4 hours is a reasonable and workable length of time for employers to respond to governmental requests for records. The 4-hour time period for providing records from a centralized source strikes a balance between the practical limitations inherent in record maintenance and the government official's need to obtain these records and use the information to conduct a workplace inspection....

OSHA believes that it is essential for employers to have systems and procedures that can produce the records within the 4-hour time. However, the Agency realizes that there may be unusual or unique circumstances where the employer cannot comply. For example, if the records are kept by a health care professional and that person is providing emergency care to an injured worker, the employer may need to delay production of the records. In such a situation,

the OSHA inspector may allow the employer additional time.

If a government representative requests records of an establishment, but those records are kept at another location, the 4-hour period can be measured in accordance with the normal business hours at the location where the records are being kept....

OSHA has designed the final rule to give each employer considerable flexibility in maintaining records. It permits an employer to centralize its records, to use computer and facsimile technologies, and to hire a third party to keep its records. However, an employer who chooses these options must also ensure that they are sufficiently reliable to comply with this rule. In other words, the flexibility provided to employers for recordkeeping must not impede the Agency's ability to obtain and use the records....

...[I]n this final rule, OSHA requires the employer to provide copies of the records requested to authorized government representatives....

FREQUENTLY ASKED QUESTIONS: Section 1904.40 (OSHA Instruction, CPL 2-0.135, Chap. 5)

Section 1904.40 Providing records to government representatives

This section will be developed as letters of interpretation become available.

LETTERS OF INTERPRETATION: Section 1904.40

Section 1904.40 Providing records to government representatives

This section will be developed as letters of interpretation become available.

Section 1904.41 Annual OSHA injury and illness survey of ten or more employers

(66 FR 6134, Jan. 19, 2001)

REGULATION: Section 1904.41

Subpart E – Reporting fatality, injury and illness information to the government

(66 FR 6133, Jan. 19, 2001)

Section 1904.41 Annual OSHA injury and illness survey of ten or more employers

(a) Basic requirement.

If you receive OSHA's annual survey form, you must fill it out and send it to OSHA or OSHA's designee, as stated on the survey form. You must report the following information for the year described on the form:

- (1) the number of workers you employed;
- (2) the number of hours worked by your employees; and
- (3) the requested information from the records that you keep under Part 1904.

(b) Implementation.

(1) *Does every employer have to send data to OSHA?*

No, each year, OSHA sends injury and illness survey forms to employers in certain industries. In any year, some employers will receive an OSHA survey form and others will not. You do not have to send injury and illness data to OSHA unless you receive a survey form.

(2) *How quickly do I need to respond to an OSHA survey form?*

You must send the survey reports to OSHA, or

OSHA's designee, by mail or other means described in the survey form, within 30 calendar days, or by the date stated in the survey form, whichever is later.

(3) *Do I have to respond to an OSHA survey form if I am normally exempt from keeping OSHA injury and illness records?*

Yes, even if you are exempt from keeping injury and illness records under Section 1904.1 to Section 1904.3, OSHA may inform you in writing that it will be collecting injury and illness information from you in the following year. If you receive such a letter, you must keep the injury and illness records required by Section 1904.5 to Section 1904.15 and make a survey report for the year covered by the survey.

(4) *Do I have to answer the OSHA survey form if I am located in a State-Plan State?*

Yes, all employers who receive survey forms must respond to the survey, even those in State-Plan States.

(5) *Does this section affect OSHA's authority to inspect my workplace?*

No, nothing in this section affects OSHA's statutory authority to investigate conditions related to occupational safety and health.

PREAMBLE DISCUSSION: Section 1904.41

(66 FR 6069, Jan. 19, 2001)

The following are selected excerpts from the preamble to the Occupational Injury and Illness Recording and Reporting Requirements, the Recordkeeping rule (66 FR 5916, 29 CFR Parts 1904 and 1952). These excerpts represent some of the key discussions related to the final rule (66 FR 6122, 29 CFR Parts 1904 and 1952).

Section 1904.41 Annual OSHA injury and illness survey of ten or more employers

Section 1904.41 of this final rule replaces section 1904.17, "Annual OSHA Injury and Illness Survey of Ten or More Employers," of the former rule issued on February 11, 1997. The final rule does not change the contents or policies of the corresponding section of the former rule in any way....

Thus, section 1904.41 of the final rule merely restates, in a plain language question-and-answer format, the requirements of former rule section 1904.17, with one minor change. The final rule adds paragraph 1904.41(b)(1), which contains no requirements or prohibitions but simply informs the employer that there is no need to send in the Part 1904 injury and illness data until the government asks for it.

FREQUENTLY ASKED QUESTIONS: Section 1904.41 (OSHA Instruction, CPL 2-0.135, Chap. 5)

Section 1904.41 Annual OSHA injury and illness survey of ten or more employers

This section will be developed as letters of interpretation become available.

LETTERS OF INTERPRETATION: Section 1904.41

Section 1904.41 Annual OSHA injury and illness survey of ten or more employers

This section will be developed as letters of interpretation become available.

