

industries in which the special industry presumption would apply (Exs. 15: 259, 341). For example, the American Health Care Association (AHCA) suggested:

[i]t should not be presumed that exposure is work-related in all long term care facilities for the elderly. Depending upon the facility and/or its location, the incidence of TB infection/disease in the facility may be less than that of the general public. The Centers for Disease Control and Prevention recognizes that even within certain settings, there are varying levels of risk (minimal to high). TB linkage to the facility should be based on the level of risk using the CDC assessment system, with work relatedness assigned to facilities within the moderate to high risk classification (Ex. 15: 341).

Two commenters suggested OSHA add more industries to the proposed list of industries to which the special industry presumption would apply. The American Nurses Association (ANA) told the Agency that "There should be no question on the inclusion of the home health arena under the rubric of health care facilities. The risk of transmission exists in all health care work sites including home health sites and must not be limited to traditional health care facilities" (Ex. 15: 376). Alliant Techsystems (Ex. 15: 78) suggested adding "Industries that causes exposure outside the United States such as the airline sector."

Some commenters argued that recording should be limited only to TB cases occurring in workers in specific industries, *i.e.*, that no case of TB in other industries, no matter how transmitted or when diagnosed, should be recordable (see, *e.g.*, Exs. 15: 351, 378, 396). Westinghouse Electric Corporation recommended that "Tuberculosis exposure or disease cases outside of listed industries where cases would be prevalent (such as health care facilities, long-term care facilities, etc.) should not be recordable as an occupational illness. The logical source of exposure would be non work-related and outside the premises of the employer's establishment." Likewise, the Air Transport Association (Ex. 15: 378) suggested that TB recording "[s]hould be limited to medical work environments rather than general industry. The administrative burden far exceeds the expected benefits."

OSHA is aware that the relative risk of TB, and of all occupational injuries and illnesses, varies widely from industry to industry and from occupation to occupation. However, OSHA does not consider this circumstance relevant for recordkeeping purposes. The fact that ironworkers experience a higher incidence of falls from elevation than do carpenters does

not mean that carpenters' injuries from such falls should not be recorded. Congress clearly intended information such as this to be used by individual employers and to be captured in the national statistical program. Again, because TB infection is a significant illness wherever in the workplace it occurs, and because no exemption applies, it must be recorded in all covered workplaces. Accordingly, in the final rule being published today, TB cases are recordable without regard to the relative risk present in a given industry, providing only that the employee with the infection has been occupationally exposed to someone with a known case of active tuberculosis. Employers may rebut the presumption only if a medical investigation or other special circumstances reveal that the case is not work-related.

In the final rule, OSHA has not adopted the "special industries" presumption, for several reasons. First, doing so would be inconsistent with the approach taken by the Agency in other parts of the rule, *i.e.*, specific industries have not been singled out for special treatment elsewhere. Second, a "special industries" presumption is not needed because the approach OSHA has taken in this section will provide employers with better ways of rebutting work-relatedness when that is appropriate. Finally, the special industries approach is not sufficiently accurate or well enough targeted to achieve the intended goal. Many cases of occupationally transmitted TB occur among employees in industries other than the "special industries," and evidence shows that the risk of TB infection varies greatly among facilities in the special industries.

Other Suggestions for Determining the Work-Relatedness of TB Cases

A number of commenters provided other suggestions for determining the work-relatedness of TB cases (see, *e.g.*, Exs. 15: 39, 154, 181, 188, 200, 218, 226, 335, 393, 407, 431, 436).

The Society for Human Resource Management stated:

Workers are exposed to tuberculosis in many places other than the work site: it would be unduly burdensome to require employers to provide evidence that the employee has had non-work exposure. Since the employee is in the best position to retrace his or her activities, he or she should be required to provide evidence to establish work-relatedness (Ex. 15: 431).

OSHA does not agree that the employee is in a better position than the employer to know whether an employee has been exposed to TB at work. For

example, the worker is not as likely to know whether a co-worker, patient, client, or other work contact has an active TB case. To determine whether exposure to an active case of TB has occurred at work, the employer may interview the employee to obtain additional information, or initiate a medical investigation of the case, but it would be inappropriate to place the burden of providing evidence of work-relationship on the employee.

The American Ambulance Association (Ex. 15: 226) did not support the proposed approach of reporting an employee's positive tuberculin skin test reaction "unless there has [also] been documentation of a work-related exposure." The American Network of Community Options and Resources (ANCOR) argued "ANCOR strongly opposes the inclusion of tuberculosis unless the infection is known to have been caused at work due to a known, active carrier" (Ex. 15: 393). The American Association of Occupational Health Nurses (AAOHN) proposed that the criteria for recording TB infection or illness be "[a]n employee tests positive for tuberculosis infection after being exposed to a person within the work environment known to have tuberculosis disease and the positive test results are determined to be caused by the person in the workplace with tuberculosis disease" (Ex. 15: 188).

Several commenters suggested that the first case of TB occurring in the workplace should not be recordable (see, *e.g.*, Exs. 15: 218, 361, 398). In two separate comments, the Association for Professionals in Infection Control (APIC) recommended:

[a]s an acceptable rebuttal to the presumption of work relationship when an employee is found to be infected with tuberculosis or to have active disease. The employer is able to demonstrate that no other employee with similar duties and patient assignments as the infected employee was found to have tuberculosis infection or active disease (Exs. 15: 361, 398).

In addition, Bell Atlantic (Ex. 15: 218) proposed that public health agencies be charged with determining the work-relationship of cases of TB in the workplace. Bell Atlantic's comments to the rulemaking record were as follows:

Bell Atlantic does not agree that tuberculosis cases should be inherently reported. The first identified incidence of tuberculosis in an employee group probably was not contracted in the workplace. However, if Public Health Officials deem it necessary to require TB testing in the facility as a preventive measure, and new cases are found, these may be recordable. The criteria here is one of public health, and where the disease initiated. The Public Health Agencies

would be charged with investigation of family members, friends, and the community away from work.

A number of commenters misunderstood the proposal as allowing the geographic presumption of work-relationship only to be rebutted in certain "high risk" industries. For example, Alcoa commented that "OSHA seems to conclude * * * that if someone in your workforce has TB then each person in the workplace who tests positive is now considered as having work-related TB due to the incidental exposure potential" (Ex. 15: 65). ALCOA suggested that the final rule allow the geographic presumption of work-relationship to be rebutted for "all other industries."

OSHA agrees that a case of TB should be recorded only when an employee has been exposed to TB in the workplace (*i.e.*, that the positional theory of causation applies to these cases just as it does to all others). OSHA has added an additional recording criterion in this case: for a TB case occurring in an employee to be recordable, that employee must have been exposed at work to someone with a known case of active tuberculosis. The language of the final rule addresses these concerns: "If any of your employees has been occupationally exposed to anyone with a known case of active tuberculosis, * * *" Under the final rule, if a worker reports a case of TB but the worker has not been exposed to an active case of the disease at work, the case is not recordable. However, OSHA sees no need for the employer to document such workplace exposure, or for the Agency to require a higher level of proof that workplace exposure has occurred in these compared with other cases. Further, OSHA knows of no justification for excluding cases simply because they are the first or only case discovered in the workplace. If a worker contracted the disease from contact with a co-worker, patient, client, customer or other work contact, the case would be work-related, even though it was the first case detected. Many work-related injury and illness cases would be excluded from the recordkeeping system if cases were only considered to be work-related when they occurred in clusters or epidemics. This was clearly not Congress's intent.

The final rule's criteria for recording TB cases include three provisions designed to help employers rule out cases where occupational exposure is not the cause of the infection in the employee (*i.e.*, where the infection was caused by exposure outside the work environment). An employer is not required to record a case involving an

employee who has a positive skin test and who is exposed at work if (1) the worker is living in a household with a person who has been diagnosed with active TB, (2) the Public Health Department has identified the worker as a contact of a case of active TB unrelated to the workplace, or (3) a medical investigation shows that the employee's infection was caused by exposure to TB away from work or proves that the case was not related to the workplace TB exposure.

The final rule thus envisions a special role for public health departments that may investigate TB outbreaks but does not permit employers to wait to record a case until a public health department confirms the work-relatedness of the case. In addition, the final rule's provisions for excluding cases apply in all industries covered by the recordkeeping rule, just as the recording requirements apply to all industries. The final rule thus does not include the "special industries" approach of the proposal. As discussed above, the Agency has rejected this proposed approach because it would not have been consistent with the approach OSHA has taken elsewhere in the rule, which is not industry-specific; it is not necessary to attain the intended goal; and it would not, in any case, have achieved that goal with the appropriate degree of accuracy or specificity.

A few commenters stressed that employers should not be required to record cases where the employee was infected with TB before employment (see, *e.g.*, Exs. 15: 65, 407, 414). For example, Alcoa (Ex. 15: 65) proposed that employers not be required to consider as work-related any case where "the employee has previously had a positive PPD [Purified Protein Derivative] test result." In response to this suggestion, OSHA has added an implementation question to the final rule to make sure that employers understand that pre-employment skin test results for TB are not work-related and do not have to be recorded. These results are not considered work-related for the purposes of the current employer's Log because the test result cannot be the result of an event or exposure in the current employer's work environment.

NIOSH proposed to expand the recording criteria for TB infection or disease to include the criterion that "regardless of the industry or source of infection, a case of active TB disease is presumed to be work-related if the affected employee has silicosis attributable to crystalline silica exposure in the employer's establishment" (Ex. 15: 407). OSHA has

chosen not to include this criterion in the final rule because in NIOSH's example the case would previously have been entered into the records as a case of silicosis. Adopting the NIOSH criterion would result in the same illness being recorded twice.

Kaiser Permanente recommended that OSHA adopt a method for determining the work relationship of TB cases that Kaiser Permanente currently uses in California to evaluate whether cases are recordable, in accordance with an agreement with the California Division of Occupational Safety and Health (Ex. 15: 200):

1. The employer shall promptly investigate all tuberculin skin test conversions according to the "Guidelines for Preventing the Transmission of Mycobacterium tuberculosis in Health-Care Facilities" published by the Centers for Disease Control and Prevention (CDC Guidelines).

2. Probable exposure to Mycobacterium tuberculosis unrelated to work environment. The conversion shall not be recorded on the log if, after investigation, the employer reasonably determines that the employee probably converted as a result of exposure unrelated to the employee's work duties.

3. Probable exposure to Mycobacterium tuberculosis related to work environment. The conversion shall be recorded on the log if, after investigation, the employer reasonably determines that the employee probably converted as a result of exposure related to the employee's work duties.

4. Inability to determine probable cause of exposure. If, after reasonably thorough investigation, the employer is unable to determine whether the employee probably converted as a result of exposure related to the employee's work duties, the following shall be done:

a. The conversion shall not be recorded on the log if the employee was, at all times during which the conversion could have occurred, assigned to a unit or job classification, which met the minimal risk, low risk, or very low risk criteria specified in the CDC Guidelines.

b. In all other cases, the conversion shall be recorded on the log.

As an initial matter, OSHA notes that the States are not authorized to provide employers with variances to the Part 1904 regulations, under either the rule being published today or the former rule. The issuing of such variances is exclusively reserved to Federal OSHA, to help ensure the consistency of the data nationwide and to make the data comparable from state-to-state. OSHA has not adopted the approach suggested by Kaiser Permanente because the approach is too complex, does not apply equally to health care and non-health care settings, and does not provide the clear guidance needed for a regulatory requirement. However, because the final rule allows employers to rebut the presumption of work-relatedness if a

medical evaluation concludes that the TB infection did not arise as a result of occupational exposure, a physician or other licensed health care professional could use the CDC Guidelines or another method to investigate the origin of the case. If such an investigation resulted in information that demonstrates that the case is not related to a workplace exposure, the employer need not record the case. For example, such an investigation might reveal that the employee had been vaccinated in childhood with the BCG vaccine. The employer may wish, in such cases, to keep records of the investigation and determination.

Section 1904.12 Recording Criteria for Cases Involving Work-Related Musculoskeletal Disorders

Section 1904.12, entitled "Recording criteria for cases involving work-related musculoskeletal disorders," provides requirements for recording work-related musculoskeletal disorders (MSDs). MSDs are defined in the final recordkeeping rule as "injuries and disorders of the muscles, nerves, tendons, ligaments, joints, cartilage, and spinal discs."

Paragraph 1904.12(a) establishes the employer's basic obligation to enter recordable musculoskeletal disorders on the Log and to check the musculoskeletal disorder column on the right side of the Log when such a case occurs. The paragraph states that, "[i]f any of your employees experiences a recordable work-related musculoskeletal disorder (MSD), you must record it on the OSHA 300 Log by checking the "musculoskeletal disorder" column." Paragraph 1904.12(b)(1) contains the definition of "musculoskeletal disorder" used for recordkeeping purposes. Paragraphs 1904.12(b)(2) and 1904.12(b)(3) provide answers to questions that may arise in implementing the basic requirement, including questions on the work-relatedness of MSDs.

The Proposal

The proposal defined MSDs as "injuries and illnesses * * * result[ing] from ergonomic hazards," such as lifting, repeated motion, and repetitive strain and stress on the musculoskeletal system. (61 FR 4046) This language was derived, in part, from the definition of the term "cumulative trauma disorders (CTDs)," used in OSHA's *Ergonomics Program Management Guidelines For Meatpacking Plants* (hereafter "*Meatpacking Guidelines*"). The 1990 *Meatpacking Guidelines* used the term CTDs to cover "health disorders arising

from repeated biomechanical stress due to ergonomic hazards." (Ex. 11 at p. 20.)

Appendix B to the recordkeeping rule proposed requirements for employers to follow when recording MSDs. The proposed requirements would have required recording: (1) whenever an MSD was diagnosed by a health care provider, or (2) whenever an employee presented with one or more of the objective signs of such disorders, such as swelling, redness indicative of inflammation, or deformity. When either of these two criteria was met, or when an employee experienced subjective symptoms, such as pain, and one or more of the general criteria for recording injuries and illnesses (i.e., death, loss of consciousness, days away from work, restricted work, job transfer, or medical treatment) were met, an MSD case would have been recordable under the proposal.

The proposal also contained special provisions for determining whether hot and cold treatments administered to alleviate the signs and symptoms of MSDs would be considered first aid or medical treatment. Under the former recordkeeping rule, the application of hot and cold treatment on the first visit to medical personnel was considered first aid, while the application of such treatment on the second or subsequent visit was considered to constitute medical treatment. OSHA proposed to revise this provision to consider hot or cold therapy to be first aid for all injuries and illnesses except MSDs, but to consider two or more applications of such therapy medical treatment if used for an MSD case (61 FR 4064). Whether hot and cold therapies constitute first aid or medical treatment is addressed in detail in section 1904.7 of the final recordkeeping rule. As discussed in that section, under the final rule, hot and cold therapies are considered first aid, regardless of the type of injury or illness to which they are applied or the number of times such therapy is applied.

The Final Rule's Definition of Musculoskeletal Disorder

The preamble to the proposal described an MSD as an injury or disorder "resulting from" ergonomic hazards. However, OSHA has not carried this approach forward in the final rule because it would rely on an assessment of the cause of the injury, rather than the nature of the injury or illness itself.

Paragraph 1904.12(b)(1) of the final rule therefore states, in pertinent part, that MSDs "are injuries and disorders of the muscles, nerves, tendons, ligaments, joints, cartilage and spinal discs. MSDs do not include injuries caused by slips,

trips, falls, or other similar accidents." This language clarifies that, for recordkeeping purposes, OSHA is not defining MSDs as injuries or disorders caused by particular risk factors in the workplace. Instead, the Agency defines MSDs as including all injuries to the listed soft tissues and structures of the body regardless of physical cause, unless those injuries resulted from slips, trips, falls, motor vehicle accidents, or similar accidents. To provide examples of injuries and disorders that are included in the definition of MSD used in the final rule, Section 1904.12(b)(1) contains a list of examples of MSDs; however, musculoskeletal conditions not on this list may also meet the final rule's definition of MSD.

Determining the Work-Relatedness of MSDs

Section 1904.12(b)(2) provides that "[t]here are no special criteria for determining which musculoskeletal disorders to record. An MSD case is recorded using the same process you would use for any other injury or illness." This means that employers must apply the criteria set out in sections 1904.5–1904.7 of the final rule to determine whether a reported MSD is "work-related," is a "new case," and then meets one or more of the general recording criteria. The following discussion supplements the information provided in the summary and explanation accompanying section 1904.5, to assist employers in deciding which MSDs are work-related.

For MSDs, as for all other types of injuries and illnesses, the threshold question is whether the geographic presumption established in paragraph 1904.5(a) applies. The presumption applies whenever an MSD or other type of injury or illness "results from an event or exposure in the work environment." For recordkeeping purposes, an "event" or "exposure" includes any identifiable incident, occurrence, activity, or bodily movement that occurs in the work environment. If an MSD can be attributed to such an event or exposure, the case is work related, regardless of the nature or extent of the ergonomic risk factors present in the workplace or the worker's job.

This position is not new to the final rule; it is clearly reflected in the 1986 BLS *Recordkeeping Guidelines*. The *Guidelines* contain the following discussion of the applicability of the work-relatedness presumption to back injuries and hernia cases, which reflects OSHA's position under this final rule:

Back and hernia cases should be evaluated in the same manner as any other case.

Questions concerning the recordability of these cases usually revolve around: (1) The impact of a previous back or hernia condition on the recordability of the case, or (2) whether or not the back injury or hernia was work-related.

Preexisting conditions generally do not impact the recordability of cases under the OSHA system. * * * For a back or hernia case to be considered work-related, it must have resulted from a work-related event or exposure in the work environment. Employers may sometimes be able to distinguish between back injuries that result from an event in the work environment, and back injuries that are caused elsewhere and merely surface in the work environment. The former are recordable; the latter are not. This test should be applied to all injuries and illnesses, not just back and hernia cases. *Guidelines* at p. 32 (emphasis in original).

The *Guidelines* provide the following question and answer to illustrate that MSDs may be attributable to events or exposures in the work environment that pose little apparent ergonomic risk:

B-16 Q. An employee's back goes out while performing routine activity at work. Assuming the employee was not involved in any stressful activity, such as lifting a heavy object, is the case recordable?

A. Particularly stressful activity is not required. If an event (such as a * * * sharp twist, etc.) occurred in the work environment that caused or contributed to the injury, the case would be recordable, assuming it meets the other requirements for recordability. *Guidelines* at p. 32 (emphasis in original).

OSHA believes that, in most cases, an employee who reports an MSD at work will be able to identify the activity or bodily movements (such as lifting, twisting, or repetitive motions) that produced the MSD. If the activity or movements that precipitated the disorder occurred at work, the presumption of work-relatedness is established without the need for further analysis. However, cases may arise in which it is unclear whether the MSD results from an event or exposure in the work environment. In these cases, paragraph 1904.5(b)(3) of the final rule directs the employer to evaluate the employee's work activities to determine whether it is likely that one or more events or exposures in the work environment caused or contributed to the disorder. In this situation the employer would consider the employee report, the ergonomic risk factors present in the employee's job, and other available information to determine work-relationship.

In evaluating job activities and work conditions to identify whether ergonomic risk factors are present, employers may turn to readily available sources of information for assistance, such as materials made available by OSHA on its web site, current scientific

evidence, available industry guidelines, and other pertinent sources. This final rule does not establish new or different criteria for determining whether an MSD is more likely than not to have resulted from work activities or job conditions, i.e., from exposure to ergonomic risk factors at work. As is the case for all injuries and illnesses, the employer must make a good faith determination about work-relatedness in each case, based on the available evidence.

The preamble discussion for paragraph 1904.5(b)(3) contains some examples to assist employers in making this determination. In addition, the *BLS Guidelines* contain the following examples:

Q. Must there be an identifiable event or exposure in the work environment for there to be a recordable case? What if someone experiences a backache, but cannot identify the particular movement which caused the injury?

A. Usually, there will be an identifiable event or exposure to which the employer or employee can attribute the injury or illness. However, this is not necessary for recordkeeping purposes. If it seems likely that an event or exposure in the work environment either caused or contributed to the case, the case is recordable, even though the exact time or location of the particular event or exposure cannot be identified.

If the backache is known to result from some nonwork-related activity outside the work environment and merely surfaces at work, then the employer need not record the case. In these situations, employers may want to document the reasons they feel the case is not work related. (*BLS Guidelines*, p. 32.)

