August 2, 1978

To: ILZRO Lead and Zinc/Cadmium Environmental Health Committees
LIA and Cadmium Council Environmental Health Committees
Members, Lead Industries Association
Members, Zinc Institute

From: Lillian Piantanida

Subject: OSHA: Employee Exposure and Medical Records - Preservation of and Access to

Three notices appeared in recent issues of the Federal Register (attached), two final rules and one proposed, relating to OSHA's requirements for preservation of employee exposure and medical records, access to these records by employees, OSHA, and NIOSH, and similar access to occupational injury and illness logs.

Preservation of Employee Exposure and Medical Records - Final rule (F.R. 43(139):31019-31021, July 19,1978): Effective immediately, this rule applies to employers in general industry who make, maintain, or have access to any employee exposure records or employee medical records. With this rule, employers must preserve these voluntarily kept employee exposure and medical records.

"Employee exposure records" are defined as monitoring or measuring records which contain qualitative or quantitative information indicative of employee exposure to toxic materials.

"Employee medical records" mean records which contain information concerning the health status of employees exposed to toxic materials, including results of medical exams and tests, opinions or recommendations of a physician or other health professional, and any employee medical complaints relating to workplace exposure.

Both definitions include individual exposure and medical records, and general research or statistical studies based on information collected from exposure and medical records. NOTE: The immediate implementation of this rule does not require employers to create records which do not currently exists or to immediately provide employees access to the records, but simply to continue to retain the records during the comment period until a final rule on access to the records is promulgated (see following paragraphs on the proposed access rules).

LIA03496

Access to Employee Exposure and Medical Records - Proposed rule (F.R. 43 (141):31371-31374, July 21,1978):

The proposed rule includes requirements for the retention of these records for the duration of employment plus five years, and for the availability of the records to employees, former employees, their designated representatives, and to OSHA and NIOSH. When promulgated, the proposed rule will supersede the interim rule requiring preservation of employee exposure records and employee medical records which was effective on July 19 (above).

By giving employees and their designated representatives the right to see relevant exposure and medical information, this proposal will make it easier for employees to identify worksite hazards, particularly workplace exposures which impair their health or functional capacity. Increased awareness of workplace hazards will also make it more likely that prescribed work and personal hygiene practices will be followed.

OSHA invites comments on whether any types of information in the medical records should be excluded from the disclosure requirements of the rule. The comment deadline is September 22, 1978. Comments should be sent to:

Docket Officer
Docket No. H-112, Rm. S-6212
U.S. Dept. of Labor
Third St. and Constitution Ave. NW
Washington, D.C. 20219

Access to Log of Occupational Injuries and Illnesses - Final rule (F.R. 43(141): 31324-31329, July 21,1978:

This regulation is effective August 21, 1978, and requires affected employers to compile and post an annual summary of occupational injuries and illnesses at each establishment. However, the detailed entries of each case on the log, upon which the summary is based, are not required by regulation to be made available to employees and their representatives (an employee representative includes, but is not limited to, a labor organization which serves as the collective bargaining representative for the employees).

Details of each of these rules is outlined in the enclosed copies of the Federal Register announcements. The announcements also indicate the persons to be contacted for further information.

(3) For vessels over 125 gross registered tons: 20,000 pounds landed weight of each species.

(4) For vessels of any size using fixed gear (hooks or gill nets): 16,000 pounds landed weight of each species.

(b) *Yellowtail flounder*. For each weekly period (0001 hours Sunday through 2400 hours Saturday, local time), no person or vessel may land yellowtail flounder in amounts greater than the following:

(1) For vessels under 60 gross registered tons: 6,000 pounds landed weight, or 10 percent by weight of all fish on board, whichever is greater.

(2) For vessels of 61-125 gross registered tons: 10,000 pounds landed weight, or 10 percent by weight of all fish on board, whichever is greater.

(3) For vessels over 125 gross registered tons: 14,000 pounds landed weight, or 10 percent by weight of all fish on board, whichever is greater.

(c) If a vessel is at sea in more than one weekly period, the cod, haddock, and yellowtail flounder on board the vessel may, at the option of the vessel operator, be considered landed in the weekly period in which they were actually caught if the vessel operator maintains a log book recording the amounts of cod, haddock, and yellowtail flounder caught each day. If such log book is not maintained, all cod, haddock, and yellowtail flounder shall be counted against the landing restriction of the weekly period in which they were landed.

(d) Any licensed trawl vessel may land up to 5,000 pounds of each species in excess of the amounts permitted to be landed under paragraph (a) through (c) of this section. Any excess quantity so landed shall be deducted from the weekly trip limitation during the week immediately following such landing.

(e) The Assistant Administrator may adjust the landing restrictions in paragraphs (a), (b), and (d) of this section, upon publication of a notice in the FEDERAL REGISTER, for the following purposes:

(1) To spread fishing effort over the entire year;

(2) To reduce the need for quarterly or annual closures;

(3) To allow each of the vessel classes in paragraphs (a) and (b) of this section to harvest its historic percentage of the catch.

(f) To accomplish the purposes stated in paragraph (e) of this section, the Assistant Administrator may adjust the landing restrictions by varying amounts for each vessel class, after consideration of the following factors:

(1) Landings for the current and previous quarters;

(2) Projected harvests;

(3) Geographic and seasonal availability of fish;

(4) Traditional and anticipated fishing patterns;

(5) Number of vessels of each class in the fishery;

(6) Capability of vessels to fish in other locations or for other species;

(7) Status of unregulated species in the trawl fishery; and

(8) Incidental catch of cod and haddock during fishing for unregulated species.

5. Revise § 651.8 by striking in its entirety; substitute the following:

§ 651.8 Closed seasons.

(a) The Assistant Administrator shall announce the closure of the season for haddock, cod, or yellowtail flounder by publication in the FEDERAL REGISTER, specifying the time, date, and area for the termination of that fishery. The closure is determined in the following manner: When the total quarterly quota of haddock, cod, or yellowtail flounder is taken, the Assistant Administrator may announce that all taking of that species shall cease for that quarter, by publication in the FEDERAL REGISTER.

(b) During the period of closure, it shall be unlawful to catch, retain, or land any species to which the closure applies. *However*, vessels using gear described in paragraph (b)(1) of § 651.6 may continue fishing so long as the catch of each species to which the closure applies does not exceed one percent of all fish on board.

[FR Doc. 78-19921 Filed 7-18-78; 8:45 am]

[4510-26]

Title 29—Labor

CHAPTER XVII—OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DEPARTMENT OF LABOR

PART 1910—OCCUPATIONAL SAFETY AND HEALTH STANDARDS

Preservation of Employee Exposure and Medical Records

AGENCY: Occupational Safety and Health Administration, Department of Labor.

ACTION: Final rule (interim).

SUMMARY: Under the Occupational Safety and Health Act of 1970, the Secretary of Labor in cooperation with the Secretary of Health, Education, and Welfare has the authority to require employers to make, keep, and preserve records regarding their activities which are necessary or appropriate for carrying out the purposes of the act. This rule requires employers to preserve any employee exposure records or employee medical records which they make or maintain or to which they have access. This rule is promulgated with an immediate effective date to assure that the records covered by it will be preserved pending completion of the rulemaking proceedings on employee access to these records, notice of which will be published on Friday, July 21, 1978.

DATES: This interim final rule is effective July 19, 1978.

ADDRESS: For additional copies contact the Publications Office, OSHA Room N-3423, U.S. Department of Labor, Third Street and Constitution Avenue NW., Washington, D.C. 20210 202-523-8677.

FOR FURTHER INFORMATION CONTACT:

Charles R. McClure, Office of Compliance Programs, OSHA, Room N-3112, U.S. Department of Labor, Third Street and Constitution Avenue NW., Washinton, D.C. 20210, 202-523-8044.

SUPPLEMENTARY INFORMATION: In cooperation with the Department of Health, Education, and Welfare, OSHA is issuing a rule which applies to employers in general industry, maritime, and construction, who make, maintain or have access to any employee exposure records or employee medical records. For the reasons stated below, this rule is effective immediately. At the same time, OSHA is publishing July 21 a notice of proposed rulemaking and inviting public comment concerning long-term retention and access to these records. When promulgated as a final rule, the proposed rule will encompass and supersede this immediately effective rule.

The background and explanation of the entire rule will be set out in the notice of proposed rulemaking of July 21 and will be incorporated by reference in this document. The interim final rule, which becomes effective today, requires employers to preserve employee exposure and medical records which they make or maintain or to which they have access. To the extent these records exist, they have primarily been kept at the initiative of employers, although some records have been subject to specific OSHA recordkeeping requirements. Specific OSHA recordkeeping requirements, such as those in the vinyl chloride standard (29 CFR 1910.1017) and the coke oven emissions standard (29 CFR 1910.1029), already require retention of the affected records for specified times and shall continue to apply. With this new rule, employers must also preserve their voluntarily kept employee exposure and medical records.