Section 1904.42 Requests from the Bureau of Labor Statistics for data

(66 FR 6134, Jan. 19, 2001)

REGULATION: Section 1904.42

Subpart E – Reporting fatality, injury and illness information to the government

(66 FR 6133, Jan. 19, 2001)

Section 1904.42 Requests from the Bureau of Labor Statistics for data

(a) Basic requirement.

If you receive a Survey of Occupational Injuries and Illnesses Form from the Bureau of Labor Statistics (BLS), or a BLS designee, you must promptly complete the form and return it following the instructions contained on the survey form.

(b) Implementation.

(1) *Does every employer have to send data to the BLS?*

No, each year, the BLS sends injury and illness survey forms to randomly selected employers and uses the information to create the Nation's occupational injury and illness statistics. In any year, some employers will receive a BLS survey form and others will not. You do not have to send injury and illness data to the BLS unless you receive a survey form.

(2) *If I get a survey form from the BLS, what do I have to do?*

If you receive a Survey of Occupational Injuries

and Illnesses Form from the Bureau of Labor Statistics (BLS), or a BLS designee, you must promptly complete the form and return it, following the instructions contained on the survey form.

(3) *Do I have to respond to a BLS survey form if I am normally exempt from keeping OSHA injury and illness records?*

Yes, even if you are exempt from keeping injury and illness records under Section 1904.1 to Section 1904.3, the BLS may inform you in writing that it will be collecting injury and illness information from you in the coming year. If you receive such a letter, you must keep the injury and illness records required by Section 1904.5 to Section 1904.15 and make a survey report for the year covered by the survey.

(4) *Do I have to answer the BLS survey form if I am located in a State-Plan State?*

Yes, all employers who receive a survey form must respond to the survey, even those in State-Plan States.

PREAMBLE DISCUSSION: Section 1904.42

(66 FR 6069-6070, Jan. 19, 2001)

The following are selected excerpts from the preamble to the Occupational Injury and Illness Recording and Reporting Requirements, the Recordkeeping rule (66 FR 5916, 29 CFR Parts 1904 and 1952). These excerpts represent some of the key discussions related to the final rule (66 FR 6122, 29 CFR Parts 1904 and 1952).

Section 1904.42 Requests from the Bureau of Labor Statistics for data

Both OSHA and the BLS collect occupational injury and illness information, each for separate purposes. The BLS collects data from a statistical sample of employers in all industries and across all size classes, using the data to compile the occupational injury and illness statistics for the Nation. The Bureau gives each respondent a pledge of confidentiality (as it does on all BLS surveys), and the establishment-specific injury and illness data are not shared with the public, other government agencies, or OSHA. The BLS's sole purpose is to create statistical data.

OSHA collects data from employers from specific size and industry classes, but collects from each and every employer within those parameters. The establishment-specific data collected by OSHA are used to administer OSHA's various programs and to measure the performance of those programs at individual workplaces....

OSHA and the BLS have worked together for many years to reduce the number of establishments that receive both surveys. These efforts have largely been successful. However, OSHA and BLS use different databases to select employers for their surveys. This makes it difficult to eliminate the overlap com-

pletely. We are continuing to work on methods to reduce further the numbers of employers who receive both BLS and OSHA survey requests.

...The rule thus specifies that the BLS has the authority to collect information on occupational fatalities, injuries and illnesses from: (1) employers who are required to keep records at all times; (2) employ-

ers who are normally exempt from keeping records; and (3) employers under both Federal and State plan jurisdiction. The information collected in the annual survey enables BLS to generate consistent statistics on occupational death, injury and illness for the entire Nation.

FREQUENTLY ASKED QUESTIONS: Section 1904.42 (OSHA Instruction, CPL 2-0.135, Chap. 5)

Section 1904.42 Requests from the Bureau of Labor Statistics for data

This section will be developed as letters of interpretation become available.

LETTERS OF INTERPRETATION: Section 1904.42

Section 1904.42 Requests from the Bureau of Labor Statistics for data

This section will be developed as letters of interpretation become available.

Section 1904.46 Definitions

(66 FR 6135, Jan. 19, 2001)

REGULATION: Section 1904.46

Subpart G – Definitions

(66 FR 6135, Jan. 19, 2001)

Section 1904.46 Definitions

The Act.

The Act means the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*). The definitions contained in section 3 of the Act (29 U.S.C. 652) and related interpretations apply to such terms when used in this Part 1904.

Establishment.

An establishment is a single physical location where business is conducted or where services or industrial operations are performed. For activities where employees do not work at a single physical location, such as construction; transportation; communications, electric, gas and sanitary services; and similar operations, the establishment is represented by main or branch offices, terminals, stations, etc. that either supervise such activities or are the base from which personnel carry out these activities.

(1) Can one business location include two or more establishments?

Normally, one business location has only one establishment. Under limited conditions, the employer may consider two or more separate businesses that share a single location to be separate establishments. An employer may divide one location into two or more establishments only when:

- (i) Each of the establishments represents a distinctly separate business;
- (ii) Each business is engaged in a different economic activity;
- (iii) No one industry description in the Standard Industrial Classification Manual (1987) applies to the joint activities of the establishments; and
- (iv) Separate reports are routinely prepared for each establishment on the number of employees, their wages and salaries, sales or receipts, and other business information. For example, if an employer operates a construction company at the same location as a lumber yard, the employer may consider each business to be a separate establishment.