Comments on Other Approaches to Recording MSDs

Commenters provided OSHA with several suggestions for recording musculoskeletal disorders: requiring diagnosis by a health care professional, recording symptoms lasting seven days, and eliminating special criteria for recording MSD cases. These are discussed below.

Eliminating Special Criteria for Recording MSD Cases

A large number of commenters suggested that the recordkeeping rule should not contain criteria for recording MSD cases that were different from those for recording all injuries and illnesses, arguing that they should be captured using the criteria for all other types of injuries and illnesses (see, e.g., Exs. 15: 9, 44, 76, 109, 122, 123, 130, 145, 146, 176, 188, 199, 201, 218, 235, 272, 273, 288, 289, 301, 303, 304, 347, 351, 359, 368, 386, 392, 395, 396, 409, 425, 427). The comments of PPG Industries, Inc. (Ex. 15: 109) are

representative of these views: "The system for evaluating all cases should be consistent. When evaluating musculoskeletal disorders, the normal recordkeeping criteria should be used." The Voluntary Protection Programs Participants' Association (VPPPA) also recommended that "MSDs should be treated as any other injury or illness. If the problem arises to the level of seriousness that it is a recordable injury or illness, then it should be recorded on the log" (Ex. 15: 425). The National Safety Council (Ex. 15: 359) recommended that "if an employee has pain, he or she should report it. It then becomes recordable or not recordable based on the usual criteria. The employer makes a decision on a case by case basis."

OSHA agrees with these commenters that MSD cases should be recorded in the same way as other injuries and illnesses, and should not have separate recordability criteria. Using the same criteria for these cases, which constitute one-third of all occupational injuries and illnesses, simplifies the final rule and makes the system easier for employers and employees to use. Employing consistent recording criteria thus helps to achieve one of OSHA's major goals in this rulemaking, simplification. Section 1904.12 has been included in the final rule not to impose different recording criteria on MSDs, but to emphasize that employers are to record MSD cases like all other injuries and illnesses. OSHA believes that this approach to the recording of MSDs will yield statistics on musculoskeletal disorders that are reliable and complete.

Requiring Diagnosis by a Health Care Professional

A number of commenters recommended that OSHA require the recording of musculoskeletal disorders only when they are diagnosed by a health care professional or identified by a medical test result (see, e.g., Exs. 15: 20, 22, 39, 42, 44, 57, 60, 78, 82, 121, 126, 146, 173, 199, 201, 218, 225, 242, 246, 247, 248, 259, 272, 288, 289, 303, 318, 324, 332, 335, 341, 342, 348, 351, 355, 356, 357, 364, 366, 378, 384, 397, 414, 424, 440, 441). The National Electrical Contractors Association (NECA) requested that "OSHA modify the current criteria to state "Positive x-ray showing broken bones or fracture, diagnosis of broken teeth, or diagnosis of acute soft tissue damages" (Ex. 15: 126). The United Technologies Company (UTC) agreed that "MSDs should only be recorded if the diagnosis is made by a health care provider operating within the scope of his or her specialty" (Ex. 15: 440). The National

Coalition on Ergonomics (Ex. 15: 366) urged OSHA to limit the recording of MSD cases to those diagnosed by highly qualified health care professionals:

[O]SHA should not encourage unqualified individuals to "diagnose" musculoskeletal disorders given the present state of medical knowledge of their causes and cures. * * * Therefore, OSHA should limit in the definition of musculoskeletal disorders the diagnosis to qualified and trained physicians, and such other practitioners as are accepted by the medical community as having the training and skill necessary to adequately and appropriately treat these cases.

Other commenters expressed similar opinions, arguing that the work relationship of a given case should be determined by a health care professional (see, e.g., Exs. 15: 9, 105, 248, 249, 250, 262, 272, 288, 303, 304, 324, 366, 397, 408, 440). The Footwear Industries of America (Ex. 15: 249) recommended that "An MSD should be recordable only if it is diagnosed by a health-care provider based on a determination that the MSD is clearly work-related—that is, caused by the work environment." The American Dental Association (Ex. 15: 408) suggested that "OSHA should not require employers to keep records of musculoskeletal disorders unless and until a physician identifies work as the "predominant cause" in a given case." United Technologies Company recommended that the health care provider use a check list to make this determination: "UTC also believes that the provider should be required to complete a check list regarding work relatedness with the language changed to include predominantly caused by the work environment and the submittal of information by the employer" (Ex. 15: 440).

The Northrop Grumman Association (Ex. 15: 42) suggested that "Recordability should only be based on objective, documented findings by a licensed physician. In [proposed] mandatory Appendix B, recordability is defined as diagnosis by a health care provider and/or objective findings. The 'or' should be deleted. Only positive test findings should denote recordability. There are physicians who diagnose cases without any objective tests to confirm their diagnosis." Other commenters (see, e.g., Exs. 15: 44, 386, 330, 332) recommended that MSD cases be recorded only when they are diagnosed by a health care provider and/or are identified by a positive test result *and* meet the general recording criteria.

A few commenters argued that a health care professional's diagnosis should not be considered evidence of work-relatedness (see, e.g., Exs. 15: 347,

363, 409). For example, the American Automobile Manufacturers Association (AAMA) remarked that "[w]e strongly oppose the recording of a musculoskeletal disorder based solely on the diagnosis by a health care provider. A diagnosis, in and of itself, does not reflect whether a musculoskeletal disorder is significant or serious in nature. Health care providers record a description or diagnosis of an employee's complaint whether minor or serious." On the other hand, the American Federation of State, County, and Municipal Employees (Ex. 15: 362) argued that "[w]orkers may not see a health care professional until after they have endured symptoms for an extended period * * * The reality of the situation is that a great number of workers who suffer from symptoms will not be diagnosed by a health care provider unless or until their condition becomes severe and/or disabling."

As discussed in the preamble to the work relationship section of the final rule (§ 1904.5), an employer is always free to consult a physician or other licensed health care professional to assist in making the determination of work relationship in individual injury or illness cases, including musculoskeletal disorders. If a physician or other licensed health care professional has knowledge of the employee's current job activities and work conditions, work history, and the work environment, he or she can often use that information, along with the results of a medical evaluation of the worker, to reach a conclusion about the work-relatedness of the condition. Relying on the expertise of a knowledgeable health care professional can be invaluable to the employer in those infrequent cases for which it is not clear whether workplace events or exposures caused or contributed to the MSD or significantly aggravated pre-existing symptoms. Employers may also obtain useful information from ergonomists, industrial engineers, or other safety and health professionals who have training and experience in relevant fields and can evaluate the workplace for the presence of ergonomic risk factors.

However, OSHA does not require employers to consult with a physician or other licensed health care professional or to have the employee undergo medical tests when making work-relationship determinations. The Agency finds that doing so would be both unnecessary and impractical in the great majority of cases and would result both in delaying the recording of occupational MSD cases and increasing medical costs for employers.

In most situations, an evaluation by a physician or other licensed health care professional is simply not needed in order to make a recording decision. For example, if a worker strains a muscle in his or her back lifting a heavy object, and the back injury results in days away from work, there is no doubt either about the work-relationship of the case or its meeting of the recording criteria. Similarly, if a worker performing a job that has resulted in MSDs of the wrist in other employees reports wrist pain and restricted motion, and the employer places the employee on restricted work, the case is recordable and there is no need to await a clinical diagnosis.

Recording of MSD Symptoms

In the preamble to the proposed rule (61 FR 4047), OSHA asked:

There is a concern that the proposed criteria [for recording MSDs] will result in a situation where workers could be working with significant pain for an extended period of time, without their case being entered into the records. OSHA has been asked to consider an additional recording criterion for these cases: record when the employee reports symptoms (pain, tingling, numbness, etc.) persisting for at least 7 calendar days from the date of onset. OSHA asks for input on this criterion.

Some commenters urged OSHA to require employers to record MSD cases where an employee reports symptoms that have persisted for at least 7 calendar days (see, e.g., Exs. 15: 87, 129, 186, 362, 369, 371, 374, 380). The American Federation of State County and Municipal Employees, AFL-CIO (AFSCME) recommended:

Under-reporting of MSDs will increase if OSHA adopts this proposal. It has been AFSCME's experience that workers experiencing pain, soreness, tenderness, numbness, tingling and other sensations in their extremities or back do not immediately report these symptoms to their employer. Rather, most employees first attempt to alleviate their symptoms on their own: they ingest medications, use topical solutions, apply heat or cold to affected areas, or utilize other remedies in their attempt to relieve pain, aches, stiffness, or other symptoms. OSHA should require that these cases be recorded when symptoms last for seven consecutive days.

Investigations conducted by AFSCME repeatedly demonstrate that inclusion of the additional criterion is necessary in order to ascertain accurately the number of work-related MSDs. Employer records typically show MSD rates at or even well below ten percent of employees at risk for these injuries. However, results of AFSCME-conducted symptom surveys show that it is common for a third or more of the employees to respond that they have felt pain, numbness, tingling, or other symptoms that have persisted for more than seven days.* * *

AFSCME wishes to emphasize that accurate and complete recording of MSDs is critically important. Early detection, proper medical intervention, and appropriate measures to address ergonomic risk factors in the workplace are all necessary to prevent and manage MSDs (Ex. 15: 362).

Many commenters objected to the proposed 7-day symptom recording concept (see, e.g., Exs. 15: 9, 20, 39, 122, 127, 128, 170, 230, 246, 248, 281, 289, 324, 330, 332, 341, 359, 378, 397, 406, 434). David E. Jones of the law firm of Ogletree, Deakins, Nash, Smoak & Stewart (Ex. 15: 406) stated that this provision was unnecessary because “[t]he prevalent experience has shown that employers typically record those symptoms when they result in medical treatment, restricted work activity, or days away from work.” The Eli Lilly Company (Ex. 15: 434) also observed that “[b]ased on input from [our] occupational health physicians, the vast majority of MSD-type cases would manifest into objective findings or a MSD diagnosis after 7 calendar days of legitimate subjective symptoms.”

Other objections to the proposal’s 7-day symptom trigger were based on practical considerations. Many commenters were opposed to recording undiagnosed conditions that persist for seven days on the grounds that the seriousness or veracity of the complaint of pain or other symptoms could not be established by the employer (see, e.g., Exs. 15: 9, 20, 39, 121, 122, 127, 128, 170, 218, 230, 246, 248, 281, 289, 359, 366, 397). For example, the Dayton Hudson Corporation (Ex. 15: 121) stated: “[s]elf-reporting of symptoms with no medical findings or evaluation is an invitation for abuse. Are these cases work-related or serious? Are they even real?” Clariant Corporation held the view that “[d]isgruntled employees could use subjective findings as a means of avoidance. It could be used to prevent them from doing a job or task they do not like” (Ex. 15: 217). The National Coalition on Ergonomics (Ex. 15: 366) opposed any recordation based on symptoms alone, stating:

First, persistent pain is a symptom, not a disorder, and therefore cannot be a case. There is often no indication that persistent pain is work-related, except that as the person becomes more fatigued, the pain may appear or become more intense. Further, because pain is subjective, there is no way to quantify it so as to focus only on serious cases. Finally, pain can exist without an underlying pathology. Pain in and of itself cannot be a case in the absence of a diagnosis by a qualified medical practitioner, provided that the case is serious, disabling or significant.

Second, other symptoms mentioned in OSHA’s question do not represent cases

either. As we discuss below, individual symptoms are not illnesses; symptoms, in conjunction with appropriate signs and/or laboratory results are essential to diagnose specific conditions.

Since symptoms do not define cases, OSHA cannot—indeed, should not—require employers to record complaints of uncertain validity and non-specific origin. It is perhaps true that such employees should see a trained physician or other practitioner, but only after this event will there be a case to record, if one exists at all.

Linda Ballas & Associates (Ex. 15: 31) expressed a different concern, namely that “[i]f an employee is experiencing pain, or reports symptoms—the clock should not have to click to 7 days before the case is recordable. This will lead to under recording and under reporting * * *.”

In response to the comments on this issue, OSHA finds that pain and/or other MSD symptoms, of and by themselves, may indicate an injury or illness. In this regard, MSD cases are not different from other types of injury or illness. As discussed in the preamble to the definitions section of the final rule (Subpart G), symptoms such as pain are one of the primary ways that injuries and illnesses manifest themselves. If an employee reports pain or other symptoms affecting the muscles, nerves, tendons, etc., the incident must be evaluated for work-relatedness, and, if determined by the employer to be work-related, must be tested against the recording criteria to determine its recordability. If it is determined by the employer to be recordable, it must be recorded as an MSD on the OSHA 300 Log.

The ICD-9-CM manual, the *International Classification of Diseases, Clinical Modification* (ICD-CM), the official system of assigning codes to diagnoses of disease, injury and illness, lists several MSD conditions that consist only of pain. That is, when health care professionals diagnose these disease states, they do so on the basis of employee-reported pain (health care professionals often evaluate and confirm such reports by physical examination when making a diagnosis). According to the National Center for Health Statistics (NCHS), the agency responsible for the coordination of all official disease classification activities in the United States relating to the International Classification of Diseases (ICD), the ICD-CM is the official system of assigning codes to diagnoses and procedures associated with hospital utilization in the United States, and is used to code and classify morbidity data from inpatient and outpatient records, physicians’ offices, and most NCHS surveys. The following table includes a

few illustrative examples of ICD illness codes for pain-related disorders that would be considered MSD cases under OSHA’s definition and would thus warrant an evaluation of work-relatedness by the employer.

ICD code	Name and description
723.1	Cervicalgia—Pain in neck.
724.1	Pain in thoracic spine.
724.2	Lumbago—Low back pain.
724.5	Backache, unspecified.

(NCHS Internet home page, <http://www.cdc.gov/nchswww/about/otheract/icd9>)

Pain is a symptom that generally indicates the existence of some underlying physiological condition, such as inflammation, damage to a spinal disc, or other biomechanical damage. The occurrence of pain or other symptoms (such as, in the case of MSDs, tingling, burning, numbness, etc.) is thus indicative of an incident that warrants investigation by the employer for work-relatedness, the first step in the injury and illness reporting and recording process. The occurrence of pain or other symptoms, however, is not enough, in the absence of an injury or illness that meets one or more of the recording criteria, to make any injury or illness (including an MSD case) recordable under Part 1904. Employers are not required to record symptoms unless they are work-related and the injury or illness reaches the seriousness indicated by the general recording criteria, which for MSD cases will almost always be days away from work, restricted work, medical treatment, or job transfer. Thus, the requirements governing the recording of all injuries and illnesses will work to ensure that symptoms such as the aches and pains that most people experience from time to time during their lives, are not automatically recorded on the OSHA Log. These same recording requirements will also ensure that those MSDs that are determined by the employer to be work-related and that also meet one or more of the recording criteria will be captured in the national statistics.

If the employer is concerned that the case is not work-related, he or she can refer the employee to a health care professional for a determination, evaluation, or treatment. In this situation, or when the employee has already obtained medical attention, the physician or other licensed health care professional can help to differentiate between work-related and non-work-related cases, minor aches and pains, or inappropriate employee reports. This is no different for MSD cases than for

other types of injuries and illnesses, and does not represent a new problem in the determination of work-related injury and illness. There have always been disputes between workers and employers over the existence of an injury or illness and whether it is work-related. If an employer subsequently demonstrates that a worker is malingering or determines that an injury or illness or is not work-related (using OSHA's definition of work-related), the employer may remove the recorded entry from the OSHA 300 Log.

Although OSHA believes that pain or other symptoms indicate an injury or illness that warrants additional analysis, the final rule has not adopted persistent symptoms alone, whether lasting for 7 days or any other set time period, as an automatic recording criterion. OSHA is concerned about workers who experience persistent pain for any reason, and such pain, if work-related, may well warrant an inquiry into the employee's work conditions and the taking of administrative actions. However, pain or other symptoms, standing alone, have not ordinarily been captured by the OSHA recordkeeping system, and OSHA has accordingly not adopted persistent musculoskeletal pain as a recording criterion, for the following reasons.

First, as discussed earlier, OSHA does not believe that MSD cases should receive differential treatment for recording purposes, and the final rule does not contain different criteria for recording MSD cases; instead, it relies on the general criteria of § 1904.7 to capture MSD cases. OSHA finds that, for recordkeeping purposes, MSD pain is no different in nature than the pain caused by a bruise, cut, burn or any other type of occupational injury or illness. For example, the OSHA rule does not contain a criterion requiring that if a burn, cut or bruise results in pain for seven days it is automatically recordable. Creating a special provision for MSD pain would create an inconsistency in the rule.

Further, OSHA believes that the provisions of the final recordkeeping rule, taken together will appropriately capture reliable, consistent, and accurate data on MSD cases. Incorporating a clear definition of MSDs, clarifying the rule's requirements for determining work-relatedness; and refining the definitions of restricted work, first aid and medical treatment; will all work together to improve the quality of the Log data on MSDs. OSHA concludes, based on an analysis of the record evidence on MSDs, that the general recording criteria will enhance the data on work-related, non-minor

MSDs occurring in the workplace, and that an additional "persistent pain" criterion is unnecessary for purposes of the recordkeeping system.

New hires

Some commenters encouraged OSHA to find a way to exclude MSD cases that involve minor muscle soreness in newly hired employees, i.e., to allow employers to not record MSDs occurring during a "break-in" period (see, e.g., Exs. 15: 27, 31, 39, 82, 87, 105, 186, 198, 204, 221, 239, 272, 283, 289, 303, 330, 359, 374, 412, 440). For example, the American Meat Institute (Ex. 15: 330) remarked: "Employees returning from vacation, or other extended break periods from the job function, could have normal muscle aches to which hot/cold packs could provide relief. Recording such cases would not meet the purpose [of the OSHA Act] either." On the same topic, the National Safety Council (Ex. 15: 359) wrote:

The concept of forgiveness for a short period of adjustment to return to work makes good sense in industries that are traditionally very resistant to early return to work programs. If allowing for a short "break-in" period helps get workers safely and comfortably back to full productivity and earning capacity it should be seriously considered. The Council recommends, however, that no specific method be developed in the proposed rule because situations may vary greatly from industry to industry.

The Harsco Corporation (Ex. 15: 105) suggested "Construction activities can be a physically demanding occupation. If a person hasn't worked in a period of time, the first couple of days can be very tough. To transfer a person to a different task which would allow for the affected body part to rest should have no bearing on recordability if no other treatment is required."

Other commenters disagreed, however, that a recording exemption for injuries occurring during a break-in period was appropriate (see, e.g., Exs. 15: 68, 359, 371). For example, the State of New York Workers' Compensation Board (Ex. 15: 68) stated that:

As to the exclusion of minor soreness commonly occurring to newly hired employees or employees on a rehab assignment during a "break-in stage", we do not envision any reason to exclude reporting solely on this basis. The criteria should not be to whom the injury happens, but rather whether the injury would otherwise be reportable regardless of who is injured.

The United Food and Commercial Workers Union (UFCW) argued:

We could not disagree more with the agency. The current proposal in fact screens out all fleeting cases, and includes only those

cases that are serious, have progressed and become debilitating. Only those cases with serious medical findings, lost workdays, restricted days and those receiving medical treatment are currently recordable—not those with fleeting pain that goes away with a good night's rest (Ex. 15: 371).

After a review of the record on this topic, OSHA finds that no special provision for newly hired or transferred workers should be included in the final rule. As the National Safety Council stated, it would be very difficult to identify a single industry-wide method for dealing with break-in or work conditioning periods. Any method of exempting such cases would risk excluding legitimate work-related, serious MSD cases. A newly hired employee can be injured just as easily as a worker who has been on the job for many years. In fact, inexperience on the job may contribute to an MSD injury or illness. For example, a new worker who is not aware of the need to get assistance to move a heavy load or perform a strenuous function may attempt to do the task without help and be hurt in the process. Cases of this type, if determined to be work-related, are appropriately included in national statistics on occupational injuries and illnesses.

OSHA notes that minor muscle soreness, aches, or pains that do not meet one or more of the general recording criteria will not be recorded on the OSHA 300 Log. Therefore, the system already excludes minor aches and pains that may occur when employees are newly hired, change jobs, or return from an extended absence. These cases will be recorded only if they reach the level of seriousness that requires recording. The final rule's definition of first aid includes hot/cold treatments and the administration of non-prescription strength analgesics, two of the most common and conservative methods for treating minor muscle soreness. Thus, the final rule allows newly hired workers to receive these first aid treatments for minor soreness without the case being recordable.