The term "record," as used in this rule, is intended to cover any recorded information regardless of its physical form or character. "Employee exposure records" are defined as monitoring or measuring records which contain qualitative or quantitative information indicative of employee exposures to toxic materials or harmful physical agents; while "employee medical records" are defined as records which contain information concerning the health status of an employee or employees exposed or potentially exposed to toxic materials or harmful physical agents. Both individual exposure and medical records and general research or statistical studies based on information collected from exposure and medical records are included within those definitions.

This rule requires that the employer make these records available upon request to the Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, for examination and copying, so that OSHA may monitor compliance with this rule and enforce it accordingly. The Director of the National Institute for Occupational Safety and Health (NIOSH), U.S. Department of Health, Education, and Welfare is also given access to these records to assist him in carrying out NIOSH's responsibilities under the act. The Assistant Secretary and the Director may, of course, designate employees of their Department to carry out their functions.

This interim final rule requiring the preservation of employee exposure and medical records is being issued under the rulemaking authority in sections 8(c)(1) and 8(g) of the Occupational Safety and Health Act of 1970 (84 Stat. 1599, 1600; 29 U.S.C. 657). Section 8(c)(1) authorized OSHA to require each employer to "make, keep and preserve, and make available to the Secretary [of Labor] or the Secretary of Health, Education, and Welfare such records regarding his activities relating to this act * * * as necessary or appropriate for the enforcement of this act or for developing information regarding the causes and prevention of occupational accidents and illnesses." Section 8(g)(2) provides general rulemaking authority as the Secretary deems necessary to carry out OSHA's responsibilities under the act. Pursuant to the statute, this rule represents a determination that preservation of employee exposure and medical records is necessary to assure a safe and healthful workplace, for developing information on occupational injuries and illnesses, and, generally, for carrying out OSHA's enforcement and other responsibilities under the act. The reasons for this determination will be set out in the preamble to the proposed rule published on July 21.

In issuing this interim final rule under its general rulemaking authority, OSHA is following the provisions of section 4 of the Administrative Procedure Act (APA) (5 U.S.C. 553). Because the preservation of employee exposure and medical record is a necessary precondition to the ultimate goal of providing employee access to these records, OSHA has determined that, in accordance with sections 553 (b)(3)(B) and 553(d)(3), an immediate effective date is necessary. Section 553 (b)(3)(B) provides for an exception to the general notice requirements of the APA "when the agency for good cause finds * * * that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest;" section 553(d)(3) provides for an exception to the requirement for publication of a substantive rule not less than 30 days before its effective date "for good cause found and published with the rule."

In this case, OSHA finds good cause to make this interim final rule effective immediately and to issue it without prior notice and opportunity for comment because of the nature and objective of the rule. As has been stated, the purpose of this rule is to assure that employee exposure and medical records are preserved, so that employees and their representatives may ultimately gain access to these records. Because most of these records have been kept voluntarily, employers have been free to dispose of them as they wish. As a result, these records could be discarded as a part of normal business procedures, or in some cases to avoid disclosure to the affected employees or to others. Much valuable information concerning occupational safety and health may be irretrievably lost in this way.

An immediate effective date for this rule is therefore necessary to assure the preservation of the records during the period of public rulemaking when the issues of employee access and the appropriate retention period for these records are being resolved. Clearly, the destruction of these records for any reason during the time provided for public participation in the rulemaking would frustrate the objectives of the proposed rule. It is noted that the immediate implementation of this rule does not require employers to create records which do not exist or to immediately provide employee access to the records, but simply to continue to retain the records during the comment period and until a final rule on access to the records is promulgated. This final rule on preservation of records is therefore an interim measure, imposing minimal burdens for a limited period of time. It is OSHA's intention to complete the subsequent rulemaking proceedings as expeditiously as possible.

For these reasons, OSHA finds that providing notice, opportunity for comment, and a delayed effective date with regard to the requirement to preserve existing employee medical and exposure records would be impracticable, unnecessary, and contrary to the public interest. Interested persons will, however, have the opportunity to present their comments, views and arguments on the proposed rule which, when promulgated, will supersede this rule. Any issue raised by today's interim final rule may be presented to OSHA during this comment period, and OSHA will carefully consider all comments before promulgating the proposed rule in final form.

This document was prepared under the direction of Eula Bingham, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, Third Street and Constitution Avenue NW., Room S-2315, Washington, D.C. 20210, 202-523-9261.

This rule is promulgated pursuant to sections 8(c)(1) and 8(g) of the Occupational Safety and Health Act of 1970 (84 Stat. 1599, 1600; 29 U.S.C. 657) and Secretary of Labor's Order No. 8-76 (41 FR 25059), and in accordance with 5 U.S.C. 553. Accordingly, by that authority, 29 CFR part 1910 is amended, effective July 19, 1978, by adding a new Subpart C, "General Safety and Health Provisions," and a new § 1910.20 as follows:

Subpart C—General Safety and Health Provisions

§ 1910.20 Preservation of records.

(a) *Scope and application.* This section applies to each employer who makes, maintains or has access to employee exposure records or employee medical records.

(b) *Definitions.* "Employee exposure record" means a record of monitoring or measuring which contains qualitative or quantitative information indicative of employee exposures to toxic materials or harmful physical agents. This includes both individual exposure records and general research or statistical studies based on information collected from exposure records.

"Employee medical record" means a record which contains information concerning the health status of an employee or employees exposed or potentially exposed to toxic materials or harmful physical agents. These records may include, but are not limited to:

(1) The results of medical examinations and tests;

(2) Any opinions or recommendations of a physician or other health professional concerning the health of an employee or employees; and

(3) Any employee medical complaints relating to workplace exposure. Employee medical records include both individual medical records and general research or statistical studies based on information collected from medical records.

property used in its boat repair operations to the N Co. for four years and gives the N Co. a covenant not to compete in the boat repair business for the period of the lease. The N Co. is considered to have acquired a separate unit of M Corp.'s business for the period of the lease.

Example (2). (a) the P Co. is engaged in the operation of a chain of department stores. There are eight divisions, each division is located in a different metropolitan area of the country, and each division operates under a different name. Although certain buying and merchandising functions are centralized, each division's day-to-day operations are independent of the others. The Q Corp. acquires all of the physical and intangible assets of one of the divisions, including the division's name. Other than making those minor adjustments necessary to give the division buying and merchandising departments, the Q Corp. allows the division to continue doing business in the same manner as it had been operating prior to the acquisition. The Q Corp. has acquired a separate unit of the P Co.'s business.

(b) The facts are the same as in (a) above, except that Q Corporation buys the division merely to obtain its store locations. Before the Q Corporation takes over, the division liquidates its inventory in a going-out-of-business sale. The Q Corporation has merely acquired assets in this transaction, not a separate unit of P Company's business.

Example (3). The R Company processes and distributes meat products. Both the processing division and the distributorship are self-sustaining, profitable operations. The acquisition of either the meat processing division or the distributorship would be an acquisition of a separate unit of the R Company's business.

Example (4). The S Corporation is engaged in the manufacture and sale of steel and steel products. S Corporation also owns a coal mine, which it operates for the sole purpose of supplying its coal requirements for its steel manufacturing operations. The acquisition of the coal mine would be an acquisition of a separate unit of the S company's business.

Example (5). The T Company, which is engaged in the business of operating a chain of drug stores, sells its only downtown drug store to the V Company and agrees not to open another T Company store in the downtown area for five years. Included in the purchase price is an amount that is charged for the goodwill of the store location. The V Company has acquired a separate unit of the T Company's business.

Example (6). The W Company, which is engaged in the business of operating a chain of drug stores sells one of its stores to the X Company, but continues to operate another drug store three blocks away. The X Company opens the store doing business under its own name. The X Company has not acquired a separate unit of the W Company's business.

Example (7). (a) The Y Corporation, which is engaged in the manufacture of mattresses, sells one of its three factories to the Z Company. At the time of the sale, the factory is capable of profitably manufacturing mattresses on its own. Z Company has acquired a separate unit of the Y Corporation.

(b) The facts are the same as in (a) above, except that a profitable manufacturing operation cannot be conducted in the factory standing on its own. Z Company has not acquired a separate unit of the Y Corporation.

Example (8). The O Construction Company is owned by A, B, and C, who are unrelated individuals. It owns equipment valued at 1.5 million dollars and construction contracts valued at 6 million dollars. A, wishing to start his own company, exchanges his interest in O Company for 2 million dollars of contracts and a sufficient amount of equipment to enable him to begin business immediately. A has acquired a separate unit of the O Company's business.