(2) Can an establishment include more than one physical location?

Yes, but only under certain conditions. An employer may combine two or more physical locations into a single establishment only when:

- (i) The employer operates the locations as a single business operation under common management;
- (ii) The locations are all located in close proximity to each other; and
- (iii) The employer keeps one set of business records for the locations, such as records on the number of employees, their wages and salaries, sales or receipts, and other kinds of business information. For example, one manufacturing establishment might include the main plant, a warehouse a few blocks away, and an administrative services building across the street.

(3) If an employee telecommutes from home, is his or her home considered a separate establishment?

No, for employees who telecommute from home, the employee's home is not a business establishment and a separate 300 Log is not required. Employees who telecommute must be linked to one of your establishments under Section 1904.30(b)(3).

Injury or illness.

An injury or illness is an abnormal condition or disorder. Injuries include cases such as, but not limited to, a cut, fracture, sprain, or amputation. Illnesses include both acute and chronic illnesses, such as, but not limited to, a skin disease, respiratory disorder, or poisoning. (Note: Injuries and illnesses are recordable only if they are new, work-related cases that meet one or more of the Part 1904 recording criteria.)

Physician or Other Licensed Health Care Professional.

A physician or other licensed health care professional is an individual whose legally permitted scope of practice (*i.e.*, license, registration, or certification)

allows him or her to independently perform, or be delegated the responsibility to perform, the activities described by this regulation.

You.

“You” means an employer as defined in Section 3 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 652).

PREAMBLE DISCUSSION: Section 1904.46

(66 FR 6071-6081, Jan. 19, 2001)

The following are selected excerpts from the preamble to the Occupational Injury and Illness Recording and Reporting Requirements, the Recordkeeping rule (66 FR 5916, 29 CFR Parts 1904 and 1952). These excerpts represent some of the key discussions related to the final rule (66 FR 6122, 29 CFR Parts 1904 and 1952).

Subpart G – Definitions

The Definitions section of the final rule contains definitions for five terms: “the Act,” “establishment,” “health care professional,” “injury and illness,” and “you.”

The Act

The Occupational Safety and Health Act of 1970 (the “OSH Act”) is defined because the term is used in many places in the regulatory text. The final rule’s definition is essentially identical to the definition in the proposal. OSHA received no comments on this definition. The definition of “the Act” follows:

The Act means the Occupational Safety and Health Act of 1970 (84 Stat. 1590 *et seq.*, 29 U.S. 651 *et seq.*), as amended. The definitions contained in section (3) of the Act and related interpretations shall be applicable to such terms when used in this Part 1904.

Employee

...In the final rule, OSHA has decided that it is not necessary to define “employee” because the term is defined in section 3 of the Act and is used in this rule in accordance with that definition.

Employer

...Because the final rule uses the term “employer” just as it is defined in the Act, no separate definition is included in the final rule.

Establishment

The final rule defines an establishment as a single physical location where business is conducted or where services or industrial operations are performed. For activities where employees do not work at a single physical location, such as construction; transportation; communications, electric, gas and sanitary services; and similar operations, the establishment is represented by main or branch offices, terminals, stations, etc. that either supervise such

activities or are the base from which personnel carry out these activities.

The final rule also addresses whether one business location can include two or more establishments. Normally, one business location has only one establishment. However, under limited conditions, the employer may consider two or more separate businesses that share a single location to be separate establishments for recordkeeping purposes. An employer may divide one location into two or more establishments only when: each of the proposed establishments represents a distinctly separate business; each business is engaged in a different economic activity; no one industry description in the Standard Industrial Classification Manual (1987) applies to the joint activities of the proposed establishments; and separate reports are routinely prepared for each establishment on the number of employees, their wages and salaries, sales or receipts, and other business information. For example, if an employer operates a construction company at the same location as a lumber yard, the employer may consider each business to be a separate establishment.

The final rule also deals with the opposite situation, and explains when an establishment includes more than one physical location. An employer may combine two or more physical locations into a single establishment only when the employer operates the locations as a single business operation under common management; the locations are all located in close proximity to each other; and the employer keeps one set of business records for the locations, such as records on the number of employees, their wages and salaries, sales or receipts, and other kinds of business information. For example, one manufacturing establishment might include the main plant, a warehouse serving the plant a block away, and an administrative services building across the street. The final rule also makes it clear that when an employee telecommutes from home, the employee’s

home is not a business establishment for record-keeping purposes, and a separate OSHA 300 Log is not required.

The definition of “establishment” is important in OSHA’s recordkeeping system for many reasons. First, the establishment is the basic unit for which records are maintained and summarized. The employer must keep a separate injury and illness Log (the OSHA Form 300), and prepare a single summary (Form 300A), for each establishment. Establishment-specific records are a key component of the recordkeeping system because each separate record represents the injury and illness experience of a given location, and therefore reflects the particular circumstances and hazards that led to the injuries and illnesses at that location. The establishment-specific summary, which totals the establishment’s injury and illness experience for the preceding year, is posted for employees at that establishment and may also be collected by the government for statistical or administrative purposes.