The Ergonomics Rulemaking

Many of the comments OSHA received on the proposed recordkeeping rule referred to OSHA's efforts to develop an ergonomics standard. Several commenters argued that OSHA was trying, through the recordkeeping rule, to collect data to support an ergonomics standard (see, e.g., Exs. 22, 183, 215, 304, 346, 397). Typical of these views was that of the National Beer Wholesalers Association (NBWA) (Ex. 15: 215):

NBWA is especially troubled by the likelihood that the new definitions of what injuries must be recorded and reported in the current proposed rule are intended artificially to inflate the number of reported musculoskeletal disorders, whether work-related or not. Such a surge in MSDs could be used to justify additional work on a workplace ergonomics rule despite the notable lack of a scientific basis for regulation in this area.

Other commenters believed that OSHA was using the recordkeeping rule to conduct a "backdoor rulemaking" to control ergonomics hazards in the workplace (see, *e.g.*, Exs. 15: 86, 215, 287, 304, 404, 412, 426). For example, the Reynolds Aluminum Company stated that:

Reynolds supports the inclusion of musculo-skeletal disorders (MSDs) on the OSHA log, but does not support the industry-wide application of the Ergonomics Program Management Guidelines For Meatpacking Plants as the criteria for determining recordability. By incorporating these guidelines into Appendix B, OSHA would be implementing an ergonomics program. It would be inappropriate and without legal or scientific basis to burden all industries with ergonomic guidelines designed for a specific, unique industry (Ex. 15: 426).

Several commenters stated that the injury and illness recordkeeping rules should not address musculoskeletal disorders until after an ergonomics standard has been completed (see, *e.g.*, Exs. 15: 13, 95, 393). For example, Entergy Services, Inc. (Ex. 15: 13) expressed the following concerns:

This area is of concern since there is no standard that really covers this issue except the meat packers standard * * * It is believed that to record this type case, a standard should be in place or language should be written to look at true disorders with long term effect as compared to short term symptoms.

Many commenters also made comments on the overall debate about ergonomics, *i.e.*, that the medical community has not reached consensus on what constitutes an MSD (see, *e.g.*, Exs. 15: 116, 1267, 323, 355), that there is too much scientific uncertainty about the issue of ergonomics (see, *e.g.*, Exs. 15: 57, 215, 304, 312, 342, 344, 355, 393, 397, 412, 424), that science and medicine cannot tell what is work-related and what is not (see, *e.g.*, Exs. 15: 204, 207, 218, 323, 341, 342, 3546, 408, 412, 424, 443), that OSHA needs to do more research before issuing a rule (Ex. 15: 234), that "musculoskeletal disorder" is a vague category (Ex. 15: 393), and that OSHA should drop the issue until the science is better (Ex. 15: 204).

OSHA does not agree that the provisions on the recording of MSDs

contained in this recordkeeping rule would conflict in any way with OSHA's ergonomics rulemaking. Unlike the proposed ergonomics standard, the final ergonomics standard does not use an OSHA recordable case as a "trigger" that would require an employer to implement an ergonomics program. As a result, a recordable musculoskeletal disorder does not necessarily mean that the employer is required to implement an ergonomics program. The recordkeeping rule's provisions on the reporting of MSDs simply address the most consistent and appropriate way to record injury and illness data on these disorders. MSDs, like all other injuries and illnesses, must be evaluated for their work-relatedness and their recordability under the recordkeeping rule's general recording criteria; only if the MSD meets these tests is the case recordable. Additionally, OSHA has required the recording of MSDs for many years.

The recordkeeping rule and the ergonomics standard treat MSDs somewhat differently because the purpose of the two rules is different. Thus, although many of the requirements in the two rules are the same, some requirements reflect the different purposes of the two rulemakings. For example, the recordkeeping rule defines MSDs more broadly than the ergonomics rule because one of the purposes of the Part 1904 recordkeeping system is to gather broad information about injuries and illnesses; the ergonomics standard, in contrast, is designed to protect workers from those MSD hazards the employer has identified in their job. Another difference between the two rules is that the ergonomics standard requires employers to evaluate employee reports of MSD signs and symptoms that last for seven consecutive days, although the recordkeeping rule does not require employers to record signs and symptoms that last for seven consecutive days unless such signs or symptoms involve medical treatment, days of restricted work, or days away from work. The record in the ergonomics rulemaking strongly supported early reporting of MSD signs and symptoms because such early reporting reduces disability, medical costs, and lost productivity. However, evidence in the recordkeeping rulemaking did not support a requirement that persistent signs and symptoms of all occupational injuries and illnesses be recorded on the OSHA Log, and the final recordkeeping rule accordingly contains no such requirement.

Section 1904.29 Forms

Section 1904.29, titled "Forms," establishes the requirements for the forms (OSHA 300 Log, OSHA 300A Annual Summary, and OSHA 301 Incident Report) an employer must use to keep OSHA Part 1904 injury and illness records, the time limit for recording an injury or illness case, the use of substitute forms, the use of computer equipment to keep the records, and privacy protections for certain information recorded on the OSHA 300 Log.

Paragraph 1904.29(a) sets out the basic requirements of this section. It directs the employer to use the OSHA 300 (Log), 300A (Summary), and 301 (Incident Report) forms, or equivalent forms, to record all recordable occupational injuries and illnesses. Paragraph 1904.29(b) contains requirements in the form of questions and answers to explain how employers are to implement this basic requirement. Paragraph 1904.29(b)(1) states the requirements for: (1) Completing the establishment information at the top of the OSHA 300 Log, (2) making a one- or two-line entry for each recordable injury and illness case, and (3) summarizing the data at the end of the year. Paragraph 1904.29(b)(2) sets out the requirements for employers to complete the OSHA 301 Incident Report form (or equivalent) for each recordable case entered on the OSHA 300 Log. The requirements for completing the annual summary on the Form 300A are found at Section 1904.32 of the final rule.

Required Forms

OSHA proposed to continue to require employers to keep both a Log (Form 300) and an Incident Report form (Form 301) for recordkeeping purposes, just as they have been doing under the former rule. OSHA received no comments on the use of two forms for recordkeeping purposes, *i.e.*, a Log with a one-line entry for each case and a supplemental report that requires greater detail about each injury or illness case. OSHA has therefore continued to require two recordkeeping forms in the final rule, although these have been renumbered (they were formerly designated as the OSHA 200 Log and the OSHA 101 Supplementary Report).

In addition to establishing the basic requirements for employers to keep records on the OSHA 300 Log and OSHA 301 Incident Report and providing basic instructions on how to complete these forms, this section of the rule states that employers may use two lines of the OSHA 300 Log to describe

an injury or illness, if necessary. Permitting employers to use two lines when they need more space and specifying this information in the rule and on the Log responds to several comments (see, e.g., Exs. 37; 15: 138, 389) about the lack of adequate space for descriptive information on the proposed OSHA 300 Log form. OSHA believes that most injury and illness cases can be recorded using only one line of the Log. However, for those cases requiring more space, this addition to the Log makes it clear that two lines may be used to describe the case. The OSHA 300 Log is designed to be a scannable document that employers, employees and government representatives can use to review a fairly large number of cases in a brief time, and OSHA believes that employers will not need more than two lines to describe a given case. Employers should enter more detailed information about each case on the OSHA 301 form, which is designed to accommodate lengthier information.

Deadline for Entering a Case

Paragraph 1904.29(b)(3) establishes the requirement for how quickly each recordable injury or illness must be recorded into the records. It states that the employer must enter each case on the OSHA 300 Log and OSHA 301 Form within 7 calendar days of receiving information that a recordable injury or illness has occurred. In the vast majority of cases, employers know immediately or within a short time that a recordable case has occurred. In a few cases, however, it may be several days before the employer is informed that an employee's injury or illness meets one or more of the recording criteria.

The former recordkeeping rule required each injury or illness to be entered on the OSHA Log and Summary no later than six working days after the employer received information about the case. OSHA proposed to change this interval to 7 calendar days. Several commenters agreed that allowing 7 calendar days would simplify the reporting time requirement and reduce confusion for employers (see, e.g., Exs. 36; 15: 9, 36, 65, 107, 154, 179, 181, 203, 332, 369, 387). Other commenters (see, e.g., Exs. 15: 46, 60, 82, 89, 184, 204, 225, 230, 239, 283, 288, 305, 348, 375, 390, 346, 347, 348, 358, 389, 409, 423, 424, 431) objected to the proposed 7 calendar-day requirement, principally on the grounds that the proposed 7 calendar-day time limit would actually be shorter than the former rule's 6 working-day limit in some situations, such as if a long holiday weekend intervened (see, e.g., Exs. 15: 9, 60, 230, 272, 375).

One commenter urged OSHA to adopt a 21-day period because conducting a thorough investigation to determine whether a case is work-related or a recurrence of an old case can sometimes take longer than 7 or even 10 days (Ex. 15: 184). In the final rule, OSHA is adopting a 7 calendar-day time limit for the recording of an injury or illness that meets the rule's recording criteria. For many employers, the 7 day calendar period will be longer than the former 6 working day period. Although it is true that, in other cases, a 7 calendar-day limit may be slightly shorter than the former rule's 6 working-day limit, the Agency believes that the 7 calendar-day rule will provide employers sufficient time to receive information and record the case. In addition, a simple "within a week" rule will be easier for employers to remember and apply, and is consistent with OSHA's decision, in this rule, to move from workdays to calendar days whenever possible. The Agency believes that 7 calendar days is ample time for recording, particularly since the final rule, like the former rule, allows employers to revise an entry simply by lining it out or amending it if further information justifying the revision becomes available. The final rule does contain one exception for the 7 day recording period: if an employee experiences a recordable hearing loss, and the employer elects to retest the employee's hearing within 30 days, the employer can wait for the results of the retest before recording.

Equivalent Forms and Computerized Records

Commenters were unanimous in urging OSHA to facilitate the use of computers and to allow the use of alternative forms in OSHA recordkeeping (see, e.g., Exs. 21, 22, 15:9, 11, 45, 72, 95, 111, 184, 262, 271, 288, 305, 318, 341, 346, 389, 390, 396, 405, 424, 434, 438). The comments of the U.S. West Company (Ex. 15:184) are representative of these views:

U S WEST strongly supports provisions in the proposed rule that allow "equivalent" forms instead of the OSHA Forms 300 and 301. U S WEST also supports the provisions that would allow use of data processing equipment and computer printouts of equivalent forms. These provisions allow employers considerable flexibility and greatly reduced paperwork burdens and costs, especially for larger multi-site employers.

Accordingly, paragraphs 1904.29(b)(4) and (b)(5) of the final rule make clear that employers are permitted to record the required information on electronic media or on paper forms that are different from the OSHA 300 Log,

provided that the electronic record or paper forms are equivalent to the OSHA 300 Log. A form is deemed to be "equivalent" to the OSHA 300 Log if it can be read and understood as easily as the OSHA form and contains at least as much information as the OSHA 300 Log. In addition, the equivalent form must be completed in accordance with the instructions used to complete the OSHA 300 Log. These provisions are intended to balance OSHA's obligation, as set forth in Section 8(d) of the OSH Act, to reduce information collection burdens on employers as much as possible, on the one hand, with the need, on the other hand, to maintain uniformity of the data recorded and provide employers flexibility in meeting OSHA's recordkeeping requirements. These provisions also help to achieve one of OSHA's goals for this rulemaking: to allow employers to take full advantage of modern technology and computers to meet their OSHA recordkeeping obligations.

Several commenters were concerned that computerized records would make it more difficult for employees to access the records (see, e.g., Exs. 15:379, 380, 418, 438). Representative of these views is a comment from the United Auto Workers (UAW):

Electronic data collection is an essential step to moving forward, especially regarding data analysis for large worksites. However, as it works today electronic collection can also be an obstacle to prompt availability to persons without direct access to the computer system. For this reason, OSHA should require the availability of electronic information to employees and employee representatives in the same time interval as hard copy information, regardless of whether the computer system is maintained at the site (Ex. 15: 438).

OSHA does not believe that computerization of the records will compromise timely employee, employer or government representative access to the records. To ensure that this is the case, paragraph § 1904.29(b)(5) of the final rule allows the employer to keep records on computer equipment only if the computer system can produce paper copies of equivalent forms when access to them is needed by a government representative, an employee or former employee, or an employee representative, as required by §§ 1904.35 or 1904.40, respectively. Of course, if the employee requesting access to the information agrees to receive it by e-mail, this is acceptable under the 1904 rule.

OSHA also proposed specifically to require that, on any equivalent form, three of the questions on the form asking for details of the injury or illness

(proposed questions 16, 17, and 18) be positioned on the form in the same order and be phrased in identical language to that used on the OSHA 301 Incident Report. The three questions were all designed to obtain more detailed information about how the injury or illness occurred, what equipment or materials the employee was using at the time of the injury or illness, and the activity the employee was engaged in at the time of the injury or illness.

A number of commenters objected to the proposed requirement that, on any equivalent form, these three questions be asked in the same order and be phrased in the same language as on the OSHA Incident Report (see, e.g., Exs. 33; 37; 15: 9, 41, 44, 59, 60, 119, 132, 156, 176, 201, 231, 281, 283, 301, 312, 318, 322, 329, 334, 335, 346). In addition to arguing that such a requirement would be burdensome and prescriptive, these commenters pointed out that the proposed OSHA recordkeeping form was not identical to many State workers' compensation forms (the forms most often used as alternatives to the OSHA forms), which would mean that employers in these States would, in effect, be forced to use the OSHA forms (Ex. 15: 334). Other commenters argued that being required to use a certain format would hamper employers' internal accident investigations (see, e.g., Exs. 15: 44, 176, 322). For example, the Kodak Company remarked:

In [proposed] section 1904.5(b)(2)—“Questions 16, 17 & 18 must be asked in the same order and using identical language from the Form 301.” Companies, like Kodak, have well established techniques to ascertain the cause of the injury and illness. This requirement would actually hamper our ability to find the root cause of an accident. This requirement should be eliminated from the rule. (Ex. 15: 322)

The final rule does not include a requirement that certain questions on an equivalent form be asked in the same order and be phrased in language identical to that used on the OSHA 301 form. Instead, OSHA has decided, based on a review of the record evidence, that employers may use any substitute form that contains the same information and follows the same recording directions as the OSHA 301 form, and the final rule clearly allows this. Although the consistency of the data on the OSHA 301 form might be improved somewhat if the questions asking for further details were phrased and positioned in an identical way on all employers' forms, OSHA has concluded that the additional burden such a requirement would impose on employers and workers'

compensation agencies outweighs this consideration.

OSHA has revised the wording of these three questions on the final OSHA 301 form to match the phraseology used by the Bureau of Labor Statistics (BLS) in its Annual Survey of Occupational Injuries and Illnesses. By ensuring consistency across both the BLS and OSHA forms, this change will help those employers who respond both to the BLS Annual Survey and keep OSHA records.

Handling of Privacy Concern Cases

Paragraphs 1904.29(b)(6) through (b)(10) of the final rule are new and are designed to address privacy concerns raised by many commenters to the record. Paragraph 1904.29(b)(6) requires the employer to withhold the injured or ill employee's name from the OSHA 300 Log for injuries and illnesses defined by the rule as “privacy concern cases” and instead to enter “privacy concern case” in the space where the employee's name would normally be entered if an injury or illness meeting the definition of a privacy concern case occurs. This approach will allow the employer to provide OSHA 300 Log data to employees, former employees and employee representatives, as required by § 1904.35, while at the same time protecting the privacy of workers who have experienced occupational injuries and illnesses that raise privacy concerns. The employer must also keep a separate, confidential list of these privacy concern cases, and the list must include the employee's name and the case number from the OSHA 300 Log. This separate listing is needed to allow a government representative to obtain the employee's name during a workplace inspection in case further investigation is warranted and to assist employers to keep track of such cases in the event that future revisions to the entry become necessary.

Paragraph 1904.29(b)(7) defines “privacy concern cases” as those involving: (i) An injury or illness to an intimate body part or the reproductive system; (ii) an injury or illness resulting from a sexual assault; (iii) a mental illness; (iv) a work-related HIV infection, hepatitis case, or tuberculosis case; (v) needlestick injuries and cuts from sharp objects that are contaminated with another person's blood or other potentially infectious material, or (vi) any other illness, if the employee independently and voluntarily requests that his or her name not be entered on the log. Paragraph 1904.29(b)(8) establishes that these are the only types of occupational injuries and illnesses that the employer may

consider privacy concern cases for recordkeeping purposes.

Paragraph 1904.29(b)(9) permits employers discretion in recording case information if the employer believes that doing so could compromise the privacy of the employee's identity, even though the employee's name has not been entered. This clause has been added because OSHA recognizes that, for specific situations, coworkers who are allowed to access the log may be able to deduce the identity of the injured or ill worker and obtain inappropriate knowledge of a privacy-sensitive injury or illness. OSHA believes that these situations are relatively infrequent, but still exist. For example, if knowing the department in which the employee works would inadvertently divulge the person's identity, or recording the gender of the injured employee would identify that person (because, for example, only one woman works at the plant), the employer has discretion to mask or withhold this information both on the Log and Incident Report.

The rule requires the employer to enter enough information to identify the cause of the incident and the general severity of the injury or illness, but allows the employer to exclude details of an intimate or private nature. The rule includes two examples; a sexual assault case could be described simply as “injury from assault,” or an injury to a reproductive organ could be described as “lower abdominal injury.” Likewise, a work-related diagnosis of post traumatic stress disorder could be described as “emotional difficulty.” Reproductive disorders, certain cancers, contagious diseases and other disorders that are intimate and private in nature may also be described in a general way to avoid privacy concerns. This allows the employer to avoid overly graphic descriptions that may be offensive, without sacrificing the descriptive value of the recorded information.

Paragraph 1904.29(b)(10) protects employee privacy if the employer decides voluntarily to disclose the OSHA 300 and 301 forms to persons other than those who have a mandatory right of access under the final rule. The paragraph requires the employer to remove or hide employees' names or other personally identifying information before disclosing the forms to persons other than government representatives, employees, former employees or authorized representatives, as required by paragraphs 1904.40 and 1904.35, except in three cases. The employer may disclose the forms, complete with personally identifying information, (2) only: (i) to an auditor or consultant

hired by the employer to evaluate the safety and health program; (ii) to the extent necessary for processing a claim for workers' compensation or other insurance benefits; or (iii) to a public health authority or law enforcement agency for uses and disclosures for which consent, an authorization, or opportunity to agree or object is not required under section 164.512 of the final rule on Standards for Privacy of Individually Identifiable Health Information, 45 CFR 164.512.

These requirements have been included in § 1904.29 rather than in § 1904.35, which establishes requirements for records access, because waiting until access is requested to remove identifying information from the OSHA 300 Log could unwittingly compromise the injured or ill worker's privacy and result in unnecessary delays. The final rule's overall approach to handling privacy issues is discussed more fully in the preamble discussion of the employee access provisions in § 1904.35.

The Treatment of Occupational Illness and Injury Data on the Forms

The treatment of occupational injury and illness data on the OSHA forms is a key issue in this rulemaking. Although the forms themselves are not printed in the Code of Federal Regulations (CFR), they are the method OSHA's recordkeeping regulation uses to meet the Agency's goal of tracking and reporting occupational injury and illness data. As such, the forms are a central component of the recordkeeping system and mirror the requirements of the Part 1904 regulation. The final Part 1904 rule requires employers to use three forms to track occupational injuries and illnesses: the OSHA 300, 300A, and 301 forms, which replace the OSHA 200 and 101 forms called for under the former recordkeeping rule, as follows:

1. *The OSHA Form 300, Log of Work-Related Injuries and Illnesses*, replaces the Log portion of the former OSHA Form 200 Log and Summary of Occupational Injuries and Illnesses. The OSHA 300 Log contains space for a description of the establishment name, city and state, followed by a one-line space for the entry for each recordable injury and illness.

2. *The OSHA Form 300A, Summary of Work-Related Injuries and Illnesses*, replaces the Summary portion of the former OSHA Form 200 Log and Summary of Occupational Injuries and Illnesses. The Form 300A is used to summarize the entries from the Form 300 Log at the end of the year and is then posted from February 1 through

April 30 of the following year so that employees can be aware of the occupational injury and illness experience of the establishment in which they work. The form contains space for entries for each of the columns from the Form 300, along with information about the establishment, and the average number of employees who worked there the previous year, and the recordkeeper's and corporate officer's certification of the accuracy of the data recorded on the summary. (These requirements are addressed further in Section 1904.32 of the final rule and its associated preamble.)