(3) *Major portion.* All the facts and circumstances surrounding the transaction shall be taken into account in determining what constitutes a major portion of a trade or business (or separate unit). Factors to be considered include:

(i) The fair market value of the assets in the portion relative to the fair market value of the other assets of the trade or business (or separate unit);

(ii) The proportion of goodwill attributable to the portion of the trade or business (or separate unit);

(iii) The proportion of the number of employees of the trade or business (or separate unit) attributable to the portion in the periods immediately preceding the transaction; and

(iv) The proportion of the sales or gross receipts, net income, and budget of the trade or business (or separate unit) attributable to the portion.

§ 1.52-3 Limitations with respect to certain persons.

(a) *Mutual savings institutions.* In the case of an organization to which section 593 applies (that is, a mutual savings bank, a cooperative bank, or a domestic building and loan association), the amount of the credit allowable under section 44B shall be 50 percent of the amount otherwise determined under section 51, or, in the case of an organization under common control, under section 52 (a) or (b).

(b) *Regulated investment companies and real estate investment trusts.* In the case of a regulated investment company or a real estate investment trust subject to taxation under subchapter M, chapter 1 of the Code, the amount of the credit allowable under section 44B shall be reduced to the company's or trust's ratable share of the credit. The ratable share shall be the ratio which the taxable income of the regulated investment company or real estate investment trust for the taxable year bears to its taxable income increased by the amount of the deduction for dividends paid taken into account under section 852 (b)(2)(D) in computing investment company taxable income or under section 857(b)(2)(B) in computing real estate investment trust taxable income, as the case may be. For purposes of computing the ratable share, the reduction of the deduction for wage or salary expenses under section 280C shall not be taken into account.

(c) *Cooperatives.* (1) In the case of a cooperative organization described in section 1381(a), the amount of the credit allowable under section 44B shall be reduced to the cooperative's ratable share of the credit. The ratable share shall be the ratio which the taxable income of the cooperative for the taxable year bears to its taxable income increased by the amount of the deductions allowed under section 1382 (b) and (c). For purposes of computing the ratable share, the reduction of the deduction for wage or salary expenses under section 280C shall not be taken into account.

§ 1.280C-1 Disallowance of certain deductions for wage or salary expenses.

If an employer is entitled to a credit under section 44B, it must reduce its deduction for wage or salary expenses paid or incurred in the year the credit is earned by the amount allowable as credit (determined without regard to the provisions of section 53). In the case in which wages and salaries are capitalized, the amount subject to depreciation must be reduced by an amount equal to the amount of the credit (determined without regard to the provisions of section 53) in determining the depreciation deduction. If the employer is an organization that is under common control (as described in § 1.52-1), it must reduce its deduction for wage or salary expenses by the amount of the credit that it is allowed under subsections (a) or (b) of section 52. The deduction for wage and salary expenses must be reduced in the year the new jobs credit is earned, even if the employer is unable to use the credit in that year because of the limitations imposed by section 53.

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[4510-26]

Title 29—Labor

CHAPTER XVII—OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DEPARTMENT OF LABOR

PART 1904—RECORDING AND REPORTING OCCUPATIONAL INJURIES AND ILLNESSES

Access to the Log of Occupational Injuries and Illnesses to Employees and Their Representatives

AGENCY: Occupational Safety and Health Administration, Department of Labor.

LIA03500

ACTION: Final rule.

SUMMARY: The Secretary of Labor in cooperation with the Secretary of Health, Education, and Welfare is required by the Occupational Safety and Health Act of 1970 (the act) to prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on, work related deaths, injuries and illnesses other than minor injuries requiring only first aid treatment. This document revises the requirements of the recordkeeping regulations in 29 CFR Part 1904 to provide access to form OSHA No. 200, the log and summary of occupational injuries and illnesses (the log) to employees, including former employees, and their representatives. The statutory requirements for occupational safety and health standards also include the employee's basic right to know about workplace hazards. Since the log contains a record of each reported workplace injury and illness, employees will be more fully alerted to present and possible hazards in the workplace and thus would be significantly assisted in their efforts under the act to protect themselves from hazards. For example employees will be able to use the information contained in the log as a first step in tracing the nature and effects of toxic substances, as well as substances not known to be toxic, and in identifying patterns of injuries or symptoms which indicate need for further exploration. Moreover, former employees retrospectively will be able to examine log information about employees who may have been or are still involved in similar working conditions and perhaps exhibiting common symptoms. Finally, access to the log and the detailed information required to be included therein will provide a necessary and important means for employees to check the accuracy of the log entries.

EFFECTIVE DATE: This regulation is effective August 21, 1978.

FOR FURTHER INFORMATION CONTACT:

Mr. Norman Root, Chief, Division of Record Requirements and Information, Office of Occupational Safety and Health Statistics, Bureau of Labor Statistics, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, D.C. 20210, 202-523-9281.

SUPPLEMENTARY INFORMATION: This final regulation concerning access to the log is issued under sections 8(c), 8(g), and 24(e) of the Occupational Safety and Health Act of 1970 (84 Stat. 1599, 1600, 1615; 29 U.S.C. 657, 673), and Secretary of Labor's Order No. 8-76 (41 FR 25059). It amends 29 CFR Part 1904 by revising § 1904.7 thereof to provide access to the log (OSHA No. 200 and its predecessor form, OSHA No. 100) to employees and their representatives and to former employees and their representatives.

I. Background

On November 14, 1973, a notice was published in the FEDERAL REGISTER (38 FR 31449) proposing to amend certain provisions in § 1904.7 of 29 CFR Part 1904, pertaining to access to the log of occupational injuries and illnesses. The notice invited interested persons to submit written data, views, or arguments by December 31, 1973. Numerous comments were received regarding the proposed changes in § 1904.7 which would have provided employees and their representatives access to the log. These comments were considered at the close of the comment period but no final regulations were issued at that time. In light of the period of time which had elapsed since the original proposal, a new proposal on this subject was published in the FEDERAL REGISTER (42 FR 55623) on October 18, 1977. In developing the 1977 proposal, the comments on the original proposal were reviewed, as were the findings and recommendations of the Ad Hoc Advisory Task Force established for the purpose of advising the Bureau of Labor Statistics (BLS) with regard to the 1973 proposal. The 1977 proposal was approved in principle at a joint meeting of the BLS Labor and Business Advisory Committees on Occupational Safety and Health Statistics on August 4, 1977. As stated in the new proposal, interested persons were given until November 17, 1977, in which to submit comments, views and arguments. In response to a number of requests for extension of time to submit comments, a notice was published on December 6, 1977 (42 FR 61615) providing an additional comment period to December 21, 1977. More than 260 written comments were received in response to the proposal to provide employees access to the log.

Under section 8(c)(2) of the Occupational Safety and Health Act of 1970, the Secretary of Labor, in cooperation with the Secretary of Health, Education, and Welfare, is required to prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on, work related deaths, injuries, and illnesses other than minor injuries requiring only first aid treatment and which do not require medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job.

The recordkeeping regulations issued by the Secretary of Labor pursuant to the Occupational Safety and Health Act are contained in 29 CFR part 1904. Among other provisions, these regulations require covered employers to prepare and maintain a log and summary of occupational injuries and illnesses (OSHA No. 200). Prior to January 1978, employers were required to maintain a form OSHA No. 100, the log of occupational injuries and illnesses, and to summarize the contents of the log for annual posting on form OSHA No. 102, the summary of occupational injuries and illnesses. To reduce the paperwork burden on employers, these two forms were combined into one form, OSHA No. 200, the log and summary of occupational injuries and illnesses, with certain modifications to streamline the recordkeeping procedures.

Employers are currently required to provide access to the log to compliance safety and health officers of the Occupational Safety and Health Administration (OSHA), representatives of BLS, U.S. Department of Labor, representatives of the Secretary of Health, Education, and Welfare, and representatives of States under approved State plans.

II. Major Issues

The existing requirements concerning access to the log are contained in 29 CFR part 1904. The regulations require affected employers to compile and post an annual summary of occupational injuries and illnesses at each establishment. However, the detailed entries of each case on the log, upon which the summary is based, are not required by regulation to be made available to employees and their representatives. By this document, the current regulations are amended to make the log information available to employees, to former employees, and to their representatives.

The log information is made available if requested by any former or current employee or a representative selected by an employee. An employee representative includes, but is not limited to, a labor organization which serves as the collective bargaining representative for the employees. The employee or his or her representative has access to the log for any establishment where the employee is or has been employed.

The requirement in the proposed access regulation of Oct. 18, 1977 relative to small employers has been changed in this final regulation in OSHA's continuing effort to reduce the paperwork burden on small employers. In the final document, employers with fewer than 11 employees who are required to maintain a log if selected to participate in the annual BLS statistical survey, are exempt from the requirement to provide access to the log to employees or their representatives.

Many issues were raised in the written comments. The following is a discussion of those issues considered to be of major importance.