Second, the definition of establishment is important because injuries and illnesses are presumed to be work-related if they result from events or exposures occurring in the work environment, which includes the employer’s establishment. The presumption that injuries and illnesses occurring in the work environment are by definition work-related may be rebutted under certain circumstances, which are listed in the final rule and discussed in the section of this preamble devoted to section 1904.5, Determination of work-relatedness.

Third, the establishment is the unit that determines whether the partial exemption from recordkeeping requirements permitted by the final rule for establishments of certain sizes or in certain industry sectors applies (see Subpart B of the final rule). Under the final rule’s partial exemption, establishments classified in certain Standard Industrial Classification codes (SIC codes) are not required to keep injury and illness records except when asked by the government to do so. Because a given employer may operate establishments that are classified in different SIC codes, some employers may be required to keep OSHA injury and illness records for some establishments but not for others, *e.g.*, if one or more of the employer’s establishments falls under the final rule’s partial exemption but others do not.

Fourth, the definition of establishment is used to determine which records an employee, former employee, or authorized employee representative may access. According to the final rule, employees may ask for, and must be given, injury and illness

records for the establishment they currently work in, or one they have worked in, during their employment....

Subpart G of the final rule defines “establishment” as “a single physical location where business is conducted or where services or industrial operations are performed. For activities such as construction; transportation; communications, electric and gas utility, and sanitary services; and similar operations, the establishment is represented for recordkeeping purposes by main or branch offices, terminals, stations, etc. that either supervise such activities or are the base from which personnel carry out these activities.” This part of the definition of “establishment” provides flexibility for employers whose employees (such as repairmen, meter readers, and construction superintendents) do not work at the same workplace but instead move between many different workplaces, often in the course of a single day.

How the definition of “establishment” must be used by employers for recordkeeping purposes is set forth in the answers to the questions posed in this paragraph of Subpart G:

- (1) Can one business location include two or more establishments?
- (2) Can an establishment include more than one physical location?
- (3) If an employee telecommutes from home, is his or her home considered a separate establishment?

The employer may consider two or more economic activities at a single location to be separate establishments (and thus keep separate OSHA Form 300s and Form 301s for each activity) only when: (1) each such economic activity represents a separate business, (2) no one industry description in the Standard Industrial Classification Manual (1987) applies to the activities carried out at the separate locations; and (3) separate reports are routinely prepared on the number of employees, their wages and salaries, sales or receipts, and other business information. This part of the definition of “establishment” allows for separate establishments when an employer uses a common facility to house two or more separate businesses, but does not allow different departments or divisions of a single business to be considered separate establishments. However, even if the establishment meets the three criteria above, the employer may, if it chooses, consider the physical location to be one establishment.

The definition also permits an employer to combine two or more physical locations into a single establishment for recordkeeping purposes (and thus

to keep only one Form 300 and Form 301 for all of the locations) only when (1) the locations are all geographically close to each other, (2) the employer operates the locations as a single business operation under common management, and (3) the employer keeps one set of business records for the locations, such as records on the number of employees, their wages and salaries, sales or receipts, and other business information. However, even for locations meeting these three criteria, the employer may, if it chooses, consider the separate physical locations to be separate establishments. This part of the definition allows an employer to consider a single business operation to be a single establishment even when some of his or her business operations are carried out on separate properties, but does not allow for separate businesses to be joined together. For example, an employer operating a manufacturing business would not be allowed to consider a nearby storage facility to be a separate establishment, while an employer who operates two separate retail outlets would be required to consider each to be a separate establishment....

OSHA has reviewed all of the comments on this issue and has responded by deleting any reference to a time-in-operation threshold in the definition of establishment but specifying a one-year threshold in section 1904.30 of the final rule....

...Under the final rule, employers will be required to maintain establishment-specific records for any workplace that is, or is expected to be, in operation for one year or longer. Employers may group injuries and illnesses occurring to workers who are employed at shorter term establishments onto one or more consolidated logs. These logs may cover the entire company; geographic regions such as a county, state or multi-state area; or individual divisions of the company. For example, a construction company with multi-state operations might have separate logs for each state to show the injuries and illnesses of short-term projects, as well as separate logs for each construction project expected to last for more than one year....

OSHA agrees that the recordkeeping system must recognize the needs of operations of this type and has adopted language in the final rule to provide some flexibility for employers in the construction, transportation, communications, electric and gas utility, and sanitary services industries, as well as other employers with geographically dispersed operations. The final rule specifies, in Subpart G, that employers may consider main or branch offices, terminals, stations, etc. that are either (1) responsible for supervising such

activities, or (2) the base from which personnel operate to carry out these activities, as individual establishments for recordkeeping purposes. This addition to the final rule's definition of establishment allows an employer to keep records for geographically dispersed operations using the existing management structure of the company as the recording unit....