3. *The OSHA Form 301, Injury and Illness Report*, replaces the former OSHA 101 Form. Covered employers are required to fill out a one-page form for each injury and illness recorded on the Form 300. The form contains space for more detailed information about the injured or ill employee, the physician or other health care professional who cared for the employee (if medical treatment was necessary), the treatment (if any) of the employee at an emergency room or hospital, and descriptive information telling what the employee was doing when injured or ill, how the incident occurred, the specific details of the injury or illness, and the object or substance that harmed the employee. (Most employers use a workers' compensation form as a replacement for the OSHA 301 Incident Report.)

The use of a three-form system for recordkeeping is not a new concept. The OSHA recordkeeping system used a separate summary form from 1972 to 1977, when the Log and Summary forms were combined into the former OSHA Form 200 (42 FR 65165). OSHA has decided that the three-form system (the 300 Log, the 300A summary, and the 301 Incident Report) has several advantages. First, it provides space for more cases to be entered on the Log but keeps the Log to a manageable size. Second, it helps to ensure that an injured or ill employee's name is not posted in a public place. When the forms were combined in 1977 into a single form, employers occasionally neglected to shield an employee's name on the final sheet of the 200 Log, even though the annual summary form was designed to mask personal identifiers. The use of a separate 300A summary form precludes this possibility. Third, the use of a separate summary form (the final rule's Form 300A) allows the data to be posted in a user-friendly format that will be easy for employees and employers to use. Fourth, a separate 300A Form provides extra space for information about an employee's right to access the Log, information about the

establishment and its employees, and the dual certifications required by § 1904.32 of the rule. Finally, a separate 300A Form makes it easier to attach to the reverse side of the form worksheets that are designed to help the employer calculate the average number of employees and hours worked by all employees during the year.

The majority of the changes to the final forms (compared with the forms used with the former rule and the proposed forms) have been made to reflect the requirements of the final rule and are needed to align the forms with the final regulatory requirements. All of the other changes to the forms reflect formatting and editorial changes made to simplify the forms, make them easier to understand and complete, and facilitate use of the data. The forms have been incorporated into an information package that provides individual employers with several copies of the OSHA 300, 300A, and 301 forms; general instructions for filling out the forms and definitions of key terms; an example showing how to fill out the 300 Log; a worksheet to assist employers in computing the average number of employees and the total number of hours worked by employees at the establishment in the previous year; a non-mandatory worksheet to help the employer compute an occupational injury and illness rate; and instructions telling an employer how to get additional help by (1) accessing the OSHA Internet home page, or (2) by calling the appropriate Federal OSHA regional office or the OSHA approved State-Plan with jurisdiction. The package is included in final rule Section VI, Forms, later in this preamble.

The Size of the OSHA Recordkeeping Forms

The OSHA recordkeeping forms required by the final Part 1904 recordkeeping rule are printed on legal size paper (8½" x 14"). The former rule's Log was an 11 by 17-inch form, the equivalent of two standard 8½ by 11-inch pages. The former 200 Log was criticized because it was unwieldy to copy and file and contained 12 columns for recording occupational injury and occupational illness cases. The proposed OSHA 300 Log and Summary would have fit on a single 8½ by 11-inch sheet of paper (61 FR 4050), a change that would have been made possible by the proposed elimination of redundancies on the former 200 Log and of certain data elements that provided counts of restricted workdays and separate data on occupational injury and illness cases. The proposed OSHA 300 Form was favorably received by a

large number of commenters (see, e.g., Exs. 19, 44, 15: 48, 157, 246, 307, 347, 351, 373, 374, 378, 384, 391, 395, 396, 427, 434, 441, 443). For example, the National Association of Plumbing-Heating-Cooling Contractors (NAPHCC) stated:

NAPHCC applauds the Agency's efforts to simplify the Injury and Illness Log and Summary in the form of a new Form 300 and Form 301. Employers will be more comfortable with the one-page forms—they appear less ominous than the oversized 200 Form and therefore have a better chance of being completed in a timely and accurate manner (Ex. 15: 443, p. 6).

A number of commenters were concerned that proposed the 300 form would fail to capture important data and argued that the former Log should be retained (see, e.g., Exs. 15:15, 47, 283, 369, 429, 438). The primary argument of this group of commenters was that the size of the form should not determine which data elements were included on the Log and which were not. The comment of the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America—UAW summed up this position: "The UAW uses this data on a yearly basis when it becomes available at the national level, and on a daily basis at the plant level. Compared to the value of the summary data and data series, the goal of reducing the size of the form to something easily Xeroxed is silly" (Ex. 15: 438, p. 2). The International Brotherhood of Teamsters commented "OSHA believes the change results in a simplified form that fits on a standard sheet of paper that can be easily copied and kept on a personal computer. * * * The storage capacity of an additional page in a personal computer is hardly burdensome. The amount of information that can be collected should always be need based, and never be limited to what an 8½" x 11" sheet of paper can hold" (Ex. 15: 369, p. 49).

OSHA agrees that the proposed Log would have resulted in a significant loss of useful data and has therefore maintained several data fields on the final OSHA 300 Log to capture counts of restricted work days and collect separate data on occupational injuries and several types of occupational illness. However, there is a limit to the information that can be collected by any one form. OSHA wishes to continue to make it possible for those employers, especially smaller employers, who wish to keep records in paper form to do so. It is also important that the Log be user-friendly, easily copied and filed, and otherwise manageable. Although a form 8½ x 11 inches in size would be even

easier to manage, OSHA has concluded that a form of that size is too small to accommodate the data fields required for complete and accurate reporting.

Accordingly, OSHA has redesigned the OSHA 300 Log to fit on a legal size (8½ x 14 inches) piece of paper and to clarify that employers may use two lines to enter a case if the information does not fit easily on one line. The OSHA forms 300A and 301, and the remainder of the recordkeeping package, have also been designed to fit on the same-size paper as the OSHA 300 Log. For those employers who use computerized systems (where handwriting space is not as important) equivalent computer-generated forms can be printed out on 8½ x 11 sheets of paper if the printed copies are legible and are as readable as the OSHA forms.

Commenters raised four major issues concerning the OSHA 300 Log: (1) Defining lost workdays (discussed below); (2) collecting separate data on occupational injury and occupational illness (discussed below); (3) collecting separate data on musculoskeletal disorders (discussed below and in the summary and explanation associated with § 1904.12; and (4) recurrences (discussed in the summary and explanation associated with § 1904.6, Determination of new cases). In addition, commenters raised numerous minor issues concerning the 300 Log data elements and forms design; these are discussed later in this section.

Defining Lost Workdays

OSHA proposed to eliminate the term "lost workdays," by replacing it with "days away from work" (61 FR 4033). The OSHA recordkeeping system has historically defined lost workdays as including both days away from work and days of restricted work activity, and the *Recordkeeping Guidelines* discussed how to properly record lost workday cases with days away from work and lost workday cases with days of restricted work activity (Ex. 2, p. 47, 48). However, many use the term "lost workday" in a manner that is synonymous with "day away from work," and the term has been used inconsistently for many years. Many commenters on the proposal agreed that the term "lost workday" should be deleted from the forms and the recordkeeping system because of this confusion (see, e.g., Exs. 33; 37; 15: 9, 26, 69, 70, 105, 107, 136, 137, 141, 146, 176, 184, 204, 224, 231, 266, 271, 272, 273, 278, 281, 287, 288, 301, 303, 305, 347, 384, 414, 428). The Akzo Nobel Chemicals Company (Ex. 37) simply commented "[a] big ATTA BOY for removing restricted work cases from

under the lost time umbrella. They never really belonged there." William K. Principe of the law firm of Constangy, Brooks & Smith, LLC, stated that:

The elimination of the term "lost work days" is a good idea, because its use under the existing recordkeeping regulations has been confusing. Recordkeepers have equated "lost work days" with "days away from work," but have not thought that "lost work days" included days of "restricted work activity." Thus, the elimination of "lost work days" will result in more understandable terminology.

The Hoffman-La Roche, Inc. company agreed with OSHA's proposal to eliminate the term lost workdays from the system, stating that "[t]he term "lost workdays" is confusing and does not clearly define whether the case involved days away from work or restricted days. However, the term "lost workday case" still has a place in defining a case that has either days away from work or restricted days." The Jewel Coal and Coke Company (Ex. 15: 281) remarked that:

[w]e believe that the listing of restricted work injuries/illnesses has its purpose as to the consideration of the seriousness of the injury or illness. However, we believe that restricted work duty injuries/illnesses should be placed in a separate category from days away from work and should not be considered as serious as accidents with days away from work but are in fact more serious than first Aid cases or other medically reportable cases. We believe that the listing of the date of return of the employee to full work activities may very well have its place on the OSHA Form 301 or other supplemental forms.

In the final rule, OSHA has eliminated the term "lost workdays" on the forms and in the regulatory text. The use of the term has been confusing for many years because many people equated the terms "lost workday" with "days away from work" and failed to recognize that the former OSHA term included restricted days. OSHA finds that deleting this term from the final rule and the forms will improve clarity and the consistency of the data.

The 300 Log has four check boxes to be used to classify the case: death, day(s) away from work, days of restricted work or job transfer; and case meeting other recording criteria. The employer must check the single box that reflects the most severe outcome associated with a given injury or illness. Thus, for an injury or illness where the injured worker first stayed home to recuperate and then was assigned to restricted work for several days, the employer is required only to check the box for days away from work (column I). For a case with only job transfer or restriction, the employer must check the

box for days of restricted work or job transfer (Column H). However, the final Log still allows employers to calculate the incidence rate formerly referred to as a "lost workday injury and illness rate" despite the fact that it separates the data formerly captured under this heading into two separate categories. Because the OSHA Form 300 has separate check boxes for days away from work cases and cases where the employee remained at work but was temporarily transferred to another job or assigned to restricted duty, it is easy to add the totals from these two columns together to obtain a single total to use in calculating an injury and illness incidence rate for total days away from work and restricted work cases.

Counting Days of Restricted Work or Job Transfer

Although the final rule does not use the term "lost workday" (which formerly applied both to days away from work and days of restricted or transferred work), the rule continues OSHA's longstanding practice of requiring employers to keep track of the number of days on which an employee is placed on restricted work or is on job transfer because of an injury or illness. OSHA proposed to eliminate the counting of the number of days of restricted work from the proposed 300 Log (61 FR 4046). The proposal also asked whether the elimination of the restricted work day count would provide an incentive for employers to temporarily assign injured or ill workers to jobs with little or no productive value to avoid recording a case as one involving days away from work (61 FR 4046).

A large number of commenters supported OSHA's proposal to eliminate the counting of restricted work days (see, e.g., Exs. 21; 26; 27; 28; 33; 37; 51; 15; 9, 19, 26, 39, 44, 60, 65, 67, 69, 70, 76, 79, 82, 83, 85, 87, 100, 105, 107, 111, 119, 121, 123, 136, 137, 141, 145, 146, 154, 156, 159, 170, 171, 173, 176, 184, 188, 194, 199, 203, 204, 205, 218, 224, 225, 229, 230, 231, 234, 235, 239, 246, 247, 260, 262, 265, 266, 271, 272, 273, 278, 281, 283, 287, 288, 289, 298, 301, 303, 304, 305, 307, 317, 321, 332, 334, 336, 337, 341, 345, 346, 347, 351, 364, 368, 373, 384, 390, 391, 392, 401, 405, 409, 413, 414, 423, 424, 426, 427, 428, 430, 434, 437, 440, 442). For example, the Union Carbide Corporation (Ex. 15: 391) argued that their:

[e]xperience with tracking lost or restricted workdays the way it is being done today indicates that it is fruitless. The interest is in the number of lost workday or restricted workday cases with only minor attention being given to the number of days involved.

Elimination of the term "lost workdays" in regard to restricted workdays would surely be a step in the direction of simplicity and focus. The severity of an injury/illness is more clearly indicated by the number of days away from work than by any other means. The inclusion of cases involving restricted work only clouds the issue.

The Monsanto Corporation (Ex. 28) urged the Agency to do away with *all* day counts, noting that Monsanto:

[u]ses the recordable case as the basis of our performance measurement system. We measure the number of days away and restricted but rarely look at them. We agree that OSHA should eliminate the number of days of restricted work from the requirements but we would also delete the number of days away as well. While the number of days are some measure of "severity", we think a better and simpler measure is just the cases rate for fatalities and/or days away cases.

The commenters who argued for eliminating the counting of restricted workdays offered several reasons: (1) Doing away with the counting would simplify the recordkeeping system and reduce burden on employers (see, e.g., Exs. 33; 15: 69, 105, 136, 137, 141, 146, 156, 176, 184, 188, 203, 224, 231, 239, 266, 272, 273, 278, 288, 289, 301, 303, 304, 336, 337, 345, 346, 347, 390, 391, 409, 424, 426, 428, 430, 442); (2) eliminating the day counts would make it easier to computerize the records (see, e.g., Exs. 15: 136, 137, 141, 224, 266, 278); (3) limiting counts of restricted work would match workers' compensation insurance requirements, which typically count only days away from work (see, e.g., Exs. 15: 225, 336); (4) counts of restricted work have little or no value (see, e.g., Exs. 21; 15: 65, 105, 119, 154, 170, 203, 205, 235, 260, 262, 265, 332, 347, 391, 401, 405, 409, 430); (5) restricted workday counts are not used in safety and health programs and their evaluation (see, e.g., Exs. 15: 65, 119, 154, 159, 194, 239, 271, 347, 409, 426, 428); (6) restricted workday counts are not a good measure of injury and illness severity (see, e.g., Exs. 15: 336, 345); and (7) restricted workday counts are not a uniform or consistent measure (see, e.g., Exs. 15: 235, 288, 289, 347, 409, 442).

For example, the National Grain and Feed Association (Ex. 15: 119) argued that "[t]here is no evidence that the current restricted work activity day counts are being used in safety and health programs and there is no purpose in continuing the restricted work activity count requirement." The Tennessee Valley Authority (Ex. 15: 235) argued that "[o]nly days away from work or death should be recorded on the 300 log. Recording of restricted workday cases is difficult to consistently

record, thereby, not providing a good data base for comparison."

However, a number of commenters opposed the proposal to eliminate the counting of restricted days (see, e.g., Exs. 35; 15: 31, 34, 41, 61, 72, 74, 181, 186, 281, 310, 350, 359, 369, 371, 380, 438). For example, Linda Ballas & Associates (Ex. 15: 31) argued that:

[r]estricted work days should be counted. A restricted case with 1 restricted day would be less severe than a restricted work case with 30 days. The elimination of the restricted work activity day count will provide an incentive for employers to temporarily assign injured or ill workers to jobs with little or no productive value to avoid recording a case as one involving days away from work. * * *

Most of these commenters argued that restricted work day data are needed to gauge the severity of an occupational injury or illness (see, e.g., Exs. 15: 31, 34, 41, 181, 186, 310, 369, 371, 438) or that such data are a measure of lost productivity (see, e.g., Exs. 15: 41, 61, 281). The American Association of Occupational Health Nurses stated that "[O]SHA should be aware that modifications to recording restricted work days will result in the loss of valuable information related to the severity of the injuries/illnesses." The Jewel Coal and Coke Company (Ex. 15: 281) stated that:

We believe that the listing of restricted work injuries/illnesses has its purpose as to the consideration of the seriousness of the injury or illness. However, we believe that restricted work duty injuries/illnesses should be placed in a separate category from days away from work and should not be considered as serious as accidents with days away from work but are in fact more serious than first Aid cases or other medically reportable cases. * * *

The North Carolina Department of Labor (Ex. 15: 186) recommended that:

[r]estricted work day counts as well as lost work day counts can be measures of the severity of individual illnesses/injuries. In addition through trend analysis lost work day rates and restricted work day rates may be calculated by job, department, etc. to identify higher risk jobs, departments, etc. and/or measure the effectiveness of interventions and progress in the development of a comprehensive ergonomics program.

As to OSHA's question in the proposal about the incentive for employers to offer restricted work to employee's in order to avoid recording a case with days away from work, a number of commenters questioned whether such an incentive exists (see, e.g., Exs. 15: 13, 26, 27, 39, 79, 136, 137, 141, 156, 181, 199, 218, 224, 229, 242, 263, 266, 269, 270, 278, 283, 341, 364, 377, 409, 426, 434, 440). For example,

the United Technologies Company (UTC) stated that “[U]TC does not believe that the recording or not recording of restricted days will influence management’s decision to temporarily assign employees to restricted work. The decision to place an employee on restricted work is driven by workers’ compensation costs rather than OSHA incidence rates” (Ex. 15: 440). The American Textile Manufacturers Association (ATMI) agreed:

[A]TMI believes that this will not provide an incentive for employers to temporarily assign injured or ill workers to jobs with little or no productive value to avoid recording a case as one involving days away from work. The restricted work activity day count is in no way related to an employer wanting to avoid having days away from work. Workers’ compensation claims and, for the most part, company safety awards are based on the number of “lost-time accidents.” The counting of restricted work days has never been an incentive or disincentive for these two key employer safety measures and ATMI believes that this will not change. (Ex. 15: 156)

Other commenters, however, believed there could be incentive effects (see, e.g., Exs. 15: 13, 31, 74, 111, 359, 369).

In the final rule, OSHA has decided to require employers to record the number of days of restriction or transfer on the OSHA 300 Log. From the comments received, and based on OSHA’s own experience, the Agency finds that counts of restricted days are a useful and needed measure of injury and illness severity. OSHA’s decision to require the recording of restricted and transferred work cases on the Log was also influenced by the trend toward restricted work and away from days away from work. In a recent article, the BLS noted that occupational injuries and illnesses are more likely to result in days of restricted work than was the case in the past. From 1978 to 1986, the annual rate in private industry for cases involving only restricted work remained constant, at 0.3 cases per 100 full-time workers. Since 1986, the rate has risen steadily to 1.2 cases per 100 workers in 1997, a fourfold increase. At the same time, cases with days away from work declined from 3.3 in 1986 to 2.1 in 1997 (Monthly Labor Review, June 1999, Vol. 122, No. 6, pp. 11–17). It is clear that employers have caused this shift by modifying their return-to-work policies and offering more restricted work opportunities to injured or ill employees. Therefore, in order to get an accurate picture of the extent of occupational injuries and illnesses, it is necessary for the OSHA Log to capture

counts of days away from work *and* days of job transfer or restriction.

The final rule thus carries forward OSHA’s longstanding requirement for employers to count and record the number of restricted days on the OSHA Log. On the Log, restricted work counts are separated from days away from work counts, and the term “lost workday” is no longer used. OSHA believes that the burden on employers of counting these days will be reduced somewhat by the simplified definition of restricted work, the counting of calendar days rather than work days, capping of the counts at 180 days, and allowing the employer to stop counting restricted days when the employee’s job has been permanently modified to eliminate the routine job functions being restricted (see the preamble discussion for 1904.7 General Recording Criteria).

Separate 300 Log Data on Occupational Injury and Occupational Illness

OSHA proposed (61 FR 4036–4037) to eliminate any differences in the way occupational injuries, as opposed to occupational illnesses, were recorded on the forms. The proposed approach would not, as many commenters believed, have made it impossible to determine the types and number of cases of occupational illnesses at the aggregated national level, although it would have eliminated the distinction between injuries and illnesses at the individual establishment level. In other words, the proposed approach would have involved a coding system that the BLS could use to project the incidences of several types of occupational illnesses nationally, but would not have permitted individual employers to calculate the incidence of illness cases at their establishments.

Many commenters reacted with concern to the proposal to eliminate, for recording purposes, the distinction between occupational injuries and occupational illnesses, and to delete the columns on the Log used to record specific categories of illnesses (see, e.g., Exs. 15: 213, 288, 359, 369, 407, 418, 429, 438). For example, Con Edison stated that “Distinguishing between injuries and illness is a fundamental and essential part of recordkeeping” (Ex. 15: 21), and the National Institute for Occupational Safety and Health (NIOSH) discussed the potentially detrimental effects on the Nation’s occupational injury and illness statistics of such a move, stating “For occupational health surveillance purposes * * * NIOSH recommends that entries on the OSHA log continue to be categorized separately as illnesses and injuries” (Ex. 15: 407).