(1) *Whether there exists a need to provide access to the log to employees, former employees, and their representatives.* Several comments questioned the need for a regulation giving access to the log to employees.

The principal purpose of the regulation is to better inform employees about the effets of workplace hazards by affording them access to current and detailed information, such as contained in the log, regarding occupational injuries and illnesses occurring in establishments. While employers also receive benefits from the programs established under the Occupational Safety and Health Act of 1970, the chief beneficiaries of the act are the employees whose safe and healthful working conditions are assured thereunder. Therefore, in order to carry out one of the basic underlying purposes of the act, that is, to keep employees informed about their working environment, it is both reasonable and desirable that employees, and those who represent them, have access to log information regarding their workplace injuries and illnesses.

The posting of an annual summary does not provide adequate or equivalent information as that contained in the log. While the broadly categorized entries in the annual summary, together with their aggregate totals of injuries and illnesses, provide useful information, the annual summary alone does not provide the particular and current type of information which is contained in the log.

For example, the log includes the date on which the injury occurred or the illness became manifest, the name and occupation of the injured or ill employee, the department in which he or she works, a brief description of the nature of the injury or illness, the part of body affected, and a measure of severity. Such information is not found in the annual summary. In addition, entries are made in the log as cases occur, while the summary is prepared and made available only once a year from February 1 to March 1. The log, therefore, provides the more useful information for employees and their representatives.

Since employees and their representatives will have access to the same information which the employer has, both labor and management will be in a more evenly balanced position in terms of information needed to foster joint labor-management efforts in identifying and reducing workplace hazards. One of the basic express purposes of the Occupational Safety and Health Act is to encourage joint labor-management efforts to reduce injuries and disease arising out of employment (section 2(b)(13)).

Employee access to the log will also provide greater assurance that the information entered in the log is both accurate and complete. Employees will be able to ascertain whether an individual's injury or illness has been entered into the log and that it has been entered properly.

In addition, employees will be able to determine whether other employees have been experiencing similar injuries or illnesses. This ability to compare entries in the log will enable employees to discover common characteristics among job-related injuries and illnesses. This knowledge will help employees to protect themselves from future occurrences.

While it is true that, at present, many more injuries than illnesses are recorded in the log, it is anticipated that the number of illness cases will increase as more toxic substances and their ill effects are identified and as diagnostic techniques are improved. The early identification and reporting of occupational illness is a valuable tool in the effort to prevent hazardous exposures and serious disabilities. Employee heightened awareness through access to the listing in the log of certain symptoms can be an important adjunct in this effort.

The purpose and reasonableness of providing access to the log to former employees was raised in several comments. For the same reasons cited above, former employees should have access to records subsequent to their employment period in the establishment to determine if medical problems currently afflicting them are being identified as work related under new diagnostic techniques and/or increased awareness of toxic substances.

(2) *Whether the information contained in the log is already available to employees and their representatives.* Comments indicated that information concerning occupational injuries and illnesses is currently available to employees and their representatives through several means. These include: Observation of injuries and illnesses; access by safety committees and union representatives to the log and other safety records; posting of citations under section 13(c) of the act; and notification to employees of exposure monitoring data. Other comments stated that the posting of the annual summary provides adequate information for both unions and employees.

The methods cited above by the comments do not provide adequate and uniform means to inform all employees about hazards. At present, the number of firms which voluntarily or through collective bargaining provide access to the log to employees or their representatives is small. There is no existing means of ensuring that all employees will have available to them the type of necessary and certain information contained in the log. This creates an inequitable situation that is alleviated by this regulation.

Firsthand observation is not considered adequate since no employee or his representative would be able to witness every injury, and illnesses by their nature are often not observable happenings. On the other hand a review of even a few log entries, such as the place of occurrence of similar injuries or illnesses, may accomplish much toward reducing hazardous situations by identifying patterns of such occurrences not readily apparent through observation.

While the use of the annual summary as a source of information for employees may provide useful information, the broadly categorized entries in the annual summary, together with their aggregate totals of injuries and illnesses, do not provide the specific and current types of information—name, occupation, department, etc.—which are contained in the log. And, as noted, the summary is prepared and made available to employees only once a year.

The other sources of information such as employee-monitoring data that are already available to employees are limited to specific exposures to previously identified hazards and limited to only a few categories of employees. These sources do not provide the broad overview of the total injury and illness experience in a workplace, and without the overview that the log data afford, the employee will be unable to gain a proper perspective of the existing and potential hazards of his or her workplace. The log, therefore, provides the most useful information for all employees, former employees, and their representatives.

(3) *Whether access to the log will achieve the goal of informing employees of the hazards in the workplace.* Several comments stated that the log does not contain information on the cause of injuries and illnesses; does not identify the hazards in the workplace; and does not fully describe the work being performed at the time of the injury. Thus, the comments contend that access to the log would not serve the purpose of informing employees of workplace hazards.

While the information contained in the log does not describe the complete circumstances associated with each injury or illness entry, the patterns of occurrences in an occupation, in a department, or of a similar kind of injury and to a specific part of the body, will point out the problem areas and provide the type of information which can lead to further inquiries. These inquiries, in turn, can produce more details of the circumstances associated with an injury or an illness.

Such log information will raise employees' general awareness of hazardous conditions and of exposures to toxic substances throughout the workplace.

(4) *Whether the Secretary of Labor has the statutory authority to permit employees access to the log.* Several comments stated that the Secretary of Labor lacked statutory authority to require employers to provide employees and their representatives access to the log. Many of these comments further contended that there is no statutory authority to extend access to include representatives of employees, or former employees, or their representatives.

The regulation requiring employers to compile and maintain the log of occupational injuries and illnesses is authorized under section 8(c)(2) where the Secretary is mandated to "prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on work related deaths, injuries and illnesses."

Section 8(c)(1) of the act requires the Secretary to issue regulations requiring employers, through posting of notices or other appropriate means, to keep their employees informed of their protections under the act. Informing employees of their protections should include more than merely providing general information about the act's requirements. Informing employees about their protections reasonably includes providing them with pertinent data about their workplace environment. It is clear that the Secretary has the authority to prescribe the necessary means to inform employees of hazards and to prescribe the means of providing the employees with information which would assist them in protecting themselves. An appropriate means of keeping employees informed of their protections is to provide them and their representatives with access to basic information, such as that contained in the log, regarding specific conditions in the workplace. It is clear that with access to the log, employees would be better informed concerning protections in the workplace and efforts to avoid and correct hazards.

The requirement that the log be made available to employees is also consistent with the language of section 8(g)(1) which authorizes the Secretary to publish, either in summary or detailed form, all reports or information obtained under section 8 of the act.

The reasonableness of the authority for extending the opportunity of access to the log to representatives of employees and former employees is also supported by the provisions of section 8(c)(3) of the act. That section mandates the Secretary to issue regulations requiring that employers maintain accurate records of employee exposures to potentially toxic materials of harmful physical agents, and that employees or their representatives have the opportunity to observe such monitoring or measuring, and that both employees and former employees have access to these records.

Section 8(c)(3) supports the position that the Secretary is authorized to require access to the log as an appropriate means of informing employees and that access may extend to representatives of employees and former employees. If access to the log were denied to designated representatives, this could in practice, result in denial of access to the information in the log to employees or former employees where the employee or former employee is unavailable, incapacitated, unable to inspect the log personally or simply not able to fully understand the entries. Additionally, the use of representatives by large numbers of employees may actually facilitate review of the logs.

From the above, as well as from the whole tenor of the act that contemplates keeping employees informed and involving them in both rulemaking and enforcement activities under the act, it is reasonable to conclude that the Secretary has the authority to provide employees and their representatives with access to the log.

The following sections from the act illustrate the importance of informing both employees and their representatives: Section 6(b)(6)(B)(v), informing employees and their representatives of the application for a temporary variance; section 6(b)(7), requiring the use of labels or other appropriate means to apprise employees of hazards; section 6(d), giving notice to employees of the application for a permanent variance; section 8(c)(1), requiring through posting or other means, that employees be informed of their protections and obligations under the act; section 8(c)(3), providing opportunity to observe monitoring and measuring and access to records; section 8(e), providing opportunity to participate in physical examination of the workplace; section 9(b), posting of citations; and section 13(c), informing employees of the existence of imminent dangers.

(5) *Whether the regulation affects collective bargaining or collective bargaining agreements in effect.* A few comments suggested that a possible inference could be drawn that access to the log, provided for in the final regulation, could be bargained away. The inference is without merit since collective bargaining clearly may not be used to bargain away that which is required by regulations that have the force and effect of law. However, the proposal and final regulation make it clear that labor and management are not precluded from bargaining collectively for access to additional information other than that required to be made available by this regulation. Thus, the requirement in this regulation may be augmented through collective bargaining to include access to other information required to be collected, recorded, and maintained.