...The final rule also recognizes that, in some narrowly defined situations, a business may have side-by-side operations at a single location that are operated as separate businesses because they are engaged in different lines of business. In these situations, the Standard Industrial Classification Manual (OMB 1987) allows a single business location to be classified as two separate establishments, each with its own SIC code. Like all government agencies, OSHA follows the OMB classification method and makes allowances for such circumstances....

...[T]he final rule makes clear in Subpart G, that an employer whose activities meet the final rule's definition may keep separate logs if he or she chooses to do so. Thus the final rule includes a provision that allows an employer to define a single business location as two separate establishments only under specific, narrow conditions. The final rule allows the employer to keep separate records only when the location is shared by completely separate business operations involved in different business activities (Standard Industrial Classifications) for which separate business records are available. By providing specific, narrow criteria, the final rule reduces ambiguity and confusion about what is required and sets out the conditions that must be met in order for employers to deviate from the one place-one establishment concept.

OSHA expects that the overwhelming majority of workplaces will continue to be classified as one establishment for recordkeeping purposes, and will keep just one Log. However, allowing some flexibility for the rare cases that meet the specified criteria is appropriate. The employer is responsible for determining whether a given workplace meets the criteria; OSHA will consider an employer meeting these criteria to be in compliance with the final rule if he or she keeps one set of records per facility. This policy allows an employer to keep one set of records for a given location and avoid the additional burden or inconvenience associated with keeping separate records....

OSHA agrees that there are situations where a single establishment that has a satellite operation in close physical proximity to the primary operation may together constitute a single business operation

and thus be a single establishment. For example, a business may have a storage facility in a nearby building that is simply an adjunct to the business operation and is not a separate business location.

OSHA believes that there are situations where establishments in separate physical locations constitute a single establishment. However, under the final rule, employers will only be allowed to combine separated physical locations into a single establishment when they operate the combined locations as a single business operation under common management and keep a single set of business records for the combined locations, such as records on the number of employees, their wages and salaries, sales or receipts, and other types of business information.

How OSHA defines an establishment also has implications for the way company parking lots and recreation facilities, such as company-provided gymnasiums, ball fields, and the like are treated for recordkeeping purposes. ... The final rule includes these areas in the definition of establishment but does not require employers to record cases occurring to employees engaged in certain activities at these locations. For example, injuries and illnesses occurring at the establishment while the employee is voluntarily engaged in recreation activities or resulting from a motor vehicle accident while the employee is commuting to or from work would not have to be recorded (see section 1904.5)....

Company Parking Lots and Access Roads

...OSHA agrees...company parking lots can be highly hazardous and that employers have considerable control over conditions in such lots. In addition, OSHA believes that having data on the kinds of injuries and illnesses occurring on company parking lots and access roads will permit employers to address the causes of these injuries and illnesses and thus to provide their employees with better protection. Accordingly, for recordkeeping purposes, the final rule includes company parking lots and access roads in the definition of establishment. However, the final rule recognizes that some injuries and illnesses occurring on company parking lots and access roads are not work-related and delineates those that are work-related from those that are not work-related on the basis of the activity the employee was performing at the time the injury or illness occurred. For example, when an employee is injured in a motor vehicle accident that occurs during that employee's commute to or from work, the injury is not considered work-related. Thus, the final rule allows the employer to exclude from the Log injuries and ill-

nesses occurring on company parking lots and access roads while employees are commuting to or from work or running personal errands in their motor vehicles (see section 1904.5). However, other injuries and illnesses occurring in parking lots and on access roads (such as accidents at loading docks, while removing snow, falls on ice, assaults, etc.) are considered work-related and must be recorded on the establishment's Log if they meet the other recording criteria of the final rule (e.g., if they involve medical treatment, lost time, etc.).

OSHA concludes that the activity-based approach taken in the final rule will be simpler for employers to use than the former rule's location-based approach and will result in the collection of better data. First, the activity-based approach eliminates the need for employers to determine where a parking lot begins and ends, *i.e.*, what specific areas constitute the parking lot, which can be difficult in the case of combined, interspersed, or poorly defined parking areas. Second, it ensures the recording of those injuries and illnesses that are work-related but simply happen to occur in these areas. If parking lots and access roads are totally excluded from the definition of establishment, employers would not record any injury or illness occurring in such locations. For example, employers could fail to record an injury occurring to an employee performing work, such as building an attendant's booth or demarcating parking spaces, from the Log.

Recreation facilities. ...In the final rule, OSHA has decided to include recreational areas in the definition of establishment but to include voluntary fitness and recreational activities, and other wellness activities, on the list of excepted activities employers may use to rebut the presumption of work-relatedness in paragraph 1904.5(b)(2). OSHA finds that this approach is simpler and will provide better injury and illness data because recreational facilities are often multi-use areas that are sometimes used as work zones and sometimes as recreational areas....

This approach is also consistent with OSHA's overall approach in the final rule of using specific activity-based exemptions to allow the employer to rebut the presumption of work relationship rather than providing exemptions by modifying the definition of establishment. OSHA also does not believe that this approach will provide an incentive for employers to eliminate recreational and fitness opportunities for their employees. Both approaches exempt the same injuries from recording, but the final rule's approach provides employers with a more straightforward mechanism for rebutting the presumption of work relationship.