Many commenters also criticized OSHA’s proposal to delete from the Log the separate columns for 7 categories of occupational illnesses (see, e.g., Exs. 20, 35, 15: 27, 283, 371). These commenters pointed out that these categories of illnesses have been part of the recordkeeping system for many years and that they captured data on illness cases in 7 categories: occupational skin diseases or disorders, dust diseases of the lungs, respiratory conditions due to toxic agents, poisoning (systemic effects of toxic materials), disorders due to physical agents, disorders associated with repeated trauma, and all other occupational illnesses. Typical of the views of commenters concerned about the proposal to delete these columns from the Log was the comment of the United Auto Workers: “OSHA should abandon the plan to change the OSHA 200 form to eliminate illness categories. The illness categories in the summary presently provide critically necessary information about cumulative trauma disorders, and useful information about respiratory conditions” (Ex. 15: 348).

Several commenters supported the proposed concept of adding a single column to the form on which employers would enter illness codes that would correspond to the illness conditions listed in proposed Appendix B, which could then be decoded by government classifiers to project national illness incidence rates for coded conditions (see, e.g., Exs. 20, 15: 27, 369, 371). For example, the United Brotherhood of Carpenters and Joiners of America stated:

The UBC would recommend [that].* * * A column should be added for an identification code for recordable conditions from Appendix B. (Eg. 1 = hearing loss, 2 = CTD’s. 3 = blood lead. Etc.) (Ex. 20).

After a thorough review of the comments in the record, however, OSHA has concluded that the proposed approach, which would have eliminated, for recording purposes, the distinction between work-related injuries and illnesses, is not workable in the final rule. The Agency finds that there is a continuing need for separately identifiable information on occupational illnesses and injuries, as well as on certain specific categories of occupational illnesses. The published BLS statistics have included separate estimates of the rate and number of occupational injuries and illnesses for many years, as well as the rate and number of different types of occupational illnesses, and employers, employees, the government, and the public have found this information useful and worthwhile. Separate illness

and injury data are particularly useful at the establishment level, where employers and employees can use them to evaluate the establishment's health experience and compare it to the national experience or to the experience of other employers in their industry or their own prior experience. The data are also useful to OSHA personnel performing worksite inspections, who can use this information to identify potential health hazards at the establishment.

Under the final rule, the OSHA 300 form has therefore been modified specifically to collect information on five types of occupational health conditions: musculoskeletal disorders, skin diseases or disorders, respiratory conditions, poisoning, and hearing loss. There is also an "all other illness" column on the Log. To record cases falling into one of these categories, the employer simply enters a check mark in the appropriate column, which will allow these cases to be separately counted to generate establishment-level summary information at the end of the year.

OSHA rejected the option suggested by the UBC and others (see, *e.g.*, Exs. 20, 15: 27, 369, 371)—to add a single column that would include a code for different types of conditions—because such an approach could require employers to scan and separately tally entries from the column to determine the total number of each kind of illness case, an additional step that OSHA believes would be unduly burdensome. Because the scanning and tallying are complex, this approach also would be likely to result in computational errors.

In the final rule, two of the illness case columns on the OSHA 300 Log are identical to those on the former OSHA Log: a column to capture cases of skin diseases or disorders and one to capture cases of systemic poisoning. The single column for respiratory conditions on the new OSHA Form 300 will capture data on respiratory conditions that were formerly captured in two separate columns, *i.e.*, the columns for respiratory conditions due to toxic agents (formerly column 7c) and for dust diseases of the lungs (formerly column 7b). Column 7g of the former OSHA Log provided space for data on all other occupational illnesses, and that column has also been continued on the new OSHA 300 Log. On the other hand, column 7e from the former OSHA Log, which captured cases of disorders due to physical agents, is not included on the new OSHA Log form. The cases recorded in former column 7e primarily addressed heat and cold disorders, such as heat stroke and hypothermia;

hyperbaric effects, such as caisson disease; and the effects of radiation, including occupational illnesses caused by x-ray exposure, sun exposure and welder's flash. Because space on the form is at a premium, and because column 7e was not used extensively in the past (recorded column 7e cases accounted only for approximately five percent of all occupational illness cases), OSHA has not continued this column on the new OSHA 300 Log.

OSHA has, however, added a new column specifically to capture hearing loss cases on the OSHA 300 Log. The former Log included a column devoted to repeated trauma cases, which were defined as including noise-induced hearing loss cases as well as cases involving a variety of other conditions, including certain musculoskeletal disorders. Several commenters recommended that separate data be collected on hearing loss (see, *e.g.*, Exs. 20, 53X, p.76, 15: 31). Dedicating a column to occupational hearing loss cases will provide a valuable new source of information on this prevalent and often disabling condition. Although precise estimates of the number of noise-exposed workers vary widely by industry and the definition of noise dose used, the EPA estimated in 1981 that about 9 million workers in the manufacturing sector alone were occupationally exposed to noise levels above 85 dBA. Recent risk estimates suggest that exposure to this level of noise over a working lifetime would cause material hearing impairment in about 9 percent, or approximately 720,000, U.S. workers (NIOSH, 1998). A separate column for occupational hearing loss is also appropriate because the BLS occupational injury and illness statistics only report detailed injury characteristics information for those illness cases that result in days away from work. Because most hearing loss cases do not result in time off the job, the extent of occupational hearing loss has not previously been accurately reflected in the national statistics. By creating a separate column for occupational hearing loss cases, and clearly articulating in section 1904.10 of the final rule the level of hearing loss that must be recorded, OSHA believes that the recordkeeping system will, in the future, provide accurate estimates of the incidence of work-related loss of hearing among America's workers.

Column on the Log for Musculoskeletal Disorders

Column 7f of the former Log also was intended to capture cases involving repetitive motion conditions, such as carpal tunnel syndrome, tendinitis, etc.

These conditions have been called by many names, including repetitive stress injuries, cumulative trauma disorders, and overuse injuries. OSHA has decided to include a separate column on the Log for musculoskeletal disorders (MSDs), the preferred term for injuries and illnesses of the muscles, nerves, tendons, ligaments, joints, cartilage and spinal discs, including those of the upper extremities, lower extremities, and back. Many MSDs are caused by workplace risk factors, such as lifting, repetitive motion, vibration, overexertion, contact stress, awkward or static postures, and/or excessive force. The repeated trauma column on the former OSHA Log did not permit an accurate count of musculoskeletal disorders, both because other conditions, such as occupational hearing loss, were included in the definition of repeated trauma and because many musculoskeletal disorders—including lower back injuries—were excluded. The column was limited to disorders classified as illnesses, but OSHA instructed employers to record all back cases as injuries rather than illnesses, even though back disorders are frequently associated with exposure to occupational stresses over time (Ex. 2, p. 38).

In its proposal, OSHA asked for comment on the need for a separate column containing information on musculoskeletal disorder (MSD) cases such as low back pain, tendinitis and carpal tunnel syndrome. OSHA received numerous comments opposing the addition of an MSD column to the Log (see, *e.g.*, Exs. 15: 9, 60, 78, 105, 122, 136, 137, 141, 201, 218, 221, 224, 266, 278, 305, 308, 318, 346, 395, 397, 406, 414, 430). These commenters objected on several grounds: because they believed that including such a column would make the forms more complex (Ex. 15: 414), because the column would have "no utility" (Ex. 15: 397), or because the column would only capture a small percentage of total MSD cases (Ex. 15: 210). Several commenters objected because they believed that an MSD column would duplicate information already obtained through the case description (see, *e.g.*, Exs. 15: 9, 105, 210, 221, 406). For example, the law firm of Ogletree, Deakins, Nash, Smoak & Stewart offered comments on behalf of a group of employers known as the ODNSS Coalition, remarking that "The log and system of OSHA recordkeeping would not benefit from a separate column for musculoskeletal disorders. The proposed rules for recording these disorders are clear, and

the revisions to the "case description" column appearing on the OSHA Form 300 provide for the ample identification of the disorders, which will enable all interested parties to track and analyze entries of that nature" (Ex. 15: 406). Another group of commenters contended that a separate MSD column would result in an inaccurate picture of MSD incidence because the numbers recorded would increase as a result of the inclusion of lower back MSDs in the cases to be entered in the column (see, e.g., Exs. 15: 305, 308, 318, 346). Representative of these comments is one from the National Association of Manufacturers (NAM):

Given the over-inclusive definitions of the terms "work-related," "injury or illness," "medical treatment" and "MSDs" (in Appendix B), and the fact that, for the first time, back injuries would be included as MSDs, we strongly objected to that idea. Under that approach, the MSD numbers probably would have been huge, would have painted a grossly inaccurate and misleading picture as to the current prevalence of MSDs, and would have been cited as justification for an ergonomics standard. Unless and until those deficiencies are completely eliminated, the NAM remains unalterably opposed to the inclusion of an MSD column on the OSHA Form 300 (Ex. 15: 305).

OSHA also received numerous comments supporting the addition of a separate MSD column on the Log (see, e.g., Exs. 35; 15: 32, 156, 371, 379, 380, 415, 418, 438). For example, the United Food and Commercial Workers stated that:

Of key concern to our membership is the lack of any categorization for musculoskeletal disorders (MSD). A major concern in meatpacking and poultry plants, our committees will now be forced to spend endless hours poring over the logs, reading each individual definition and deciding whether it is a MSD. The logs are often hand written and xerox copies of these are difficult to read. This is a real burden for workers, companies, joint committees and anyone using the logs (Ex. 15: 371).

After a thorough review of the record, and extensive consultation with NIOSH and the BLS to establish the need for such statistics, OSHA has concluded that including a separate column on the final OSHA 300 Log for MSD cases is essential to obtain an accurate picture of the MSD problem in the United States. In 1997, more than 600,000 MSDs resulting in days away from work were reported to the BLS by employers, although determining this number has required close cooperation between OSHA and the BLS and several "special runs" by the BLS (i.e., computer analyses performed especially for

OSHA) (see on the Internet at ftp://146.142.4.23/pub/special.requests/ocwc/osh/). OSHA believes that such a column on the OSHA 300 Log will not only permit more complete and accurate reporting of these disorders and provide information on the overall incidence of MSDs in the workplace, it will provide a useful analytical tool at the establishment level. OSHA recognizes that the column will add some complexity to the form, but believes that the additional complexity will be more than offset by the fact that all recordable MSDs will be captured in a single entry on the Log. Thus, the total count of cases in the MSD column will allow employers, employees, authorized representatives, and government representatives to determine, at a glance, what the incidence of these disorders in the establishment is. OSHA does not agree with those commenters who stated that entries in the MSD column will duplicate information recorded in the injury/illness description; the case description column will include additional information, e.g., on the particular type of MSD (back strain, carpal tunnel syndrome, wrist pain, tendinitis, etc.).

OSHA also does not agree with those commenters who argued that including a separate column for MSDs would introduce error into the national statistics on the incidence of MSDs. The views of these commenters are not persuasive because the number of reportable lost-workday MSDs is already being captured in national statistics, albeit under two categories ("injuries" and "illnesses") that are difficult to interpret. In response to comments that including a separate column on the Log will provide OSHA with "justification for an ergonomics standard," the Agency notes that it has already developed and proposed an ergonomics standard despite the absence of a single MSD column on employers' Logs.

Miscellaneous 300 Form Issues

The proposed OSHA Form 300 contained a column designated as the "Employer Use" column. Many employers keep two sets of injury and illness records; one for OSHA Part 1904 purposes and another for internal safety management system purposes. OSHA envisioned that the proposed Employer Use column would be used to tailor the Log to meet the needs of the establishment's particular safety and health program and reduce the practice some employers have adopted of keeping multiple sets of occupational injury and illness records for various

purposes. For example, OSHA envisioned that an employer could enter codes in this column to collect data on occupational injuries and illnesses beyond what is required by the OSHA Part 1904 regulation, such as the results of accident investigations, whether the case was accepted by workers' compensation, or whether or not the employee was hospitalized for treatment.

A number of commenters supported the proposed Employer Use column (see, e.g., Exs. 15: 87, 136, 137, 141, 170, 224, 266, 278, 359). Some stated that employers could utilize the column to identify cases based on specific criteria that could be used in their internal safety and health evaluations (see, e.g., Exs. 15: 136, 137, 141, 170, 224, 266, 278, 359). For example, the National Safety Council stated "The Council believes that adding the employer use column to the log will effectively reduce the adverse effects of accountability systems. This will allow employers to identify cases for which supervisors and managers should be held accountable, using company specific criteria" (Ex. 15: 359, p. 14). Another commenter, Kathy Mull, stated "The comment on possible use of the 'employer use column' to note cases not included in internal safety statistics is a possible mechanism to defer pressures on internal performance measures as tied strictly to OSHA recordkeeping" (Ex. 15: 278, p. 4).

Several commenters opposed the addition to the Log of an Employer Use column, however (see, e.g., Exs. 15: 28, 82, 109, 132, 375). Among these was the American Petroleum Institute, which stated "If the revised regulation meets API's recommended system objectives, the 'employer use' column would not be needed. Cases recorded would then be credible, reasonable and meaningful to employers, employees (and to OSHA). * * * OSHA should consider the employer as the primary user of the system" (Ex. 15: 375A, p. 55). Commenters also expressed concern that an Employer Use column could have a negative effect on the use of the data. For example, the Sherman Williams Company stated "It is not necessary to provide column j, for 'other' information that may be provided by the employer. It will lead to inconsistent utilization of the proposed form. Delete column j of the proposed Form 300" (Ex. 15: 132, p. 1).

Several other commenters argued for the addition of new data requirements to the OSHA 300 Log, as follows:

Commenter	Suggested addition to the 300 Log
G. Neil Companies (Ex. 15: 29) Atlantic Dry Dock Corp. (Ex. 15: 179) Maine Department of Labor (Ex. 15: 41)	Information explaining which employers must keep the Log should be added to the form. A line to carry over the totals from previous page should be added at the top of the form. The form should include three columns for case type: a column for days away only, a column for days away and restricted, and a column for restricted only to differentiate the three different types of cases.
Ford Motor Company (Ex. 15: 347)	"To facilitate identification, Ford proposes that the employee's last four numbers of his or her social security number be included on the OSHA 300 and 301 Forms * * * The last four numbers of the social security number will greatly assist in employee identification and at the same time offer some measure of confidentiality."
American Trucking Associations (Ex. 15: 397) ..	"OSHA should add a new column to the proposed OSHA 300 form allowing employers to indicate whether an injury occurred off-site. This recommendation is not novel [] the current OSHA 101 form asks if the injury or illness occurred on the employer's premises * * * the inclusion of the 'off-site' column is crucial in determining which fixed facilities maintain abnormally high rates of workplace injuries/illnesses. In addition, this recommendation furthers the goal of requiring motor carriers to record injuries and illnesses to their employees as well as provides valuable information to OSHA and others regarding the employer's lack of control over the site of the injury."

OSHA has not added the fields or columns suggested by commenters to the final 300 or 301 forms because the available space on the form has been allocated to other data that OSHA considers more valuable. In addition, there is no requirement in the final rule for employers to enter any part of an employee's social security number because of the special privacy concerns that would be associated with that entry and employee access to the forms. However, employers are, of course, free to collect additional data on occupational injury and illness beyond the data required by the Agency's Part 1904 regulation.

The OSHA 301 Form

Although the final OSHA 300 Log presents information on injuries and illnesses in a condensed format, the final OSHA 301 Incident Record allows space for employers to provide more detailed information about the affected worker, the injury or illness, the workplace factors associated with the accident, and a brief description of how the injury or illness occurred. Many employers use an equivalent workers' compensation form or internal reporting form for the purpose of recording more detailed information on each case, and this practice is allowed under paragraph 1904.29(b)(4) of the final rule.

The OSHA Form 301 differs in several ways from the former OSHA 101 form it replaces, although much of the information is the same as the information on the former 101 Form, although it has been reworded and reformatted for clarity and simplicity. The final Form 301 does not require the following data items that were included on the former OSHA 101 to be recorded:

- The employer name and address;
- Employee social security number;
- Employee occupation;

- Department where employee normally works;
- Place of accident;
- Whether the accident occurred on the employer's premises; and
- Name and address of hospital.

OSHA's reasons for deleting these data items from the final 301 form is that most are included on the OSHA Form 300 and are therefore not necessary on the 301 form. Eliminating duplicate information between the two forms decreases the redundancy of the data collected and the burden on employers of recording the data twice. The employee social security number has been removed for privacy reasons. OSHA believes that the information found in several other data fields on the 301 Form (e.g., the employee's name, address, and date of birth) provides sufficient information to identify injured or ill individuals while protecting the confidentiality of social security numbers.

OSHA has also added several items to the OSHA Form 301 that were not on the former OSHA No. 101:

- The date the employee was hired;
- The time the employee began work;
- The time the event occurred;
- Whether the employee was treated at an emergency room; and
- Whether the employee was hospitalized overnight as an in-patient (the form now requires a check box entry rather than the name and address of the hospital).

OSHA concludes that these data fields will provide safety and health professionals and researchers with important information regarding the occurrence of occupational injuries and illnesses. The questions pertaining to what the employee was doing, how the injury or illness occurred, what the injury or illness was, and what object or substance was involved have been

reworded somewhat from those contained on the former OSHA No. 101, but do not require employers or employees to provide additional information.

Proposed Form 301

The proposed OSHA 301 Injury and Illness Incident Record differed in minor respects from the former OSHA 101. For example, a number of fields would have been eliminated to reduce redundancy between the Log and the Incident Report, and several items would have been added to the Incident Report to obtain additional information about occupational injuries and illnesses. OSHA proposed to add to the Form 301 the following:

- The date the employee was hired;
- The time the employee began work;
- The time the event occurred;
- Whether the employee was treated at an emergency room;
- Whether the employee was hospitalized overnight as an in-patient;
- The equipment, materials or chemicals the employee was using when the event occurred; and
- The activity the employee was engaged in when the event occurred.

In addition, the proposed regulation would have required the employer to ask several questions (questions 16 through 18) in the same order and using the same language as used on the OSHA forms, in order to obtain more consistent and accurate data about these data items.

A number of commenters approved of the proposed Form 301 (see, e.g., Exs. 21; 15: 32, 153, 246, 324, 369, 374, 380, 396, 427, 441). For example, the International Brotherhood of Teamsters (Ex. 15: 369) stated that the union "[s]upports the [proposed] modifications of the OSHA Injury and Illness Incident Record (OSHA Form

301) to collect more useful information.” Other commenters preferred the former OSHA 101 form and urged OSHA to retain it (see, e.g., Exs. 15: 47, 48, 122, 242). For example, the Boiling Springs Fire District (Ex. 15: 47) opposed any changes to the Log or 101 forms, stating “[W]e like the forms we are presently using and feel that the information in these forms is adequate. I am a great believer in the old saying ‘if it is not broke—why fix it?’”

Many of the commenters who specifically addressed the proposed 301 form were concerned about the privacy implications of providing employees, former employees, and employee representatives with access to the OSHA 301 forms. These concerns are addressed in detail in the section of this summary and explanation associated with section 1904.35, Employee involvement. Many other commenters were concerned with the use of equivalent forms (discussed above) and with the requirement to ask certain questions in the same order and using the same language (also discussed above). The remaining comments relating to the proposed forms are grouped into three categories: comments about the proposed case detail questions (proposed questions 9, 10, 16, 17 and 18) and the data they would collect; the other fields OSHA proposed to add to the form 101/301; and comments urging the Agency to place additional data fields on the 301 form.

Rewording of the Proposed Case Detail Questions (questions 9, 10, 16, 17, and 18)

OSHA proposed to include five questions on the final OSHA 301 form to gather information about the details of each work-related injury or illness case:

- Proposed question 9 asked for information about the specific injury or illness (e.g., second degree burn or toxic hepatitis);
- Proposed question 10 asked for information on the body part or parts affected (e.g., lower right forearm);
- Proposed question 16 asked for information on all equipment, materials or chemicals the employee was using when the event occurred;
- Proposed question 17 asked for information on the specific activity the employee was engaged in when the event occurred;
- Proposed question 18 asked for information on how the injury or illness occurred, including a description of the sequence of events that led up to the incident and the objects or substances that directly injured or made the employee ill.

OSHA received only one comment about the contents of the proposed questions: George R. Cook, Jr., of the Hearing Conservation Services Company, stated:

Questions 9, 10, and 16 on the OSHA 301 form should be worded so that the combination of the answers to these three questions could be used as the answer to Question F. on the OSHA 300. Therefore, if a form 301 is filled out in computerized form, that information could then be carried over to the form 300 thus eliminating the need for duplicate entry (Ex. 15: 188).

As discussed above, final Form 301 no longer requires the employer to include these questions on any equivalent form in the same format or language as that used by the OSHA 301 form. However, any employer wishing to take the approach suggested by Mr. Cook is free to do so.