Also without merit is the comment that the regulation encourages collective bargaining for access to other employer reports. The terms of the regulation convey no such encouragement; the language merely makes it clear that access to the log in no way bars management and labor from bargaining collectively for access to additional items.

(6) *Whether access to the log is an invasion of privacy and should not be permitted.* Numerous comments raised questions concerning the issue of privacy. The basic thrust of the arguments is that access to the log invades the employee's right of privacy in information contained in the log and is contrary to the provisions of the Privacy Act of 1974 (5 U.S.C. §552a); or at least contrary to the underlying policy and spirit of the Privacy Act.

The purpose of the Privacy Act of 1974 is to provide certain safeguards to individuals against an invasion of personal privacy by instituting controls on personal information collected, maintained, used, and disseminated by Federal agencies.

The log of occupational injuries and illnesses is compiled and maintained by employers, not by Federal agencies, and therefore the log is clearly not a Federal record and thus not subject to the Privacy Act of 1974. Even though the Secretary requires employers under section 8(c)(2) of the act to produce such records, the log is maintained by the employer, kept at his business establishment and is otherwise under the control of the employer. Thus, the comment that the regulation violates the Privacy Act of 1974 is without merit since by its terms the Privacy Act does not apply to records compiled and maintained by employers.

With respect to comments that the regulation violates the underlying policy or spirit of the Privacy Act, we believe that the limited privacy interest that an individual employee might have in a log entry is clearly outweighed by the need of all employees to have access to the log. The regulation does not involve access to medical information about an employee's general physical condition or state of health. The regulation involves only information about those particular injuries and health problems that are employment related. Because the information to which access is provided is associated with work-related safety and health problems, all the employees in a particular working establishment have a direct and compelling need to know the nature and extent of the injuries and illnesses being sustained by them and their coworkers. Information about an employee's injuries and illnesses in the working environment shared by employees in an establishment need not be accorded the same degree of privacy to which an individual is entitled in the case of information about his or her state of health that is not employment related and that has no effect on other persons. The employees' compelling need to know about adverse health effects which coworkers are suffering as a result of the working environment that affects all workers is a necessary and reasonable justification for permitting access to information about such effects.

Indeed, we seriously question the propriety of denying employees access to information that directly, and in many cases urgently, affects them. For example, if two or three employees are exhibiting symptoms of nausea and dizziness where toxic or suspected toxic chemicals are being used in the workplace, it would be imprudent to keep such germane information from other employees. In such cases, the right of privacy must be tempered by the obvious exigencies of informing employees about the effects of workplace hazards.

In addition to the compelling and overriding need for employees to know about on-the-job injuries and illnesses that directly affect them, there are also certain factors in connection with this regulation that mitigate the privacy issue. The log arguably contains information which could be described as medical information and therefore we have given our fullest consideration to the sensitive issue of privacy. The log, however, does not contain the detailed diagnostic type of medical information normally kept by a physician in the case of a patient.

To the contrary, the log contemplates only the briefest description of the nature of the injury or illness and most often, as a matter of practice, the log entry is not made by a physician and therfore contains no medical diagnosis, as such. According to a special study conducted by BLS for the year 1976, less than 1 percent of log entries were made by physicians.

However, even where a physician does make the entry of a diagnosis in the log, that entered diagnosis should not include elaborate details that may prove embarrassing to the employee. Examples of these brief descriptions are cited on the log form and they illustrate the type of entry which is required for the log and which we believe, if discretion is used by the one making the entry, will cause no embarrassment to the employee and no invasion of his or her privacy. Examples are: "Amputation—left forefinger," "electrocution—body," "dermatitis—arms," etc.

Some comments stated the belief that even the employer's right of privacy would be abridged where employees are given access to the log. We believe this comment is without merit. The log contains no particularly sensitive information about the employer such as trade-secret type of information. As far as other log information is concerned, we believe that the compelling need for employees to be informed about their own injuries and illnesses far outweighs an employer's asserted right to withhold such information from employees.

(7) *Whether the regulation would place an undue burden on employers.* Several comments discussed possible administrative burdens which employers may incur as a result of employee access to the log of occupational injuries and illnesses. The comments contend that employee access to the log will cause additional paper-work, lost worktime, and loss of productivity.

The promulgation of a regulation giving access to the log to employees will create some additional burdens on employers. The added administrative burden on employers is not expected to be substantial.

The use of the term "reasonable" should provide relief to employers from any possible harrassment. The potential for misuse of this regulation by employees or representatives of employees is claimed to exist. We think that actual abuses of access to the log will be few in number, if any, and employers will be able to deal with such circumstances as they arise, exercising good judgment and commonsense.

There were additional concerns that attorneys might utilize the access provisions for "fishing expeditions" for lawsuits or workers' compensation claims. However, attorneys for employees involved in compensation cases already have other means of obtaining information from the log and other sources as a matter of course. Attorneys without evidence of representation of an employee or former employee would not have the right of access to the log.

(8) *Whether Department of Labor employees other than Compliance Safety and Health Officers (CSHO's) and representatives of the Bureau of Labor Statistics should have access to all OSHA injury and illness records.* A few comments questioned the rationale of providing access to Department of Labor employees other than CSHO's and representatives of BLS. Section 1904.7 of the current regulations permits access to OSHA injury and illness records for inspection and copying by compliance safety and health officers of OSHA during any occupational safety and health inspection under part 1903 of the OSHA regulations and section 8 of the act. This amendment to the regulations would specifically provide access to these records to any authorized representative of the Secretary of Labor. The purpose of this language is to make the records available to other officials and employees of the Department of Labor who have a legitimate need to examine and copy employers' OSHA records in order to carry out various responsibilities under the Occupational Safety and Health Act, which are not directly related to compliance. For example, these would include Department officials inspecting a workplace to determine if a variance should be granted under section 6(d) of the Occupational Safety and Health Act, or officials engaged in gathering information for the purpose of developing standards (section 6(b)).

OTHER ISSUES

29 CFR 1904.15 exempts small employers with 10 or fewer employees from keeping OSHA records unless such small employers are specifically notified by BLS that they have been selected to participate in a BLS annual survey. In such cases, those selected small employers must keep records for the survey year. The October 18, 1977, proposed access regulation contained a provision requiring small employers who were selected in the annual statistical survey (and therefore required to maintain a log) to provide to their employees access to that log. This proposed provision is not included in the final rule because: In a small firm with fewer than 11 employees, an injury or illness to 1 of the employees is readily observable; the requirement to provide access to the small employer's log is not consistent with the effort to reduce the paperwork burden on small employers; the log to which employees would have access would only be available for 1 year; and the sample of small employers selected to participate in the BLS annual survey is presently limited to about 1 in 30.

Several requests for a hearing were received. The Assistant Secretary of Labor for Occupational Safety and Health has determined, in accordance with 5 U.S.C. 553, that a hearing is unnecessary. The written comments regarding access that have already been submitted to the Department of Labor are sufficient in assisting the Assistant Secretary in the preparation of this final regulation. The purpose of a hearing is to provide for the presentation of additional evidence and the opportunity to probe and test the evidence. In the case of access to the log, most of the information submitted is in the nature of argument and opinion. There is no data of an evidentiary nature that would be forthcoming at a hearing. Therefore, the requests for a hearing are denied, and reliance has been placed on the substantial number of written comments that have been received.

At the time of the publication of the October 18, 1977, proposal on access to the log of occupational injuries and illnesses to employees and their representatives a determination was made that an economic impact statement in accordance with Executive Order 11949 need not be prepared. On March 24, 1978, Executive Order 12044 was published at 43 FR 12262 establishing regulatory analyses to replace the old economic impact statements. The Secretary of Labor has published a proposed Secretary's order encompassing the policy considerations in Executive Order 12044. The proposed Secretary's order states on page 22918: "No analysis is needed if on or before March 23, 1978 * * * a decision has been made that none was needed." Therefore, based on the previous determination and in accordance with the proposed Secretary's order, no regulatory analysis is needed.

AUTHORITY

This document was prepared under the direction of Eula Bingham, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, D.C. 20210.

Accordingly, under sections 8(c) (1), (2), and (3), 8(g) (1) and (2), and 24(e) of the Occupational Safety and Health Act of 1970 (84 Stat. 1599, 1600, 1615, 29 U.S.C. 657, 673), Secretary of Labor's Order No. 8-76 (41 FR 25059), and 5 U.S.C. 553, 29 CFR Part 1904 is hereby amended by revising § 1904.7 to read as set forth below.

In order to insure that affected employers and employees will be informed of the existence of the new provisions and to familiarize themselves with the new requirements, the effective date of the revision to § 1904.7 will be August 21, 1978.

Signed at Washington, D.C., this 17th day of July 1978.

EULA BINGHAM,
Assistant Secretary of Labor.