OSHA believes that injuries and illnesses occurring to employees who are present in recreational areas as part of their assigned work duties should be recorded on the Log; the final rule thus only permits employers to exclude recreational activities that are being performed by the employee voluntarily from their Logs. For example, an injury to an exercise instructor hired by the company to conduct classes and demonstrate exercises would be considered work related, as would an injury or illness sustained by an employee who is required to exercise to maintain specific fitness levels, such as a security guard.

Private homes as an establishment. ...In the final rule, OSHA has not excluded private homes from the definition of establishment because many private homes contain home offices or other home-based worksites, and injuries and illnesses occurring to employees during work activities performed there on behalf of their employer are recordable if the employer is required to keep a Log. However, the final rule makes clear that, in the case of an employee who telecommutes from his or her home, the home is not considered an establishment for OSHA recordkeeping purposes and the employer is not required to keep a separate Log for the home office. For these workers, the worker's establishment is the office to which they report, receive direction or supervision, collect pay, and otherwise stay in contact with their employer, and it is at this establishment that the Log is kept. For workers who are simply working at home instead of at the company's office, *i.e.*, for employees who are telecommuting, OSHA does not consider the worker's home to be an establishment for recordkeeping purposes, and the definition of establishment makes this fact clear. OSHA has issued a compliance directive clarifying that OSHA does not and will not inspect home offices in the employee's home and would inspect a home-based worksite other than a home office only if the Agency received a complaint or referral. A fuller discussion concerning the determination of the work-relatedness of injuries and illnesses that occur when employees are working in their homes can be found in the discussion of Section 1904.5 Determination of work-relatedness.

Miscellaneous issues ...[T]he final rule does contain an exception from recordability of cases where the employee, for example, chokes on his or her food, is burned by spilling hot coffee, etc. (see paragraph 1904.5(b))....

OSHA will continue to allow employers to keep their records centrally and on computer equipment, and nothing in the final rule would preclude such electronic centralization. OSHA believes that the definition

of establishment in the final rule will have no impact on the ability of the employer to keep records centrally; however, the final rule does continue to require employers to summarize and post the records for each establishment at the end of the year....

Health Care Professional

The final rule defines health care professional (HCP) as "a physician or other state licensed health care professional whose legally permitted scope of practice (*i.e.*, license, registration or certification) allows the professional independently to provide or be delegated the responsibility to provide some or all of the health care services described by this regulation." ...

...Although the rule does not specify what medical specialty or training is necessary to provide care for injured or ill employees, the rule's use of the term health care professional is intended to ensure that those professionals providing treatment and making determinations about the recordability of certain complex cases are operating within the scope of their license, as defined by the appropriate state licensing agency....

...OSHA does not intend the use of the term "health care professional" in this rule to modify or supersede any requirement of any other OSHA regulation or standard....

...The definition in the final rule ensures that, although decisions about the recordability of a particular case may be made by a wide range of health care professionals, the professionals making those decisions must be operating within the scope of their license or certification when they make such decisions.

Injury or Illness

The final rule's definition of injury or illness is based on the definitions of injury and illness used under the former recordkeeping regulation, except that it combines both definitions into a single term "injury or illness." Under the final rule, an injury or illness is an abnormal condition or disorder. Injuries include cases such as, but not limited to, a cut, fracture, sprain, or amputation. Illnesses include both acute and chronic illnesses, such as, but not limited to, a skin disease, respiratory disorder, or systemic poisoning. The definition also includes a note to inform employers that some injuries and illnesses are recordable and others are not, and that injuries and illnesses are recordable only if they are new, work-related cases that meet one or more of the final rule's recording criteria....

...OSHA has decided to continue to include psy-

chological conditions in the final rule's definition of injury and illness because many such conditions are caused, contributed to, or significantly aggravated by events or exposures in the work environment, and the Agency would be remiss if it did not collect injury and illness information about conditions of these types that meet one or more of the final rule's recording criteria.

Although injury and illness are broadly defined, they capture only those changes that reflect an adverse change in the employee's condition that is of some significance, *i.e.*, that reach the level of an abnormal condition or disorder. For example, a mere change in mood or experiencing normal end-of-the-day tiredness would not be considered an abnormal condition or disorder. Similarly, a cut or obvious wound, breathing problems, skin rashes, blood tests with abnormal results, and the like are clearly abnormal conditions and disorders. Pain and other symptoms that are wholly subjective are also considered an abnormal condition or disorder. There is no need for the abnormal condition to include objective signs to be considered an injury or illness. However, it is important for employers to remember that identifying a workplace incident as an occupational injury or illness is only the first step in the determination an employer makes about the recordability of a given case.