Several commenters objected to proposed question 16 and questioned why information on all of the materials, equipment or chemicals the employee was using when the event occurred was needed (see, e.g., Exs. 15: 35, 205, 318, 334, 375, 424). For example, the Chocolate Manufacturers Association and the National Confectioners Association, in a joint comment (Ex. 15: 318, p. 9), stated:

[W]e strongly disagree with the approach reflected in Question 16. We believe the additional information sought by Question 16 (and not by Question 18) is irrelevant and would not, in any event, justify a second set of reporting forms for every recordable incident subject to federal or state OSHA jurisdiction. Requiring a listing of “all” equipment, materials or chemicals an employee might have been using—without regard to whether they contributed to the injury or illness—would serve no useful purpose.

OSHA agrees with this assessment and has not included this question from the final 301 form.

The final form solicits information only on the object or substance that directly harmed the employee. The final 301 form contains four questions eliciting case detail information (i.e., what was the employee doing just before the incident occurred?, what happened?, what was the injury or illness?, and what object or substance directly harmed the employee?). The language of these questions on the final 301 form has been modified slightly from that used in the proposed questions to be consistent with the language used on the BLS Survey of Occupational Injuries and Illnesses collection form. The BLS performed extensive testing of the language used in these questions while developing its survey form and has subsequently used

these questions to collect data for many years. The BLS has found that the order in which these questions are presented and the wording of the questions on the survey form elicit the most complete answers to the relevant questions. OSHA believes that using the time-tested language and ordering of these four questions will have the same benefits for employers using the OSHA Form 301 as they have had for employers responding to the BLS Annual Survey. Matching the BLS wording and order will also result in benefits for those employers selected to participate in the BLS Annual Survey. To complete the BLS survey forms, employers will only need to copy information from the OSHA Injury and Illness Incident Report to the BLS survey form. This should be easier and less confusing than researching and rewording responses to the questions on two separate forms.

The Data Fields OSHA Proposed to Change on the Proposed 301 Form

Proposed field 5, Date hired. OSHA proposed to add this data field to collect additional data about the work experience of the injured or ill worker. Such data can be very useful for employers, employees, and OSHA because it enables researchers to discover, for example, whether newly hired or inexperienced workers experience relatively more injuries and illnesses than more experienced workers. Several commenters questioned the value of the data OSHA proposed to collect in field 5 (see, e.g., Exs. 15: 151, 152, 179, 180, 201, 347, 409). For example, Caterpillar Inc. (Ex. 15: 201) recommended that “[i]tem 5 of Form 301 be deleted. The date hired is not a significant factor in analyzing injury causation. If any similar data is necessary, it should be the time on the current job, which is a better indicator of relative job skills or work experience.” Several commenters asked for clarification of the “date hired” phrase (see, e.g., Exs. 15: 151, 152, 179, 180). For example, Atlantic Marine, Inc. (Ex. 15: 180) asked “What date shall be recorded as the ‘Date Hired’ if an employee is laid off, is terminated, or resigns and then is rehired? Should the date of initial hire or the date of rehire be recorded?”

OSHA continues to believe that the data gathered by means of the “date hired” field will have value for analyzing occupational injury and illness data and has therefore included this data field on the final OSHA 301 form. These data are useful for analyzing the incidence of occupational injury and illness among newly hired

workers and those with longer tenure. OSHA is aware that the data collected are not a perfect measure of job experience because, for example, an employee may have years of experience doing the same type of work for a previous employer, and that prior experience will not be captured by this data field. Another case where this data field may fail to capture perfect data could occur in the case of an employee who has worked for the same employer for many years but was only recently reassigned to new duties. Despite cases such as these, inclusion of this data field on the Form 301 will allow the Agency to collect valid data on length of time on the job for most employment situations.

For the relatively infrequent situation where employees are hired, terminated, and then rehired, the employer can, at his or her discretion, enter the date the employee was originally hired, or the date of rehire.

Proposed field 6, Name of health care provider; proposed field 7, If treatment off site, facility name and address; and proposed field 8, Hospitalized overnight as in-patient? The former OSHA Form 101 included similar data fields: former field 18 collected the "name and address of physician," while former field 19 collected data on "if hospitalized, name and address of hospital." Several commenters discussed these data fields and questioned their usefulness for analytical purposes (see, e.g., Exs. 15: 95, 151, 152, 179, 180, 347, 409). The Pacific Maritime Association (Ex. 15: 95) noted the difficulty of collecting the data requested by proposed data fields 5, 6, 7, and 13 as they pertain to longshoremen:

Items 5, 6, 7, and 13 on the OSHA Form 301 presents problems for direct employers of longshoremen. Longshoremen are hired on a daily basis, select their own health care provider; may be treated at a facility of their choice, and may not return to the same employer when returning to work.

Several commenters asked OSHA to clarify the data that OSHA was asking for in these data fields (see, e.g., Exs. 15: 51, 152, 179, 180, 347, 409). For example, the Ford Motor Company (Ex. 15: 347) asked:

[I]tem 6, "Name of health care provider" is unclear in terms of the general instructions. Who is considered the primary health care provider? Is it the individual who sees the employee on the initial medical visit, the individual who renders the majority of care for a case, or the individual who renders care if the employee is referred to an off-site provider on the initial visit? We feel that the last choice is the correct response. We also question the benefit of providing this

information. The criteria for OSHA recordability focuses on the care provided, and not on the individual providing the care.

Item 7, "If treated off-site, facility name and address" requires more specific instructions as to when this field must be completed. Is this to be completed if the employee is referred to an outside provider on the initial visit, or is this to be completed should the individual be referred out later in the course of the injury or illness? We feel that the former is the correct response. We also question the benefit of providing this information.

OSHA has decided to continue to collect information on final Form 301 concerning the treatment provided to the employee (proposed data field 7). OSHA's experience indicates that employers have not generally had difficulty in providing this information, either in the longshoring or any other industry. The data in this field is particularly useful to an OSHA inspector needing additional information about the medical condition of injured or ill employees. (OSHA does not request this medical information without first obtaining a medical access order under the provisions of 29 CFR part 1913, Rules Concerning OSHA Access to Employee Medical Records.) The final OSHA 301 Form therefore includes a data field for information on the off-site treating facility.

The final 301 Form also includes a data field requesting the name of the health care professional seen by the injured or ill employee. The employer may enter the name either of the physician or other health care professional who provided the initial treatment or the off-site treatment. If OSHA needs additional data on this point, the records of the health care professional listed will include both the name of the referring physician or other health care professional as well as the name of the health care professional to whom the employee was referred for specialized treatment.

Several commenters asked OSHA to collect data on whether a hospitalization involved in-patient treatment or was limited to out-patient treatment (see, e.g., Exs. 15: 151, 152, 179, 180). For example, Alabama Shipyard, Inc. recommended "Instead of asking in [proposed] item 8 if an employee is hospitalized overnight as in-patient, have a check box to record whether the treatment was as an in-patient or outpatient status" (Ex. 15: 152). OSHA agrees that the additional information suggested by this commenter would be useful, and final OSHA Form 301 asks two hospitalization-related questions: Was employee treated in an emergency

room?, and Was employee hospitalized overnight as an in-patient?

Proposed question 13, Date of return to work at full capacity: The proposed Injury and Illness Incident Report (Form 301) contained a data field requiring the date the employee returned to work at full capacity if the case involved restricted work activity or days away from work. This field was included to provide information regarding the length of time the employee was partially or fully incapacitated by the injury or illness. However, because the final rule requires employers to record day counts both for cases involving days away from work and cases involving job transfer or restriction (see discussion above), the date at which an employee returned to work at full capacity field is no longer necessary and does not appear on the final form.

Proposed questions 14, Time of event and 15, Time employee began work: No commenter objected to the inclusion of proposed data field 14, Time of event, and only two commenters objected to proposed data field 15, Time employee began work (see, e.g., Exs. 15: 347, 409). Both of these commenters, the Ford Motor Company and the American Automobile Manufacturers Association, stated that:

"Time employee began work," is of questionable benefit. Many employees perform a variety of jobs during the day or may have their job changed during the day (work added or subtracted). This question is burdensome and offers little benefit for data analysis.

Several commenters discussed the way the proposed form collected the new information on the time of the accident (see, e.g., Exs. 15: 151, 152, 179, 180, 260, 262, 265, 347, 401, 409). Several of these commenters suggested that OSHA do away with the am/pm designation and use a 24-hour clock instead (see, e.g., Exs. 15: 151, 152, 179, 180). The comments of Atlantic Marine (Ex. 15: 152) are representative:

Change the form from using A.M. or P.M. to using a 24-hour clock. A 24-hour clock is much easier to use in drawing conclusions on the relationship between injuries/illnesses and the time of day that they occurred. OSHA may find that many employers are currently using a 24-hour clock system.

Another group of commenters suggested that OSHA add am/pm boxes the employer could simply check off as an easier way to collect the data (see, e.g., Exs. 15: 260, 262, 265, 401). For example, the Edison Electric Institute (Ex. 15: 401) suggested that "Questions 14 and 15 should include a box which can be checked for AM and PM to reduce the possibility that this information will be omitted."

OSHA has included on the final 301 form the two questions asking for data on the time of the event and the time the employee began work so that employers, employees and the government can obtain information on the role fatigue plays in occupational injuries and illness. Both questions (*i.e.*, on time of event and time employee began work) must be included to conduct this analysis. Thus, OSHA has included both fields on the final Form 301. In addition, the form has been designed so that the employer can simply circle the a.m. or p.m. designation. OSHA believes that this approach will provide the simplest, least burdensome method for capturing these data, and that using a 24 hour clock system would be cumbersome or confusing for most employers.

Data fields for the name and phone number of the person completing the form. Both the former and proposed Incident Report forms included fields designed to obtain information on the person who completed the form. The former OSHA 101 form asked for the date of report, the name of the preparer, and that person's official position. The proposed form would have carried forward the name and title of the preparer and the date, and added the person's phone number. OSHA received very little comment on these proposed data fields. The Ford Motor Company (Ex. 15: 347) and the American Automobile Manufacturers Association (Ex. 15: 409) both made the following comment:

The "Completed by" field could be modified to consolidate name and title. This would be consistent with the manner in which most health care professionals routinely sign their name.

The "Phone number required" item should refer to the medical department's number or the general number of the establishment, and be included with the establishment's name and address at the top of the form. This would decrease the paperwork burden by allowing the use of a stamp or a pre-typed format as opposed to completing a phone number on each OSHA Form 301.

The final OSHA Form 301 permits the employer to include the name and title in either field, as long as the information is available. As to the phone number, the employer may use whatever number is appropriate that would allow a government representative accessing the data to contact the individual who prepared the form.

Case File number: The former OSHA 101 form did not include a method for linking the OSHA 300 and 301 forms. Any linking had to be accomplished via the employee's name, department,

occupation, and the other information from the forms. OSHA proposed to add a field to the OSHA 301 form that would use the same case number as that on the OSHA 300 form, thus making it easier for employers, employees and government representatives to match the data from the two forms. Two commenters objected to the addition of such a case file number (Exs. 15: 217, 334). The American Forest & Paper Association (AF&PA) argued:

Another issue of concern to AF&PA is the requirement for a unique case or file number on the Form 300 and Form 301 to facilitate cross-referencing between the forms. We believe there is sufficient data (employee name, date of birth, date of injury) on all existing state First Report of Injury forms to readily cross-reference the First Report to the entry on the Form 300. A uniform requirement for employers to create an indexing system would serve no useful purpose. Furthermore, it would be unduly burdensome for many affected companies except in those cases when there is a reason to maintain the confidentiality of the affected employee's name (Ex. 15: 334).

OSHA continues to believe that easy linkage of the Forms 300 and 301 will be beneficial to all users of these data. Thus, the final Form 301 contains a space for the case file number. The file/case number is required on both forms to allow persons reviewing the forms to match an individual OSHA Form 301 with a specific entry on the OSHA Form 300. Access by authorized employee representatives to the information contained on the OSHA Form 301 is limited to the information on the right side of the form (see § 1904.35(b)(2)(v)(B) of the final rule). The case/file number is the data element that makes a link to the OSHA Form 300 possible. OSHA believes that this requirement will add very little burden to the recordkeeping process, because the OSHA Log has always required a unique file or case number. The final Form 301 requirement simply requires the employer to place the same number on the OSHA 301 form.

Suggested Fields

Commenters submitted suggestions for other data fields that they believed should be included on the OSHA Form 301, as follows.

Commenter(s)	Suggested addition to the 301 incident report, and OSHA response
American Industrial Hygiene Association (AIHA) (Ex. 15: 153).	"AIHA suggests a corrective action box on the OSHA 301. This form is often used as an employer's accident report, and this would encourage employers to seek action as appropriate to prevent recurrence."
(Exs. 15: 179, 180, 151, 152).	OSHA has not included this suggested change because the 301 form is not designed to be an accident investigation form, but is used to gather information on occupational injuries and illnesses. Corrective actions would thus not be an appropriate data field for this form.
.....	"A space is needed for recording an employee identification number. This number is important for maintaining records. Some employers use the employee's social security number, while others have a unique, employer generated identifier for each employee."
Ogletree, Deakins, Nash, Smoak & Stewart (Ex. 15: 406).	OSHA believes the combination of other data fields (case number, employee name, address and date of birth) provides the user the ability to identify individuals when necessary. Substituting "regular job title" would provide for effective use of Form 301 in conducting safety and health analysis of the workplace. The OSHA 300 Log asks for the employee's job title. OSHA does not believe there is a need to ask for the data on both forms.

Commenter(s)	Suggested addition to the 301 incident report, and OSHA response	Commenter(s)	Suggested addition to the 301 incident report, and OSHA response
American Petroleum Institute (Ex. 15: 375).	<p>“[t]he supplemental data should contain all information necessary to make recordkeeping decisions, and to facilitate certification of the logs at year end. For this reason, the following should be added to what OSHA proposes for the supplemental data: company name, establishment name, employee social security number, regular job title, “new injury or illness?”, “loss of consciousness?”, days away from work, first date absent, est. duration of absence, “date days-away cases returned to work?,” “result in restricted activity?,” “job transfer?,” “termination of employment?”</p> <p>OSHA has not included these data fields on the final form because the Agency believes that doing so would duplicate the information on the OSHA 300 form. There is also no need to use the OSHA 301 form to document all the employer’s recordkeeping decisions.</p>		<ul style="list-style-type: none"> —Time employee began work. —Specific description of injury or illness. —Location where the accident or exposure occurred (e.g. loading dock). —Facility or Project (e.g. Hackensack factory, or Dreamwood Subdevelopment). —Body part affected. —Equipment, tools, materials, or chemicals being used. —Specific activity when injured or upon onset of illness. —How injury or illness occurred. <p>OSHA notes that the final OSHA 301 form contains many of these data elements. The Agency believes that the remaining fields are unnecessary or duplicative of information already found on the OSHA 300 Log.</p>
Ford Motor Company and the American Automobile Manufacturers Association (Exs. 15: 347, 409).	<p>“AAMA proposes the OSHA Form 301 include the establishment name and address at the top of the form. This will assist not only the employer, but OSHA as well, to avoid any confusion over records in which one medical department may serve several establishments. Also, it will be helpful in those cases where a company employee, who works predominately at one particular facility, sustains an injury or illness at another company establishment.”</p>	<p>Summary</p>	<ul style="list-style-type: none"> —Section 1904.33, which requires the employer to retain and update the injury and illness records; —Section 1904.34, which requires the employer to transfer the records if the business changes owners; —Section 1904.35, which includes requirements for employee involvement, including employees’ rights to access the OSHA injury and illness information; —Section 1904.36, which prohibits an employer from discriminating against employees for exercising their rights under the Act; —Section 1904.37, which sets out the state recordkeeping regulations in OSHA approved State-Plan states; and —Section 1904.38, which explains how an employer may seek a variance from the recordkeeping rule.
Building and Construction Trades Department, AFL-CIO (Ex. 15: 394).	<p>The establishment name and location are included on the OSHA Form 300. In an effort to identify and eliminate duplication of data, OSHA has not included this data item on the OSHA Form 301.</p> <p>For every potentially recordable injury or illness, the employer shall record: case number, date case reported and name of employee.</p> <ul style="list-style-type: none"> —Job title of employee. —Date of injury or illness. —Time of event or exposure. 	<p>The final forms employers will use to keep the records of those occupational injuries and illnesses required by the final rule to be recorded have been revised to reflect the changes made to the final rule, the record evidence gathered in the course of this rulemaking, and a number of changes designed to simplify recordkeeping for employers. In addition, the forms have been revised to facilitate the use of equivalent forms and employers’ ability to computerize their records.</p>	<p>Section 1904.30 Multiple Establishments</p> <p>Section 1904.30 covers the procedures for recording injuries and illnesses occurring in separate establishments operated by the same business. For many businesses, these provisions are irrelevant because the business has only one establishment. However, many businesses have two or more establishments, and thus need to know how to apply the recordkeeping rule to multiple establishments. In particular, this section applies to businesses where separate work sites create confusion as to where injury and illness records should be kept and when separate records must be kept for separate work locations, or establishments. OSHA recognizes that the recordkeeping system must accommodate operations of this type, and has adopted language in the final rule to provide some flexibility for employers in the construction, transportation, communications, electric and gas utility, and sanitary services industries, as well as other employers with geographically dispersed operations. The final rule provides, in part, that operations are not considered separate establishments unless they continue to be in operation for a year or more. This length-of-site-operation provision increases the chances of discovering patterns of occupational injury and illness, eliminates the burden of creating OSHA 300 Logs for transient work sites, and ensures that useful records are generated for more permanent facilities.</p> <p>OSHA’s proposed rule defined an establishment as a single physical location that is in operation for 60 calendar days or longer (61 FR 4059), but did not provide specific provisions covering multiple establishments. In the final rule, the definition of</p>
Subpart D. Other OSHA injury and illness recordkeeping requirements			
			<p>Subpart D of the final rule contains all of the 29 CFR Part 1904 requirements for keeping OSHA injury and illness records that do not actually pertain to entering the injury and illness data on the forms. The nine sections of Subpart D are:</p> <ul style="list-style-type: none"> —Section 1904.30, which contains the requirements for dealing with multiple business establishments; —Section 1904.31, which contains the requirements for determining which employees’ occupational injuries and illnesses must be recorded by the employer; —Section 1904.32, which requires the employer to prepare and post the annual summary;

establishment is included in Subpart G, Definitions.

The basic requirement of § 1904.30(a) of this final rule states that employers are required to keep separate OSHA 300 Logs for each establishment that is expected to be in business for one year or longer. Paragraph 1904.30(b)(1) states that for short-term establishments, i.e., those that will exist for less than a year, employers are required to keep injury and illness records, but are not required to keep separate OSHA 300 Logs. They may keep one OSHA 300 Log covering all short-term establishments, or may include the short-term establishment records in logs that cover individual company divisions or geographic regions. For example, a construction company with multi-state operations might have separate OSHA 300 Logs for each state to show the injuries and illnesses of its employees engaged in short-term projects, as well as a separate OSHA 300 Log for each construction project expected to last for more than one year. If the same company had only one office location and none of its projects lasted for more than one year, the company would only be required to have one OSHA 300 Log.

Paragraph 1904.30(b)(2) allows the employer to keep records for separate establishments at the business' headquarters or another central location, provided that information can be transmitted from the establishment to headquarters or the central location within 7 days of the occurrence of the injury or illness, and provided that the employer is able to produce and send the OSHA records to each establishment when § 1904.35 or § 1904.40 requires such transmission. The sections of the final rule are consistent with the corresponding provisions of the proposed rule.

Paragraph 1904.30(b)(3) states that each employee must be linked, for recordkeeping purposes, with one of the employer's establishments. Any injuries or illnesses sustained by the employee must be recorded on his or her home establishment's OSHA 300 Log, or on a general OSHA 300 Log for short-term establishments. This provision ensures that all employees are included in a company's records. If the establishment is in an industry classification partially exempted under § 1904.2 of the final rule, records are not required. Under paragraph 1904.30(b)(4), if an employee is injured or made ill while visiting or working at another of the employer's establishments, then the injury or illness must be recorded on the 300 Log of the establishment at which the injury or illness occurred.