JANET L. NORWOOD,
Acting Commissioner of the Bureau of Labor Statistics.

§ 1904.7 Access to records.

(a) Each employer shall provide, upon request, records provided for in §§ 1904.2, 1904.4, and 1904.5, for inspection and copying by any representative of the Secretary of Labor for the purpose of carrying out the provisions of the act, and by representatives of the Secretary of Health, Education, and Welfare during any investigation under section 20(b) of the act, or by any representative of a State accorded jurisdiction for occupational safety and health inspections or for statistical compilation under sections 18 and 24 of the act.

(b) (1) The log and summary of all recordable occupational injuries and illnesses (OSHA No. 200) (the log) provided for in § 1904.2 shall, upon request, be made available by the employer to any employee, former employee, and to their representatives for examination and copying in a reasonable manner and at reasonable times. The employee, former employee, and their representatives shall have access to the log for any establishment in which the employee is or has been employed.

(2) Nothing in this section shall be deemed to preclude employees and employee representatives from collectively bargaining to obtain access to information relating to occupational injuries and illnesses in addition to the information made available under this section.

(3) Access to the log provided under this section shall pertain to all logs retained under the requirements of § 1904.6.

(Sec. 8, 24, 84 Stat. 1599, 1600, 1615 (29 U.S.C. 657, 673); Secretary of Labor's Order No. 8-76 (41 FR 25059); sec. 4 of the Administrative Procedure Act (5 U.S.C. 553).)

[FR Doc. 78-20231 Filed 7-20-78; 8:45 am]

[4510-26]

PART 1910—OCCUPATIONAL SAFETY AND HEALTH STANDARDS

Preservation of Employee Exposure and Medical Records

NOTE.—This document originally appeared in the FEDERAL REGISTER for Wednesday, July 19, 1978. It is reprinted in this issue to meet requirements for publication on an assigned day of the week. (See the inside cover of this issue for information about agencies publishing on assigned days of the week.)

AGENCY: Occupational Safety and Health Administration, Department of Labor.

ACTION: Final rule (interim).

SUMMARY: Under the Occupational Safety and Health Act of 1970, the Secretary of Labor in cooperation with the Secretary of Health, Education, and Welfare has the authority to require employers to make, keep, and preserve records regarding their activities which are necessary or appropriate for carrying out the purposes of the act. This rule requires employers to preserve any employee exposure records or employee medical records which they make or maintain or to which they have access. This rule is promulgated with an immediate effective date to assure that the records covered by it will be preserved pending completion of the rulemaking proceedings on employee access to these records, notice of which will be published on Friday, July 21, 1978.

DATES: This interim final rule is effective July 19, 1978.

ADDRESS: For additional copies contact the Publications Office, OSHA, Room N-3423, U.S. Department of Labor, Third Street and Constitution Avenue NW., Washington, D.C. 20210, 202-523-8677.

FOR FURTHER INFORMATION CONTACT:

Charles R. McClure, Office of Compliance Programs, OSHA, Room N-3112, U.S. Department of Labor, Third Street and Constitution Avenue NW., Washington, D.C. 20210, 202-523-8044.

SUPPLEMENTARY INFORMATION: In cooperation with the Department of Health, Education, and Welfare, OSHA is issuing a rule which applies to employers in general industry, maritime, and construction, who make, maintain or have access to any employee exposure records or employee medical records. For the reasons stated below, this rules is effective immediately. At the same time, OSHA is publishing July 21 a notice of proposed rulemaking and inviting public comment concerning long-term retention and access to these records. When promulgated as a final rule, the proposed rule will encompass and supersede this immediately effective rule.

The background and explanation of the entire rule will be set out in the notice of proposed rulemaking of July 21 and will be incorporated by reference in this document. The interim final rule, which becomes effective today, requires employers to preserve employee exposure and medical records which they make or maintain or to which they have access. To the extent these records exist, they have primarily been kept at the initiative of employers, although some records have been subject to specific OSHA recordkeeping requirements. Specific OSHA recordkeeping requirements, such as those in the vinyl chloride standard (29 CFR 1910.1017) and the coke oven emissions standard (29 CFR 1910.1029), already require retention of the affected records for specified times and shall continue to apply. With this new rule, employers must also preserve their voluntarily kept

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ment requirements. The community may at any time enact stricter requirements on its own, or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations will also be used to calculate the appropriate flood insurance premium rates for new buildings and their contents and for the second layer of insurance on existing buildings and their contents.

The proposed base (100-year) flood elevations for selected locations are:

Source of Flooding	Location	Elevation in feet, national geodetic vertical datum
Ahnapee River	At mouth	584
	100 ft. upstream of 2nd St.	584
	Downsteam side of 4th St.	585
	200 ft. upstream of 4th St.	586
	At upstream corporate limit.	587
Silver Creek	At confluence with Ahnapee River.	587
	Downstream of Ahnapee and Western RR.	587
	100 ft. upstream of Perry St.	589
	2500 ft. upstream of Perry St.	590
	3200 ft. upstream of Perry St.	592
	At upstream corporate limit.	593

(National Flood Insurance Act of 1968 (title XIII of Housing and Urban Development Act of 1968), effective Jan. 28, 1969 (33 FR 17804, Nov. 28, 1968), as amended (42 U.S.C. 4001-4128); and Secretary's delegation of authority to Federal Insurance Administrator, 43 FR 7719.)

Issued: July 10, 1978.

GLORIA M. JIMENEZ,
Federal Insurance Administrator.

[FR Doc. 78-19969 Filed 7-20-78; 8:45 am]

[4510-26]

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[29 CFR Part 1910]

[Docket H-112]

ACCESS TO EMPLOYEE EXPOSURE AND MEDICAL RECORDS

Proposed Rule

AGENCY: Occupational Safety and Health Administration, Department of Labor.

ACTION: Proposed rule.

SUMMARY: This proposed rule on access to employee exposure records and employee medical records would implement OSHA's policy under the Occupational Safety and Health Act of 1970 that employees have the basic right to know about their exposures to workplace hazards and the effects of exposure. The proposed rule includes requirements for the retention of these records for the duration of employment plus five (5) years and for the availability of these records to employees, former employees, their designated representatives, and to OSHA and NIOSH. When promulgated, the proposed rule will supersede the interim rule requiring preservation of employee exposure records and employee medical records which was effective July 19 (43 FR 31019).

DATES: Comments must be submitted on or before September 22, 1978.

ADDRESS:

Comments should be sent to: Docket Officer, Docket No. H-112, Room S-6212, U.S. Department of Labor, Third Street and Constitution Avenue NW., Washington, D.C. 20210, 202-523-7895.

For additional copies contact the Publications Office, OSHA, Room N-3423, U.S. Department of Labor, Third Street and Constitution Avenue NW., Washington, D.C. 20210, 202-523-8677.

FOR FURTHER INFORMATION CONTACT:

Mr. David Welsh, Directorate of Health Standards Programs, Room N-3663, U.S. Department of Labor, Third and Constitution Avenue NW., Washington, D.C. 20210, 202-523-7174.

SUPPLEMENTARY INFORMATION:

BACKGROUND AND LEGAL AUTHORITY

The American labor force numbers about 100 million workers, many of them exposed to toxic materials or harmful physical agents in their workplaces. Millions of these workers are unaware of the hazards posed by these exposures. However, date exist in employee exposure records and emplyee medical records which will increase the employees' recognition of these hazards in their workplaces.

This proposed rule is being issued in cooperation with the Department of Health, Education, and Welfare. Its purpose is to provide the affected employees and their designated representatives, as well as OSHA and NIOSH, with access to this important safety and health information. The goals of occupational safety and health are not adequately served if employers do not fully share the available information on toxic materials and harmful physical agents with employees. Until now, lack of this information has too often meant that occupational diseases and methods for reducing exposures have been ignored and employees have been unable to protect themselves or obtain adequate protection from their employers. By giving employees and their designated representatives the right to see relevant exposure and medical information, this proposal will make it easier for employees to identify worksite hazards, particularly workplace exposures which impair their health or functional capacity. Increased awareness of workplace hazards will also make it more likely that prescribed work and personal hygiene practices will be followed.

The Assistant Secretary has previously stated OSHA's policy concerning employee's rights to this type of information:

> The Act's declared objectives and specific implementing provisions demonstrate the importance of providing employees with full and complete information about safety and health conditions at their worksite. * * * Moreover, [the need for] employee access to this information is reinforced by the limited resources of OSHA to inspect worksites for hazards and to impose abatement requirements when violations are found. (42 FR 55623, October 18, 1977.)

In carrying forward this policy, OSHA relies specifically upon the authority of sections 8(c) and 8(g) of the act (29 U.S.C. 657). In addition, many other provisions in the act, including sections 6(b)(7), 8(e), 9(b) and 13(c), also support OSHA's authority to implement the employee's basic right to know about workplace hazards.