OSHA finds that this definition provides an appropriate starting point for decision-making about recordability, and that the requirements for determining which cases are work-related and which are not (section 1904.5), for determining which work-related cases reflect new injuries or illnesses rather than recurrences (section 1904.6), and for determining which new, work-related cases meet one or more of the general recording criteria or the additional criteria (sections 1904.7 to 1904.12) together constitute a system that ensures that those cases that should be recorded are captured and that minor injuries and illnesses are excluded....OSHA has added language to the definition of injury and illness to make it clear that many injuries and illnesses are not recordable, either because they are not work-related or because they do not meet any of the final rule's recording criteria....

After reviewing this issue thoroughly, OSHA finds that a system that initially defines injury and illness broadly and then applies a series of screening mechanisms to narrow the number of recordable incidents to those meeting OSHA and statutory criteria has several advantages. First, by being inclusive, this system avoids the problem associated with any "narrow gate" approach: that some cases that should be evaluated are lost even before the evaluation process begins. Second, this approach is consistent with the broad definitions of these terms that OSHA has used for more than 20 years, which means that the approach is already familiar to employers and their recordkeepers. Third, adding terminology like "significant" and "reasonable probability that ill-health will result," as commenters suggested, would unnecessarily complicate the first step in the evaluation process.

Accordingly, the definition of injury and illness in the final rule differs from the former definition only in minor respects. The definition is based on the former rule's definitions, simply combining the separate definitions of injury and illness into a single category, to be consistent with the elimination of separate recording thresholds for occupational injuries and occupational illnesses. As discussed above, OSHA has elected to continue to use a broad definition of illness or injury. The definition in the final rule also makes it clear that each injury and illness must be evaluated for work-relatedness, to decide if it is a new case, and to determine if it is recordable before a covered employer must enter the case in the OSHA record-keeping system.

"You"

The last definition in the final rule, of the pronoun "you," has been added because the final rule uses the "you" form of the question-and-answer plain-language format recommended in Federal plain-language guidance. "You," as used in this rule, means the employer, as that term is defined in the Act. This definition makes it clear that employers are responsible for implementing the requirements of this final rule, as mandated by the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*)

FREQUENTLY ASKED QUESTIONS: Section 1904.46 (OSHA Instruction, CPL 2-0.135, Chap. 5)

Section 1904.46 Definitions

This section will be developed as letters of interpretation become available.

LETTERS OF INTERPRETATION: Section 1904.46

Section 1904.46 Definitions

OSHA requirements are set by statute, standards and regulations. Letters of interpretation explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. These letters constitute OSHA's interpretation of the requirements discussed. Note that OSHA enforcement guidance may be affected by changes to OSHA rules. Also, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA's website at <http://www.osha.gov>.

Letters of Interpretation constitute OSHA's interpretation only of the requirements discussed and may not be applicable to any situation not delineated within the original correspondence.

Letter of interpretation related to sections 1904.29, 1904.29(a), 1904.29(b), 1904.29(b)(2), 1904.31, 1904.33, 1904.40 and 1904.46 –

Recording criteria for cases involving workers from a temporary help service, employee leasing service, or personnel supply service.

June 23, 2003

Mr. Edwin G. Foulke, Jr.
Jackson Lewis LLP
2100 Landmark Building
301 North Main Street
Greenville, SC 29601-2122

Dear Mr. Foulke:

Thank you for your April 3, 2003 facsimile and April 10, 2003 letter to the Occupational Safety and Health Administration (OSHA) regarding the Injury and Illness Recording and Reporting Requirements contained in 29 CFR Part 1904. Specifically, you ask OSHA to clarify the recording criteria for cases involving workers from a temporary help service, employee leasing service, or personnel supply service. Your questions have been outlined below followed by OSHA's response.

Question 1: Under 29 CFR Section 1904.31, employers who supervise temporary or leased employees at their facility are required to maintain the OSHA 300 Logs for those employees. With respect to those injuries, can the employer keep a separate 300 Log for the company employees and one log for the temporary or leased employees?

Response: The log is to be kept for an establishment. Under Section 1904.46 Definitions, an establishment is a single physical location where business is conducted or where services or industrial operations are performed. The controlling employer (using firm) may sub-divide the OSHA 300 Log to provide separate listings of temporary workers, but must consider the separate listings to be one record for all recordkeeping purposes, including access by government representatives, employees, former employees and employee representatives as required by Section 1904.35 and 1904.40 in the Recordkeeping regulation. OSHA's view is that a given establishment should have one OSHA Log. Injuries and illnesses for all the covered employees at the establishment are then entered into that record to create a single OSHA 300-A Summary form at the end of the year.

Question 2: Under 29 CFR Section 1904.31, while the standard clearly indicates the 300 Logs must be maintained for supervised temporary or leased employees, it does not indicate who maintains the 301 documents or the first report of injuries, as well as the medical records on those employees. Also, if a temporary or leased employee has days away from work, it is normally the temporary or leased employee provider's contractual responsibility to handle the medical treatment of the employee. The temporary or leased employee provider is the only person/entity to have the information on days away from work. Who is responsible for maintaining the 301 logs or the first report of injury forms as well as the medical records for these employees, assuming that the employee provider can produce the required documents to the employer for production in the time periods set forth in the standard?