How Long Must an Establishment Exist to Have a Separate OSHA Log

As previously stated, the final rule provides that an establishment must be one that is expected to exist for a year or longer before a separate OSHA log is required. Employers are permitted to keep separate OSHA logs for shorter term establishments if they wish to do so, but the rule does not require them to do so. This is a change from the proposed rule, which would have required an establishment to be in operation for 60 days to be considered an "establishment" for recordkeeping purposes. The proposed 60-day threshold would have changed the definition of "establishment" used in OSHA's former recordkeeping rule, because that rule included a one-year-in-operation threshold for defining a fixed establishment required to keep a separate OSHA Log (Ex. 2, p. 21). The effect of the proposed change in the threshold would have been to increase the number of short-duration operations required to maintain separate injury and illnesses records.

The majority of the comments OSHA received on this issue opposed the decrease in the duration of the threshold from one year to 60 calendar days, primarily because commenters felt that requiring temporary facilities to maintain records would be burdensome, costly and would not increase the utility of the records (see, e.g., Exs. 21, 15: 21, 43, 78, 116, 122, 123, 145, 170, 199, 213, 225, 254, 272, 288, 303, 304, 305, 308, 338, 346, 349, 350, 356, 358, 359, 363, 364, 375, 389, 392, 404, 412, 413, 423, 424, 433, 437, 443, 475). For example, the Associated Builders and Contractors, Inc. (ABC):

[d]isagrees that sites in existence for as little as 60 days need separate injury and illness records. The redefinition of "establishment" will cause enormous problems for subcontractors in a variety of construction industries. Even employers with small workforces could be on the site of several projects at any one time, and in the course of the year could have sent crews to hundreds of sites. Though they may be on such sites for only brief periods of time, they will be required under this proposal to create separate logs for each site, increasing greatly their paperwork requirements without increasing the amount of information available to their employees (Ex. 15: 412).

In addition, many of these commenters argued that a 60-day threshold would be especially burdensome because it would capture small work sites where posting of the annual summary or mailing the summary to employees would make little sense because so few cases would be captured on each Log. The majority

of these commenters suggested that OSHA retain the former one-year duration threshold in the definition of establishment (see, e.g., Exs. 15: 78, 123, 225, 254, 305, 356, 389, 404).

Other commenters expressed concern that the proposed 60-day threshold would create an unreasonable burden on employers in service industries like telecommunications and other utilities, whose employees typically report to a fixed location, such as a service center or garage, but perform tasks at transient locations that remain in existence for more than 60 days. These commenters felt that classifying such locations as "establishments" and creating thousands of new OSHA Logs, would have "no benefit to anyone" (Ex. 15: 199) (see also Exs. 15: 65, 170, 213, 218, 332, 336, 409, 424).

In contrast, commenters who supported the 60-day threshold worried that injuries and illnesses occurring at transient locations would never be accounted for without such a provision (see, e.g., Exs. 15: 9, 133, 310, 369, 425). Some urged OSHA to adopt an even shorter time-in-operation threshold (see, e.g., Exs. 15: 369, 418, 429). For example, the International Brotherhood of Teamsters (IBT) stated that they "[w]ould strongly support reducing the requirement to thirty days to cover many low level housing construction sites, and transient operations, similar to mobile amusement parks" (Ex. 15: 369). The AFL-CIO agreed: "* * * the 60-day time period is still too long. We believe that to truly capture a majority of these transient work sites, a 30-day time period would be more realistic. A 30-day time period as the trigger would capture construction activities such as trenching, roofing, and painting projects which will continue to be missed if a 60-day time period is used" (Ex. 15: 418). OSHA agrees that under the proposed provisions there was a potential for injuries and illnesses to be missed at short term establishments and for employees who did not report to fixed establishments. Therefore, §§ 1904.30(b)(1) and (b)(3) have been added to make it clear that records (but not a *separate* log) must be kept for short-term establishments lasting less than one year, and that each employee must be linked to an establishment.

The United Parcel Service (UPS) recommended that OSHA craft its rule to coincide with a company's personnel records system, stating "[t]he unit for which an employer maintains personnel records is presumptively appropriate and efficient; accordingly, OSHA should not mandate a rule that conflicts with a company's current personnel units policy" (Ex. 15: 424). OSHA recognizes

that employers would prefer OSHA to allow companies to keep records in any way they choose. However, OSHA believes that allowing each company to decide how and in what format to keep injury and illness records would erode the value of the injury and illness records in describing the safety and health experience of individual workplaces and across different workplaces and industries. OSHA has therefore decided not to adopt this approach in the final rule, but to continue its longstanding requirement requiring records to be kept by establishment.

OSHA has reviewed all of the comments on this issue and has responded by deleting any reference to a time-in-operation threshold in the definition of establishment but specifying a one-year threshold in section 1904.30(a) of the final rule. OSHA finds, based on the record evidence, that the one-year threshold will create useful records for stable establishments without imposing an unnecessary burden on the many establishments that remain in existence for only a few months.

Centralized Recordkeeping

As previously stated, the proposed rule did not include a specific section covering multiple establishments. The proposal did require that records for employees not reporting to any single establishment on a regular basis should be kept at each transient work site, or at an established central location, provided that records could be obtained within 4 hours if requested as proposed.

Most commenters supported provisions that would allow the employer to keep records at a centralized location (see, e.g., Exs. 20, 21, 15: 9, 38, 48, 136, 137, 141, 154, 173, 203, 213, 224, 234, 235, 254, 260, 262, 265, 266, 272, 277, 278, 288, 303, 321, 336, 350, 367, 373, 375, 401, 409). Many, however, disagreed with the requirement that records be produced within 4 hours if requested by an authorized government official. Those comments are discussed in the preamble for § 1904.40, Providing records to government representatives. The only other concern commenters expressed about centralized recordkeeping was that centralized records, like computerized records, would make it more difficult for employees to access the records (see, e.g., Exs. 15:379, 380, 418, 438).

OSHA does not believe that centralization of the records will compromise timely employee or government representative access to the records. To ensure that this is the case,

centralization under § 1904.30(b)(2) is allowed only if the employer can produce copies of the forms when access to them is needed by a government representative, an employee or former employee, or an employee representative, as required by §§ 1904.35 and 40.

Recording Injuries and Illnesses Where They Occur

Proposed section 1904.7, Location of records, and section 1904.11, Access to records, covered recordkeeping requirements for employees who report to one establishment but are injured or made ill at other locations of the same company. Specifically, these sections required that records for employees reporting to a particular establishment but becoming ill or injured at another establishment within the same company be kept at the establishment in which they became injured or ill. This was derived from OSHA's longstanding interpretation that employees' cases should be recorded where they occur, if it is at a company establishment (April 24, 1992 letter of interpretation to Valorie A. Ferrara of Public Service Electric and Gas Company). Several commenters objected to the proposed requirement that an employee's injury or illness be recorded on the log of the establishment where the injury occurred, rather than on the log of the establishment they normally report to (see, e.g., Exs. 15: 60, 107, 146, 184, 199, 200, 232, 242, 263, 269, 270, 329, 335, 343, 356, 375, 377). The comments of the B.F. Goodrich Company (Ex. 15: 146) are representative:

[t]he requirement for a company to log a visiting employee's injury or illness on the log of the company establishment that they are visiting rather than on the log of their normal work establishment, is not consistent with the data collection process. As proposed, the rule requires the facility to record the injury or illness and not the hours worked by the visiting employee. These individuals would not normally be counted in the number of employees at the visited site nor in the manhours worked at that site. Recording of cases from visiting employees would improperly skew the incidence rates of both facilities. This approach is particularly inappropriate in the case of an illness, since the case may be a result of accumulated exposures which have nothing to do with the site visited during the onset of the illness. Alternately, an injury or illness could manifest after the visitor leaves the facility.

OSHA disagrees with these commenters about where the injuries and illnesses should be recorded. For the vast majority of cases, the place where the injury or illness occurred is the most useful recording location. The

events or exposures that caused the case are most likely to be present at that location, so the data are most useful for analysis of that location's records. If the case is recorded at the employee's home base, the injury or illness data have been disconnected from the place where the case occurred, and where analysis of the data may help reveal a workplace hazard. Therefore, OSHA finds that it is most useful to record the injury or illness at the location where the case occurred. Of course, if the injury or illness occurs at another employer's workplace, or while the employee is in transit, the case would be recorded on the OSHA 300 Log of the employee's home establishment.

For cases of illness, two types of cases must be considered. The first is the case of an illness condition caused by an acute, or short term workplace exposure, such as skin rashes, respiratory ailments, and heat disorders. These illnesses generally manifest themselves quickly and can be linked to the workplace where they occur, which is no different than most injury cases. For illnesses that are caused by long-term exposures or which have long latency periods, the illness will most likely be detected during a visit to a physician or other health care professional, and the employee is most likely to report it to his or her supervisor at the home work location.

Recording these injuries and illnesses could potentially present a problem with incidence rate calculations. In many situations, visiting employees are a minority of the workforce, their hours worked are relatively inconsequential, and rates are thus unaffected to any meaningful extent. However, if an employer relies on visiting labor to perform a larger amount of the work, rates could be affected. In these situations, the hours of these personnel should be added to the establishment's hours of work for rate calculation purposes.

Section 1904.31 Covered employees

Final Rule Requirements and Legal Background

Section 1904.31 requires employers to record the injuries and illnesses of all their employees, whether classified as labor, executive, hourly, salaried, part-time, seasonal, or migrant workers. The section also requires the employer to record the injuries and illnesses of employees they supervise on a day-to-day basis, even if these workers are not carried on the employer's payroll.

Implementing these requirements requires an understanding of the Act's definitions of "employer" and

“employee.” The statute defines “employer,” in relevant part, to mean “a person engaged in a business affecting interstate commerce who has employees.” 29 U.S.C. 652 (5). The term “person” includes “one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.” 29 U.S.C. 652 (4). The term “employee” means “an employee of an employer who is employed in a business of his employer which affects interstate commerce.” 29 U.S.C. 652(6). Thus, any individual or entity having an employment relationship with even one worker is an employer for purposes of this final rule, and must fulfill the recording requirements for each employee.

The application of the coverage principles in this section presents few issues for employees who are carried on the employer’s payroll, because the employment relationship is usually well established in these cases. However, issues sometimes arise when an individual or entity enters into a temporary relationship with a worker. The first question is whether the worker is an employee of the hiring party. If an employment relationship exists, even if temporary in duration, the employee’s injuries and illnesses must be recorded on the OSHA 300 Log and 301 form. The second question, arising in connection with employees provided by a temporary help service or leasing agency, is which employer—the host firm or the temporary help service—is responsible for recordkeeping.

Whether an employment relationship exists under the Act is determined in accordance with established common law principles of agency. At common law, a self-employed “independent contractor” is not an employee; therefore, injuries and illnesses sustained by independent contractors are not recordable under the final Recordkeeping rule. To determine whether a hired party is an employee or an independent contractor under the common law test, the hiring party must consider a number of factors, including the degree of control the hiring party asserts over the manner in which the work is done, and the degree of skill and independent judgment the hired party is expected to apply. *Loomis Cabinet Co. v. OSHRC*, 20 F.3d 938, 942 (9th Cir. 1994).

Other individuals, besides independent contractors, who are not considered to be employees under the OSH Act are unpaid volunteers, sole proprietors, partners, family members of farm employers, and domestic workers in a residential setting. See 29 CFR

§ 1975.4(b)(2) and § 1975.6 for a discussion of the latter two categories of workers. As is the case with independent contractors, no employment relationship exists between these individuals and the hiring party, and consequently, no recording obligation arises.

A related coverage question sometimes arises when an employer obtains labor from a temporary help service, employee leasing firm or other personnel supply service. Frequently the temporary workers are on the payroll of the temporary help service or leasing firm, but are under the day-to-day supervision of the host party. In these cases, Section 1904.31 places the recordkeeping obligation upon the host, or utilizing, employer. The final rule’s allocation of recordkeeping responsibility to the host employer in these circumstances is consistent with the Act for several reasons.

First, the host employer’s exercise of day-to-day supervision of the temporary workers and its control over the work environment demonstrates a high degree of control over the temporary workers consistent with the presence of an employment relationship at common law. See *Loomis Cabinet Co.*, 20 F.3d at 942. Thus, the temporary workers will ordinarily be the employees of the party exercising day-to-day control over them, and the supervising party will be their employer.

Even if daily supervision is not sufficient alone to establish that the host party is the employer of the temporary workers, there are other reasons for the final rule’s allocation of recordkeeping responsibility. Under the OSH Act, an employer’s duties and responsibilities are not limited only to his own employees. Cf. *Universal Constr. Co. v. OSHRC*, 182 F.3d 726, 728–731 (10th Cir. 1999). Assuming that the host is an employer under the Act (because it has an employment relationship with someone) it reasonably should record the injuries of all employees, whether or not its own, that it supervises on a daily basis. This follows because the supervising employer is in the best position to obtain the necessary injury and illness information due to its control over the worksite and its familiarity with the work tasks and the work environment. As discussed further below, the final rule is sensible and will likely result in more accurate and timely recordkeeping.

The Proposed Rule

The final rule’s coverage rules are consistent with the basic principles embodied in the former rule and in the proposal. The proposed rule would have

continued to require employers to record the injuries and illnesses of employees over whose work they exert “day-to-day supervision” (61 FR 4058/3). OSHA proposed to codify this longstanding interpretation by adding a definition of “employee” together with a note explaining its application to Part 1904 recordkeeping. The proposed definition restated the definition of employee in the OSH Act. It then explained that, for recordkeeping purposes, an employer should consider as its employees any persons who are supervised on a day-to-day basis at the establishment. The proposal noted that this was the test regardless of whether the persons were labeled as “independent contractors,” “migrant workers,” or workers provided by a temporary help service.

The proposal further explained that day-to-day supervision occurs “when, in addition to specifying the output, product or result to be accomplished by the person’s work, the employer supervises the details, means, methods and processes by which the work is to be accomplished” (61 FR 4059/1). OSHA also noted that other classes of workers would not be covered because they were not considered employees, either as defined in the OSH Act or as set forth in regulatory interpretations. These included sole proprietors, partners, family members of farm employers, and domestic workers in a residential setting.

Response To the Proposal

A number of commenters agreed with OSHA’s approach to differentiate between employees and true independent contractors, and to require employers to keep records for employees they supervise on a day-to-day basis (see, e.g., Exs. 15: 61, 65, 205, 305, 322, 333, 346, 348, 351, 369, 390, 429). The National Association of Manufacturers (NAM) stated:

[f]or purposes of recordkeeping, OSHA has consistently taken the position that the term “employee” includes all personnel who are supervised on a day-to-day basis by the employer using their services (not only with respect to the result to be achieved, but also the means, methods and processes by which the work is to be accomplished). While this is a fact-intensive determination that must be made on a case-by-case basis, we commend the Agency for attempting to clarify the matter by making that approach an explicit part of the rule, presumably for purposes of both recordkeeping and records access (Ex. 15: 305).

The National Association of Temporary Staffing Services (NATSS) supported:

[c]ontinuation of "utilizing employer" rule for maintaining records for temporary employees. Temporary help and staffing service firms recruit individuals with a broad range of training, education and skills, and then assign them to work at customer locations on a variety of assignments and projects. The fundamental nature of the service relationship is such that while staffing service firms are the general employers of their workers and assume a broad range of employer responsibilities, those responsibilities generally do not include direct supervision of the employees at the worksite. Hence, staffing firms have a limited ability to affect conditions at the worksite.

In recognition of the above, OSHA's long-standing policy has been to require the worksite employer, not the staffing firm, to maintain illness and injury records of temporary workers supervised by the worksite employer. The proposed rules continue this policy. In a special "note" in section 1904.3, "employee" for record keeping purposes is defined to include temporary workers "when they are supervised on a day-to-day basis by the employer utilizing their services." Under this definition, the worksite employer, not the staffing firm, would be required to maintain records for temporary employees supplied by a staffing firm, provided they are supervised by the worksite employer. As stated in the background section of the proposed rule, "this is consistent with case law and the interpretation currently used by OSHA" (61 F.R. 4034). NATSS strongly supports this proposed definition. (Ex. 15: 333)

A number of commenters opposed OSHA's proposed approach on this issue (see, e.g., Exs. 15: 9, 23, 26, 64, 67, 82, 92, 119, 154, 159, 161, 184, 185, 198, 203, 204, 225, 259, 287, 297, 299, 312, 335, 336, 338, 341, 356, 363, 364, 370, 404, 423, 424, 427, 431, 437, 443). Several of these commenters thought that including temporary employees from temporary services, independent contractors and other leased personnel within the definition of employee would impose new burdens on employers (see, e.g., Exs. 15: 35, 67, 356, 423, 437). However, the proposal did not alter the long-standing meanings of the terms employee, employer or employment relationship. The day-to-day supervision test for identifying the employer who is responsible for compliance with Part 1904 is a continuation of OSHA's former policy, and is consistent with the common law test. The comments indicate that many employers are not aware that they need to keep records for leased workers, temporary workers, and workers who are inaccurately labeled "independent contractors" but are in fact employees. However, these workers are employees under both the former rule and the final rule. Incorporating these requirements into the regulatory text can only help to

improve the consistency of the data by clarifying the employer's responsibilities.

Several commenters erroneously believed that they might need to keep records for all employees of independent contractors performing work in their establishment (see, e.g., Exs. 15: 161, 203, 312). The Battery Council International remarked:

[i]t is unclear how this clarification would apply to employers in the battery industry who hire independent contractors to perform construction and other activities on their manufacturing facilities. Often times, battery manufacturers will provide the contractors with an orientation to the facility (which includes the facility's safety and health rules and location of MSDSs) [material safety data sheets], and monitor the work of the contractor to ensure that work contracted for has been completed, but do not otherwise supervise the details, means, methods and processes by which the work is to be accomplished. In these relationships, the contractors certify to the battery manufacturers that they comply with all OSHA requirements including training, which must be completed as part of the work contract.

If the intent of the proposed clarification is to not require the reporting of injuries and illnesses to independent contractors under similar conditions as described above, then BCI supports this concept and requests further clarification on this issue. BCI will oppose, however, any attempt by OSHA to require the reporting of injuries or illnesses that occur to "independent contractors" where the employer has not otherwise supervised the details, means, methods and processes by which the work was accomplished (Ex. 15: 161).

The International Dairy Foods Association (IDFA) was concerned that if a dairy processing facility hired an electrical contractor to install new lighting and the electrical contractor's employee were injured while installing the lighting, the dairy might have to record the incident in its Part 1904 records (Ex. 15: 203).

The 1904 rule does not require an employer to record injuries and illnesses that occur to workers supervised by independent contractors. However, the label assigned to a worker is immaterial if it does not reflect the economic realities of the relationship. For example, an employment contract that labels a hired worker as an independent contractor will have no legal significance for Part 1904 purposes if in fact the hiring employer exercises day-to-day supervision over that worker, including directing the worker as to the manner in which the details of the work are to be performed. If the contractor actually provides day-to-day supervision for the employee, then the contractor is responsible for compliance

with Part 1904 as to that employee. In the IDFA example, unless the dairy exercised supervisory control over the time and manner of the electrician's work, the dairy would not be considered the electrician's employer and would not be required to record the incident.

Some commenters argued that the injury and illness statistics would be more accurate or useful if the payroll employer recorded the injuries and illnesses, regardless of which employer controlled the work or the hazard (see, e.g., Exs. 15: 9, 26, 92, 161, 198, 259, 287, 297, 299, 333, 341, 356, 364, 443). The Sandoz Corporation stated that "[t]he control and responsibility for reporting these injuries should be with the employer, i.e. the establishment that pays the employee. This simplifies the control and reporting. It also allows a company that utilizes temporary or contract services to look at the OSHA record of the supplier as part of the purchasing decision and thus put pressure on the supplier for better safety performance, thus using market forces to improve safety" (Ex. 15: 299). The Battery Council International added "[r]equiring employers to record the injuries and illnesses of independent contractors under such circumstances is unfair and will result in the over recording of injuries and illnesses by the battery industry. This will result in more OSHA inspections on the lead battery industry, which will in turn impose additional costs and burdens on BCI members" (Ex. 15: 161). The Fertilizer Institute stated "[a]dopting compensation as the basis for determining the employer/employee relationship results in simplification that is not afforded when one must look at day-to-day supervision" (Ex. 15: 154).