Section 8(c)(1) authorizes OSHA, in cooperation with the Department of Health, Education, and Welfare, to require each employer to "make, keep, and preserve records regarding his activities relating to the act * * * as [are] necessary or appropriate for the enforcement of this act or for developing information regarding the causes and prevention of occupational accidents and illnesses."

Section 8(c)(3) authorizes regulations requiring employers to maintain accurate records of emloyee exposures to potentially toxic materials or harmful physical agents which are required to be monitored or measured by a particular OSHA safety and health standard, and also to "make appropriate provision for each employee or former employee to have access to such records as will indicate his own exposure to toxic materials or harmful physical agents."

Authority for this proposed rule is also found in section 8(g) of the Act. Section 8(g)(1) authorizes OSHA and NIOSH to compile, analyze, and publish, either in summary or in detailed form, all reports or information obtained under section 8. In addition, section 8(g)(2) authorizes OSHA and NIOSH to prescribe such rules and regulations as they deem necesssary to carry out their responsibilities under the act.

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This proposed rule thus implements the mandate of section 8 and the general mandate of other provisions of the act by requiring employers to preserve employee exposure and medical records and to make them available to employees, former employees, their designated representatives, and OSHA and NIOSH.

DISCUSSION OF THE PROPOSED RULE

SCOPE AND APPLICATION

The proposed rule applies to each employer in general industry, maritime, or construction, who makes, maintains, or has access to employee exposure records or employee medical records. The term "record" as used in this proposed rule, is intended to cover any recorded information regardless of its physical form or character. These records may have been maintained by the employer as a result of exposure monitoring or medical surveillance programs initiated by the employer, or the records may have been required by a specific OSHA standard. To come within the scope of this proposed rule, the records do not have to be within the employer's physical control as long as the employer has access to them. The concept of employer access encompasses situations in which any of the employer's officers, employees, agents, or contractors (including the corporate medical department) has physical control or access to records, even though they are not generally available to all officers, employees, agents, and contractors.

The proposed rule does not mandate the creation of new records or reports, nor impose any independent obligation on employers to monitor or measure employee exposures or to provide medical surveillance or examinations. In addition, the proposed rule does not establish mandatory requirements as to exposure records or medical records or specify their format. Instead, the proposed rule reflects a recognition that monitoring and medical surveillance are conducted by many employers at their own initiative and that employers retain information concerning the results of this monitoring and medical surveillance. This rule would simply require an employer who makes these records to retain them for specified periods of time and to make them available upon request to employees, former employees, their designated representatives, and to OSHA and NIOSH.

The proposed rule is intended to establish the rights of access under the act to all employee exposure and employee medical records, whether or not these records are the subject of specific occupational safety and health standards. On the other hand, as explained below, the retention periods of specific standards will continue to apply. At the time of final promulgation, OSHA will make the necessary conforming amendments to current OSHA standards such as those in subparts T and Z of part 1910 so that their access provisions will be identical to this rule.

For the purpose of this proposed rule, "employee exposure records" are monitoring or measuring records which contain qualitative or quantitative information that is indicative of employee exposure to toxic materials or harmful physical agents. These records would include determinations of airborne concentrations of chemicals to which an employee is exposed, or would be exposed if not wearing a respirator. They would also include determinations of physical agents within the workplace environment which might impair an employee's health or functional capacity, for example, records of heat, noise, radiation, vibration, or hypo- or hyperbaric (i.e. nonatmospheric) pressure. Records of area sampling of workplace contaminant levels and representative or random employee sampling are covered by this definition. If a record contains information which is useful to determine employee exposure, the record would be covered by this rule even though the record was not created for occupational health purposes.

An "employee medical record" is a record concerning the health status of an employee or employees exposed or potentially exposed to toxic materials or harmful physical agents. This record would include, but is not limited to: (1) The results of medical examinations and tests, (2) any opinions or recommendations of a physician or other health professional (such as a nurse or a medical technician) concerning the health of an employee or employees, and (3) any employee medical complaints relating to workplace exposure.

Both individual exposure and medical records and general research or statistical studies based on information collected from exposure and medical records are included within these definitions. The information in these records is necessary to determine employee exposure to toxic materials or harmful physical agents and the effects of these exposures.

The proposal therefore includes basically commonsense, broad definitions of employee exposure records and medical records which would be subject to disclosure. These records, however, may in fact contain a collection of different kinds of information of varying significance to occupational safety and health. Medical records in particular may include a multiplicity of information. These include personal and family information to identify the person who is subject of the record, medical histories including family medical histories, medical complaints of the employee, chemical test data (including X-rays and laboratory reports), diagnostic evaluations, records of treatments and prescriptions, and recommendations to the employee and management regarding the employee's condition. Miscellaneous information in the records may include written consents to medical examinations or procedures, referrals for medical service, consulting physicians' medical reports, refusals of medical service, notices of need for medical attention, releases of medical information, and immunization records.

While most of the information in the records will have been volunteered by the employee-patient or obtained by direct examination or observation by the physician, some may have been provided confidentially by third parties (e.g. management, spouses, personal physicians). While all of the information in the records presumably relates to the employee's health status, some may be general in nature and irrelevant to occupational exposure or medical fitness to perform work. Moreover, some of the information may be in the nature of preliminary, informal or subjective notes by the physician which the physician considers to be of possible aid in future diagnoses but have no present diagnostic value. It is noteworthy that in many well conducted corporate medical programs, only the physician's opinion or recommedations as to the employee's condition or medical fitness to work is available to managment, and that the confidentiality of much of the remainder of the records, including the underlying diagnostic data, is maintained by the physician.

Accordingly, OSHA invites comments on whether any types of information in the medical records should be excluded from the disclosure requirements of the final rule. For instance, should the employer (i.e. medical department) have discretion to disclose certain kinds of information (i.e. diagnoses of psychological impairments or terminal illnesses) only to the employee's designated physician? Should physicians' notes of a preliminary, informal, or subjective nature which have not formed the basis of a recommendation or opinion to management be mandatorily disclosable? Should the identities of third parties who have provided information in the medical record be mandatorily disclosable? Should diagnostic records or other kinds of information not available to management be mandatorily disclosable? Should general studies based on information con-

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tained in individual exposure or medical records be mandatorily disclosable?

PRESERVATION OF RECORDS

Employers will be required to preserve records covered by this proposed rule for at least the duration of the employee's employment in the employer's workplace plus an additional 5 years after the termination of employment. The purpose of this proposed rule is to ensure that affected employees and Federal occupational health agencies have access to pertinent exposure and medical records. Relating the retention period to the length of the individual's employment plus a specified period thereafter (i.e. 5 years) is an appropriate means of accomplishing this purpose. There may be situations where this retention period may be longer than absolutely necessary, and others where it is too short to ensure the preservation of the record throughout the latency period of an occupational illness arising from an earlier exposure to toxic materials. OSHA believes that the general retention period of this proposed rule strikes a reasonable balance between these two situations.

Nevertheless, because it recognizes that the longer the retention period, the greater the risk of infringement upon employees' privacy interests and the greater the administrative burden on employers, OSHA invites comments on whether a lesser or longer period should be adopted in the final rule for some or all kinds of records covered by the regulation. Comments are also invited on whether there should be a provision, such as those in specific OSHA standards, for the transfer of record if an employer goes out of business.

Specific recordkeeping requirements have been established by individual OSHA standards based on the specific occupational hazard or illness involved, for example, the commercial diving standard (29 CFR 1910.401 et seq.), the vinyl chloride standard (29 CFR 1910.1017) and the coke oven emissions standard (29 CFR 1910.1029). Under this proposal, the retention periods of specific OSHA standards would continue to apply to the affected records or portions of the record. This approach is considered appropriate because the retention period in these specific standards were based on rulemaking evidence of the particular consequences of employee exposure to the toxic material or harmful physical agent (e.g. cancer).

AVAILABILITY OF RECORDS

The proposed rule requires that the employer make employee exposure and medical records available, upon request, for examination and copying. These records bear directly on the employees' exposures to toxic materials and harmful physical agents. For the reasons stated above, access to this information is vital to the identification, treatment, and prevention of occupational illnesses.

Under the proposed rule, employees, former employees, and their designated representatives are provided equivalent rights to examine and copy employee exposure records and medical records. (Since employees and former employees are treated alike in this rule, any reference in this preamble or rule to employees includes former employees.) This proposal does not provide a limiting definition of "designated representative." Rather, a designated representative could be anyone to whom an employee has given written permission to act on his or her behalf to obtain direct access to his or her records. For instance, a collective bargaining agen*, physician, attorney, family member, fellow employee, or anyone else, could be a designated representative, provided the necessary consent were obtained. Access to employee exposure records and medical records by designated representatives is necessary so they can assist the employees they represent in making effective use of their records and in securing their rights under the OSHA Act.