Response: Section 1904.29(a) says: "You must use OSHA 300, 300-A and 301 forms, or equivalent forms, for recordable injuries and illnesses." In addition, 1904.29(b)(2) says: "You must complete an OSHA 301 Incident Report form, or an equivalent form, for each recordable injury or illness entered on the OSHA 300 Log." Therefore, when the workers from a temporary help service or leasing firm are under the day-to-day supervision of the controlling party (using firm) the entire OSHA injury and illness recordkeeping responsibility belongs to the using firm.

Question 3: Using the facts in Question 2, it is also important to note that an injured temporary or leased employee, who requires days from work, may be replaced by another leased or temporary employee at the work site. From time of the injury, the employer has no information about the return to work status of the injured employee. In fact, the injured employee may be assigned to another employer once he or she is able to return to work. How can the original employer keep accurate 300 Logs when the employee provider has sole access to information on days away from work and return to work status?

Response: The controlling employer has the ultimate responsibility for making good-faith recordkeeping determinations regarding an injury and illness to any of those temporary employees they supervise on a day-to-day basis. Although controlling employers ultimately decide if and how a particular case should be recorded, their decision must not be an arbitrary one, but should be made in accordance with the requirements of the Act, regulation, and the instructions on the forms. Therefore, the controlling employer must make reasonable efforts to acquire the necessary information in order to satisfy its Part 1904 recordkeeping requirements. However, if the controlling employer is not able to obtain information from the employer of the leased or temporary employee, the controlling employer should record the injury based on whatever information is available to the controlling employer. The preamble contains a brief reference about OSHA's expectation that the employers share information to produce accurate records, stating that "the two employers have shared responsibilities and may share information when there is a need to do so." (*Federal Register* p. 6041)

Finally, the last question you raised is whether your client or contractor has any requirements under the recordkeeping standard to provide the new contractor the current OSHA 300 Logs for that facility covering those employees who now work for that contractor? Since there was no change of your client's business ownership, he or she needs only to retain the records as per 1904.33 and provide access under 1904.35 and 1904.40.

Thank you for your interest in occupational safety and health. We hope you find this information helpful. OSHA requirements are set by statute, standards, and regulations. Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. This letter constitutes OSHA's interpretation of the requirements discussed. Note that our enforcement guidance may be affected by changes to OSHA rules. Also, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA's website at <http://www.osha.gov>. If you have any further questions, please contact the Division of Recordkeeping Requirements, at 202-693-1702.

Sincerely,

John L. Henshaw
Assistant Secretary

Section 1952.4 Injury and illness recording and reporting requirements

(66 FR 6135, Jan. 19, 2001)

REGULATION: Section 1952.4

Injury and illness recording and reporting requirements Part 1952 – [Amended]

(66 FR 6135, Jan. 19, 2001)

2. The authority citation for Part 1952 is revised to read as follows:

Authority: 29 U.S.C. 667; 29 CFR part 1902, Secretary of Labor’s Order No. 1-90 (55 FR 9033) and 6-96 (62 FR 111).

3. Section 1952.4 is revised to read as follows:

Section 1952.4 Injury and illness recording and reporting requirements

(a) Injury and illness recording and reporting requirements promulgated by State-Plan States must be substantially identical to those in 29 CFR part 1904 “Recording and Reporting Occupational Injuries and Illnesses.” State-Plan States must promulgate recording and reporting requirements that are the same as the Federal requirements for determining which injuries and illnesses will be entered into the records and how they are entered. All other injury and illness recording and reporting requirements that are promulgated by State-Plan States may be more stringent than, or supplemental to, the Federal requirements, but, because of the unique nature of the national recordkeeping program, States must consult with OSHA and obtain approval of such addi-

tional or more stringent reporting and recording requirements to ensure that they will not interfere with uniform reporting objectives. State-Plan States must extend the scope of their regulation to State and local government employers.

(b) A State may not grant a variance to the injury and illness recording and reporting requirements for private sector employers. Such variances may only be granted by Federal OSHA to assure nationally consistent workplace injury and illness statistics. A State may only grant a variance to the injury and illness recording and reporting requirements for State or local government entities in that State after obtaining approval from Federal OSHA.

(c) A State must recognize any variance issued by Federal OSHA.

(d) A State may, but is not required, to participate in the Annual OSHA Injury/Illness Survey as authorized by 29 CFR 1904.41. A participating State may either adopt requirements identical to 1904.41 in its recording and reporting regulation as an enforceable State requirement, or may defer to the Federal regulation for enforcement. Nothing in any State plan shall affect the duties of employers to comply with 1904.41, when surveyed, as provided by section 18(c)(7) of the Act.

PREAMBLE DISCUSSION: Section 1952.4

Section 1952.4 Injury and illness recording and reporting requirements

See 1904.37

FREQUENTLY ASKED QUESTIONS: Section 1952.4 (OSHA Instruction, CPL 2-0.135, Chap. 5)

Section 1952.4 Injury and illness recording and reporting requirements

This section will be developed as letters of interpretation become available.

LETTERS OF INTERPRETATION: Section 1952.4

Section 1952.4 Injury and illness recording and reporting requirements

This section will be developed as letters of interpretation become available.



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