With regard to employee exposure records, employees, former employees, and their designated representatives would have the right to examine and copy all relevant employee exposure records. For the purposes of this proposed rule, "relevant" exposure records encompass records of past, present, and potential exposures, including records of an employee's own exposures, exposure records of other employees with related or comparable exposures, and records containing general exposure information concerning the employee's workplace or working conditions. Thus, an employee and his or her designated representative would be entitled to exposure information that is indicative not only of the employee's current exposures, but also information regarding former exposures and future or potential exposures as well (e.g., exposure information concerning a different workplace or job where an employee may be transferred).

As for employee medical records, employees, former employees, and their designated representatives would have the right to examine and copy only those records of which the employee is the subject or for which written consent has been obtained from the subject employee. Contrary to common industry practice, the proposal places no conditions on the employee's right to gain direct access to his or her own medical records, since the employee should have the option of being as fully informed about his or her health status as the employer's medical department. While OSHA recognizes the importance of having a professionally trained person to interpret and explain the information contained in the records, and indeed provides for direct access by designated representatives in this proposal, it believes that the benefits of direct employee access outweigh the risk that the employee may misinterpret the information to his or her detriment. Of course, consistently with this proposal, the corporate physician could explain the contents and significance of the medical record in addition to releasing it to the employee or designated representative. At the same time, there may be circumstances where disclosure of information directly to the employee would be damaging. Thus, as previously stated, OSHA invites comments on whether the employer (i.e., medical department) should have discretion to disclose certain kinds of information (e.g., diagnoses of psychological impairments or terminal illnesses) only to the employee's designated physician.

In the absence of written consent, however, this proposal does not provide an employee or designated representative with access to medical records of other employees with related or comparable exposures. OSHA recognizes that these records could be important sources of information to a treating physician, industrial hygienist, epidemiologist, or other health researcher. Nevertheless, because of the often personal nature of information contained in medical records and the importance of encouraging candor between patient and physician, it believes that the privacy interest of an individual in his or her medical records must be paramount. Therefore, OSHA believes that written consent must be obtained from the subject employee before access can be gained to that employee's medical records.

This proposal on the availability of employee exposure records and medical records raises several important questions. In particular, OSHA invites comments on the desirability of broadening access to the health information in employee medical records by providing either for the removal of personal identifiers from the records of those employees who have not given written consent, or for making available the essential information only in summary or statistical form. By removing identifying information, it may be possible to protect the privacy of the individuals involved, since the records would then be essentially anonymous, and at the same time to further the occupational health purposes of this rule by making highly relevant medical data

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more available than would be true under the current proposal. A subsidiary question is whether such broadened access of "anonymous records" should be limited to physicians, industrial hygienists, epidemiologists, and/or other health researchers who represent employees either individually or on behalf of a collective bargaining agent, on the grounds that these health professionals have the professional training and responsibility to respect the confidentiality of sensitive information and to use the information for appropriate health purposes. Comments are also welcome on the question of which categories of personal and family data (e.g., age, sex, race, height, weight, job title, place of residence, social security or payroll numbers) should be removed as personal identifiers to protect the privacy of the employee, and which are necessary to the conduct of valid health and epidemiology studies.

Finally, in addition to employees, former employees, and designated representatives, the proposed rule makes the covered records available to authorized employees of OSHA and NIOSH for examination and copying, upon their request. This is consistent with sections 8(c)(1) and 8(g)(1) of the act and other OSHA standards and is necessary for the agencies to carry out their enforcement, investigatory, research, and rulemaking functions.

Instruction of Employees

The proposed rule would require the employer to inform employees at least annually of the existence, location, and availability of records covered by the rule and to inform them of their rights of access to these records. Employee awareness of their rights under this rule is essential to the fulfillment of its purpose. This requirement therefore will help to make meaningful the rights given to employees by this proposed rule.

Public Participation

Interested persons are invited to submit comments, views, and arguments on any issue raised by this proposed rule. These comments must be submitted on or before September 22, 1978, in quadruplicate, to the Docket Officer, Docket No. H-112, Room S-6212, U.S. Department of Labor, Third Street and Constitution Avenue NW., Washington, D.C. 20210, 202-523-7895. They will be available for public inspection and copying at the above address and will be carefully evaluated and considered by OSHA before it promulgates the final rule.

Authority

This document was prepared under the direction of Eula Bingham, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, Room S-2315, Third Street and Constitution Avenue NW., Washington, D.C. 20210, 202-523-9261.

Accordingly, pursuant to sections 8(c)(1), 8(c)(3), and 8(g) of the Occupational Safety and Health Act of 1970 (84 Stat. 1599, 1600; 29 U.S.C. 657) and Secretary of Labor's Order No. 8-76 (41 FR 25059), and in accordance with 5 U.S.C. 553, it is proposed to amend 29 CFR Part 1910 by revising § 1910.20 to read as follows:

§ 1910.20 Preservation and access to records.

(a) *Scope and application.* This section applies to each employer who makes, maintains, or has access to employee exposure records or employee medical records, whether or not the records are subject to specific occupational safety and health standards.

(b) *Definitions.* "Employee exposure record" means a record of monitoring or measuring which contains qualitative or quantitative information indicative of employee exposures to toxic materials or harmful physical agents. This includes both individual exposure records and general research or statistical studies based on information collected from individual records.

"Employee medical record" means a record which contains information concerning the health status of an employee or employees exposed or potentially exposed to toxic materials or harmful physical agents. These records may include, but are not limited to:

(1) The results of medical examinations and tests;

(2) Any opinions or recommendations of a physician or other health professional concerning the health of an employee or employees; and

(3) Any employee medical complaints relating to workplace exposure.

Employee medical records include both individual medical records and general research or statistical studies based on information collected from medical records.

(c) *Preservation of records.* Each employer who makes, maintains, or has access to employee exposure records or employee medical records shall preserve and retain them for at least the duration of the affected employee's employment with the employer plus five (5) years, except where a specific occupational safety and health standard provides a different retention period.

(d) *Availability of records.*—(1) *General.* The employer shall, upon request, make the records covered by this section available for examination and copying in accordance with the requirements of this paragraph.

(2) *Employees, former employees, and designated representatives.* The employer shall make available to each employee, former employee, or a designated representative: (i) All relevant employee exposure records, and (ii) employee medical records of which the employee or former employee is the subject or for which written consent has been obtained from the subject employee or former employee. For the purposes of this rule, relevant employee exposure records include records of the employee's or former employee's own exposures, exposure records of other employees or former employees with related or comparable exposures, and records containing general exposure information concerning the employee's or former employee's workplace or working conditions. In addition to records of current exposures, exposure records of past and potential exposures are included in the records which must be made available.

(3) *OSHA and NIOSH.* The employer shall make available to the Assistant Secretary of Labor, U.S. Department of Labor, the Director of the National Institute for Occupational Safety and Health, and their designees, all employee exposure and medical records.

(e) *Instruction of employees.* The employer shall inform each employee at least annually of the existence, location, and availability of the records covered by this section and the rights of access to these records.

(Sec. 8, 84 Stat. 1599, 1600 (29 U.S.C. 657); Secretary of Labor's Order No. 8-76 (41 FR 25059); sec. 4 of the Administrative Procedure Act (5 U.S.C. 553).)

Signed at Washington, D.C., this 17th day of July 1978.

Eula Bingham,
Assistant Secretary of Labor.

[FR Doc. 78-20195 Filed 7-20-78; 8:45 am]

[3510-22]

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[50 CFR Part 611]

FOREIGN FISHING

Foreign Fishing for Billfish and Oceanic Sharks in the Pacific Ocean

AGENCY: National Oceanic and Atmospheric Administration, Commerce.

ACTION: Proposed regulations and proposed amendments to foreign fishing regulations.

SUMMARY: Foreign fishing regulations are being proposed for the conservation and management of billfishes and sharks in the Pacific Ocean portion of the Fishery Conservation Zone of the United States

(c) *Preservation of records.* Each employer who makes, maintains, or has access to employee exposure records or employee medical records shall preserve these records.

(d) *Availability of records.* The employer shall make available, upon request, to the Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, or a designee, and the Director of the National Institute for Occupational Safety and Health, U.S. Department of Health, Education, and Welfare, or a designee, all employee exposure records and employee medical records for examination and copying.

Effective date: This amendment is effective July 19, 1978.

Signed on this 17th day of July, 1978 at Washington, D.C.

(Sec. 8, 84 Stat. 1599, 1600 (29 U.S.C. 657); Secretary of Labor's Order No. 8-76 (41 FR 25059); Sec. 4 of the Administrative Procedure Act (5 U.S.C. 553).)

EULA BINGHAM,
Assistant Secretary of Labor.

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