A few commenters recommended that the employer responsible for workers' compensation insurance also be required to record the injuries and illnesses (Ex. 15: 204, 225, 336, 364). The American Gas Association (Ex. 15: 225) stated that OSHA should:

[s]trive to parallel Workers' Compensation law. The employer may have supervision of some types of temporary workers, e.g., daily office workers. However, the employer may have no control over a crew of construction contractors. In this case, the employer does not supervise the details, means, methods and processes by which the work accomplished. The definition of employee, along with the note to the definition proposed by OSHA requires a subjective determination to be made. 61 Fed. Reg. at 4058. We recommend OSHA follow a more objective test. The responsibility of reporting injuries and illnesses should turn on the fact of who provides the Workers' Compensation insurance, not necessarily daily supervision. This would then be an objective, rather than

subjective test, less likely open to interpretation and mistakes.

OSHA has rejected the suggestions that either the payroll or workers' compensation employer keep the OSHA 1904 records. The Agency believes that in the majority of circumstances the payroll employer will also be the workers' compensation employer and there is no difference in the two suggestions. Temporary help services typically provide the workers' compensation insurance coverage for the employees they provide to other employers. Therefore, our reasons for rejecting these suggestions are the same. OSHA agrees that there are good arguments for both scenarios: 1. Including injuries and illnesses in the records of the leasing employer (the payroll or workers' compensation employer and 2. For including these cases in the records of the controlling employer. Requiring the payroll or workers' compensation employer to keep the OSHA records would certainly be a simple and objective method. There would be no doubt about who keeps the records. However, including the cases in the records of the temporary help agency erodes the value of the injury and illness records for statistical purposes, for administering safety and health programs at individual worksites, and for government inspectors conducting safety and health inspections or consultations. The benefits of simplification and clarity do not outweigh the potential damage to the informational value of the records, for the reasons discussed below.

First, the employer who controls the workers and the work environment is in the best position to learn about all the injuries and illnesses that occur to those workers. Second, when the data are collected for enforcement and research use and for priority setting, the injury and illness data are clearly linked to the industrial setting that gave rise to them. Most important, transferring the recording/reporting function from the supervising employer to the leasing firm would undermine rather than facilitate one of the most important goals of Part 1904—to assure that work-related injury and illness information gets to the employer who can use it to abate work-related hazards. If OSHA were to shift the recordkeeping responsibility from the controlling employer to the leasing firm, the records would not be readily available to the employer who can make best use of them. OSHA would need to require the leasing firm to provide the controlling employer with copies of the injury and illness logs and other reports

to meet this purpose. This would be both burdensome and duplicative.

Requiring the controlling (host) employer to record injuries and illnesses for employees that they control has several advantages. First, it assigns the injuries and illnesses to the individual workplace with the greatest amount of control over the working conditions that led to the worker's injury or illness. Although both the host employer and the payroll employer have safety and health responsibilities, the host employer generally has more control over the safety and health conditions where the employee is working. To the extent that the records connect the occupational injuries and illnesses to the working conditions in a given workplace, the host employer must include these cases to provide a full and accurate safety and health record for that workplace.

If this policy were not in place, industry-wide statistics would be skewed. Two workplaces with identical numbers of injuries and illnesses would report different statistics if one relied on temporary help services to provide workers, while the other did not. Under OSHA's policy, when records are collected to generate national injury and illness statistics, the cases are properly assigned to the industry where they occurred. Assigning these injuries and illnesses to temporary help services would not accurately reflect the type of workplace that produced the injuries and illnesses. It would also be more difficult to compare industries. To illustrate this point, consider a hypothetical industry that relies on temporary help services to provide 10% of its labor force. Assuming that the temporary workers experience workplace injury and illness at the same rate as traditional employees, the Nation's statistics would underrepresent that industry's injury and illness numbers by 10%. If another industry only used temporary help services for 1% of the labor force, its statistics would be closer to the real number, but comparisons to the 10% industry would be highly suspect.

The policy also makes it easier to use an industry's data to measure differences that occur in that industry over time. Over the last 20 years, the business community has relied increasingly on workers from temporary help services, employee leasing companies, and other temporary employees. If an industry sector as a whole changed its practices to include either more or fewer temporary workers over time, comparisons of the statistics over several years might show trends in injury and illness experience that

simply reflected changing business practices rather than real changes in safety and health conditions.

Some commenters objected to this aspect of the proposal because they thought it would require both the personnel leasing firm and the host employer to record injuries and illnesses. Double recording would lead to inaccurate statistics when both employers reported their data to BLS (see, e.g., Exs. 15: 9, 26, 92, 198, 259, 287, 297, 333, 341, 356, 364, 443). The National Association of Temporary Staffing Services Stated:

[i]f the exemption is not retained in the case of SIC 7363 [Help Supply Services] employers, it would be especially important for the final rules to expressly provide * * * that there is no intent to impose a dual reporting requirement. At least one state OSH office already has construed the proposed lifting of the partial exemption as creating an obligation on the part of staffing firms to maintain records for all of its employees, including temporary employees supervised by the worksite employer. This is clearly inconsistent with the intent of the proposed rule and should be clarified (Ex. 15: 333).

The Society of the Plastics Industry added:

[b]ecause statistics are required to be collected for several years, it would take a significant effort to contact several independent companies on a continual basis to obtain such information. This would only result in a serious duplication of records, as both the host employer and the temporary leasing employer record the case. This will increase the recordkeeping burden for both the employer and those independent companies hired for a specific job by that employer (Ex. 15: 364).

OSHA agrees with these commenters that there is a potential for double counting of injuries and illnesses for workers provided by a personnel supply service. We do not intend to require both employers to record each injury or illness. To solve this problem, the rule, at § 1904.31(b)(4), specifically states that both employers are not required to record the case, and that the employers may coordinate their efforts so that each case is recorded only once—by the employer who provides day-to-day supervision. When the employers involved choose to work with each other, or when both employers understand the Part 1904 regulations as to who is required to record the cases and who is not, there will not be duplicative recording and reporting. This policy will not completely eliminate double recording of these injuries and illnesses, but it provides a mechanism for minimizing the error in the BLS statistics.

OSHA believes that many employers already share information about these

injuries and illnesses to help each other with their own respective safety and health responsibilities. For example, personnel service employers need information to process workers' compensation claims and to determine how well their safety and health efforts are working, especially those involving training and the use of personal protective equipment. The host employer needs information on conditions in the workplace that may have caused the injuries or illnesses.

Many commenters objected to the requirement that the employer who controls the work environment record injuries and illnesses of temporary workers because that employer does not have adequate information to record the cases accurately (see, e.g., Exs. 15: 9, 23, 184, 341, 363, 364, 370). These commenters contended that temporary workers supplied by personnel agencies may not have been at any given assignment long enough for the controlling employer to count days away from work accurately or to make informed judgments about the recordability of ongoing or recurring cases. The comments also contended that the controlling employer may have difficulty judging whether an injury or illness is related to that employer's work environment, to other places of employment, or is totally non-work related. These drawbacks in turn affect the recording employer's ability to certify to the completeness and accuracy of the annual summary of the Log. U.S. West, Inc. (Ex. 15: 184) remarked:

[e]mployers should not be responsible for recordkeeping involving independent contractors, workers from temporary agencies, etc. A major reason for this would be the difficulties presented when trying to track such individuals for injuries/illnesses that have long periods of days away from work. In addition, it is often difficult to assign work relatedness for cases to a specific employer—an example would be upper extremity repetitive motion disorders for an individual from a temporary agency that works for several different employers in the course of a week or month. To avoid such problems, recordkeeping should be the responsibility of the individual's actual employer.

OSHA agrees with these commenters that recording work-related injuries and illnesses for temporary, leased employees will sometimes present these difficulties. However, the solution is not, as some commenters urge, to require the personnel leasing agency to assume responsibility for Part 1904 recording and reporting. The personnel leasing firm will not necessarily have better information than the host employer about the worker's exposures or accidents in previous assignments,

previously recorded injuries or illnesses, or the aftermath of an injury or illness. And the personnel leasing firm will certainly have less knowledge of and control over the work environment that may have caused, contributed to, or significantly aggravated an injury or illness. As described above, the two employers have shared responsibilities and may share information when there is a need to do so.

If Part 1904 records are inaccurate due to lack of reasonably reliable data about leased employees, there are ways for OSHA to address the problem. First, the OSH Act does not impose absolutely strict liability on employers. The controlling employer must make reasonable efforts to acquire necessary information in order to satisfy Part 1904, but may be able to show that it is not feasible to comply with an OSHA recordkeeping requirement. If entries for temporary workers are deficient in some way, the employer can always defend against citation by showing that it made the efforts that a reasonable employer would have made under the particular circumstances to obtain more complete or accurate data.

A few commenters suggested that OSHA should link the recording requirement to the duration of time that the contract or temporary employee works at a specific location (see, e.g., Exs. 15: 185, 259, 341, 364). The National Wholesale Druggists Association (NWDA) believed that:

[t]here should be a length-of-employment delineation to determine whether a temporary or contract employee illness or injury should be included in the OSHA log. OSHA should set a length of time that the contract or temporary employee must work in a location before requirements for OSHA log reporting are triggered. By setting a length of employment standard, OSHA will not only eliminate the possibility of duplicative reporting of injuries and illnesses but will also eliminate the reporting of those short-term temporary employee assignments that may be covered by the temporary agency (Ex. 15: 185).

The Society of the Plastics Industry (SPI) recommended that the controlling firm should only keep records for permanently leased workers, stating “[f]or temporary employees, the employer who pays an employee (with the presumption that this is for whom they work) should be required to keep the records. For permanently assigned, leased employees, SPI agrees that such cases should be recorded by the leasing employer” (Ex. 15: 364). The Iowa Health Care Association asked whether a temporary nurse's aide who works in a facility for seven days to cover a

vacationing permanent employee would be considered to be under the day-to-day supervision of the host facility (Ex. 15: 259).

OSHA has decided not to base recording obligations on the temporary employee's length of employment. Recording the injuries and illnesses of some temporary employees and not others would not improve the value or accuracy of the statistics, and would make the system even more inconsistent and complex. In OSHA's view, the duration of the relationship is much less important than the element of control. In the example of the temporary nurse's aide, for OSHA recordkeeping purposes the worker would be considered an employee of the facility for the days he or she works under the day-to-day supervision of the host facility.

Several commenters questioned whether or not temporary workers would be included in the total number of employees of that employer (see, e.g., Exs. 15: 67, 356, 375, 437). The number of employees is used in two separate areas of the recordkeeping system. The number of employees is used to determine the exemption for smaller employers, and is entered on the annual summary of occupational injuries and illnesses. The Small Business Administration expressed concern over whether counting these workers as employees would affect the exemption for smaller employers, stating “[t]he definition of ‘employee’ goes beyond the statutory intent * * * Small businesses would not only have new obligations for coverage, but this methodology for counting employees would impact the opportunity for an exemption under this standard” (Exs. 15: 67, 437). The American Petroleum Institute (API) was concerned about how the employee count affects the way that the host employer completes the annual summary, particularly the entries for hours worked by all employees and the average number of employees:

[u]sing the OSHA-specified approach for determining the number of employees and hours worked, particularly for temporary employees and/or smaller establishments, is not often feasible. Assumption (1) [that the employer already has this data] is not true for temporary employees. Their hours worked are maintained by their contract employers. Host employers have dollar costs paid to each contractor employer. Therefore, getting employee counts and hours worked for temporaries requires making assumptions and estimating (Ex. 15: 375).

Because OSHA is using the common law concepts to determine which workers are to be included in the records, a worker who is covered in

terms of recording an injury or illness is also covered for counting purposes and for the annual summary. If a given worker is an employee under the common law test, he or she is an employee for all OSHA recordkeeping purposes. Therefore, an employer must consider all of its employees when determining its eligibility for the small employer exemption, and must provide reasonable estimates for hours worked and average employment on the annual summary. OSHA has included instructions on the back of the annual summary to help with these calculations.

The Texas Chemical Council argued that supervising employers should not have to record injuries or illnesses of agency-supplied workers unless the supervising employer has authority to hold these workers accountable for safety performance (Ex. 15: 159). According to this commenter, most temporary agencies limit the contracting employer to following the agencies' policies for corrective action for unacceptable performance. OSHA would simply point out that this is a matter within the contract arrangements between the two employers, and that OSHA intervention in this area is not necessary or appropriate. In any event, we believe that this should not determine who records occupational injuries and illnesses.

The Phibro-Tech company asked "[i]f the facility is now responsible for tracking these injuries on their Form 300, will this affect the Worker's Compensation liability?" (Ex. 15: 35). Tracking injuries and illnesses for OSHA purposes does not affect an employer's workers' compensation liability. An employer's liability for workers' compensation is a separate matter that is covered by state law. Employers who maintain workers' compensation coverage will be responsible for injuries and illnesses regardless of which employer records them for OSHA purposes.

Bell Atlantic Network Services asked "[a]re contract employee OSHA recordable injury/illness incidents to be recorded on the same OSHA 300 log as employer's full-time employees? Are they to be identified as "Contract/Temporary" employees on the OSHA 300 Log, i.e., under the column E—Job Title?" (Ex. 15: 218). OSHA's view is that a given establishment should have one OSHA Log and only one Log. Injuries and illnesses for all the employees at the establishment are entered into that record to create a single summary at the end of the year. OSHA does not require temporary workers or any other types of workers to

be identified with special titles in the job title column, but also does not prohibit the practice. This column is used to list the occupation of the injured or ill worker, such as laborer, machine operator, or nursing aide. However, OSHA does encourage employers to analyze their injury and illness data to improve safety and health at the establishment. In some cases, identifying temporary or contract workers may help an employer to manage safety and health more effectively. Thus an employer may supplement the OSHA Log to identify temporary or contract workers, although the rule does not require it.

OSHA received two suggestions that would provide an OSHA inspector with injury and illness data for temporary workers without putting their injuries on the host employer's OSHA 300 Log. The National Grain and Feed Association, Grain Elevator and Processing Society, and National Oilseed Processors Association jointly recommended:

[e]mployers with employees who work under contract at a site other than the employer's should be required to provide a copy of the appropriate first report of injury or OSHA 301 to the site controlling employer. The site controlling employer can then maintain a file of Form 301's to facilitate OSHA's evaluation of workplace hazards (Ex. 15: 119).

The Douglas Battery Manufacturing (Ex. 15: 82) company suggested the following alternative:

[a]n option that would allow an employer of temporary workers to determine the incident rate of the temporaries, would be to require the temporary agency/ contractor to forward a copy of its OSHA log for workers at a particular facility, to that facility by February of the next calendar year. The names and other personal identifiers of the temporary/contract workers could be removed prior to submittal but the data would be available on site for agency inspection purposes.

OSHA believes that neither of these alternatives would be an acceptable substitute for completing the 300 Log and 301 form for injured workers. The information would not be entered into the annual summary, so the establishment's statistics would not be complete. While these options would create a method (although a cumbersome method) for providing the information to a government inspector, the data would not be collected for statistical purposes.

Some commenters asked OSHA about how they should deal with a variety of other types of workers. The American Ambulance Association suggested that OSHA "[s]pecifically exclude from the

definition of employee, students who are unpaid by the company/institution which is providing a clinical or practice setting" (Ex. 15: 226). The Maine Department of Labor (Ex. 15: 41) asked the following question:

[q]uestions about how to report people such as Interns, Aspire (welfare) program participants, prison release workers and volunteers are now being asked. A clear definition needs to be established to account for all kinds of employees. Our Public Sector law requires us to count all people who are permitted to work. Maybe you don't want that inclusive a definition, but it is something to consider. We had to come up with a specific definition of volunteers to exclude sporadic volunteers (essentially those not working at a specific place at a specific time on a regular basis). With some workplaces utilizing volunteers and with welfare reform changes expected, you may want to prepare for these questions now.

These workers should be evaluated just as any other worker. If a student or intern is working as an unpaid volunteer, he or she would not be an employee under the OSH Act and an injury or illness of that employee would not be entered into the Part 1904 records. If the worker is receiving compensation for services, and meets the common law test discussed earlier, then there is an employer-employee relationship for the purposes of OSHA recordkeeping. The employer in that relationship must evaluate any injury or illness at the establishment and enter it into the records if it meets the recording criteria.

Section 1904.32 Annual Summary

At the end of each calendar year, section 1904.32 of the final rule requires each covered employer to review his or her OSHA 300 Log for completeness and accuracy and to prepare an Annual Summary of the OSHA 300 Log using the form OSHA 300-A, Summary of Work-Related Injuries and Illnesses, or an equivalent form. The summary must be certified for accuracy and completeness and be posted in the workplace by February 1 of the year following the year covered by the summary. The summary must remain posted until April 30 of the year in which it was posted.

Preparing the Annual Summary requires four steps: reviewing the OSHA 300 Log, computing and entering the summary information on the Form 300-A, certification, and posting. First, the employer must review the Log as extensively as necessary to make sure it is accurate and complete. Second, the employer must total the columns on the Log; transfer them to the summary form; and enter the calendar year covered, the name of the employer, the name and

address of the establishment, the average number of employees on the establishment's payroll for the calendar year, and the total hours worked by the covered employees. If there were no recordable cases at the establishment for the year covered, the summary must nevertheless be completed by entering zeros in the total for each column of the OSHA 300 Log. If a form other than the OSHA 300-A is used, as permitted by paragraph 1904.29(b)(4), the alternate form must contain the same information as the OSHA 300-A form and include identical statements concerning employee access to the Log and Summary and employer penalties for falsifying the document as are found on the OSHA 300-A form.

Third, the employer must certify to the accuracy and completeness of the Log and Summary, using a two-step process. The person or persons who supervise the preparation and maintenance of the Log and Summary (usually the person who keeps the OSHA records) must sign the certification statement on the form, based on their direct knowledge of the data on which it was based. Then, to ensure greater awareness and accountability of the recordkeeping process, a company executive, who may be an owner, a corporate officer, the highest ranking official working at the establishment, or that person's immediate supervisor, must also sign the form to certify to its accuracy and completeness. Certification of the summary attests that the individual making the certification has a reasonable belief, derived from his or her knowledge of the process by which the information in the Log was reported and recorded, that the Log and summary are "true" and "complete."

Fourth, the Summary must be posted no later than February 1 of the year following the year covered in the Summary and remain posted until April 30 of that year in a conspicuous place where notices are customarily posted. The employer must ensure that the Summary is not defaced or altered during the 3 month posting period.

Changes from the former rule.

Although the final rule's requirements for preparing the Annual Summary are generally similar to those of the former rule, the final rule incorporates four important changes that OSHA believes will strengthen the recordkeeping process by ensuring greater completeness and accuracy of the Log and Summary, providing employers and employees with better information to understand and evaluate the injury and illness data on the Annual Summary, and facilitating greater employer and

employee awareness of the recordkeeping process.

1. *Company Executive Certification of the Annual Summary.* The final rule carries forward the proposed rule's requirement for certification by a higher ranking company official, with minor revision. OSHA concludes that the company executive certification process will ensure greater completeness and accuracy of the Summary by raising accountability for OSHA recordkeeping to a higher managerial level than existed under the former rule. OSHA believes that senior management accountability is essential if the Log and Annual Summary are to be accurate and complete. The integrity of the OSHA recordkeeping system, which is relied on by the BLS for national injury and illness statistics, by OSHA and employers to understand hazards in the workplaces, by employees to assist in the identification and control of the hazards identified, and by safety and health professionals everywhere to analyze trends, identify emerging hazards, and develop solutions, is essential to these objectives. Because OSHA cannot oversee the preparation of the Log and Summary at each establishment and cannot audit more than a small sample of all covered employers' records, this goal is accomplished by requiring employers or company executives to certify the accuracy and completeness of the Log and Summary.

The company executive certification requirement imposes different obligations depending on the structure of the company. If the company is a sole proprietorship or partnership, the certification may be made by the owner. If the company is a corporation, the certification may be made by a corporate officer. For any management structure, the certification may be made by the highest ranking company official working at the establishment covered by the Log (for example, the plant manager or site supervisor), or the latter official's supervisor (for example, a corporate or regional director who works at a different establishment, such as company headquarters).

The company executive certification is intended to ensure that a high ranking company official with responsibility for the recordkeeping activity and the authority to ensure that the recordkeeping function is performed appropriately has examined the records and has a reasonable belief, based on his or her knowledge of that process, that the records are accurate and complete.

The final rule does not specify how employers are to evaluate their recordkeeping systems to ensure their

accuracy and completeness or what steps an employer must follow to certify the accuracy and completeness of the Log and Summary with confidence. However, to be able to certify that one has a reasonable belief that the records are complete and accurate would suggest, at a minimum, that the certifier is familiar with OSHA's recordkeeping requirements, and the company's recordkeeping practices and policies, has read the Log and Summary, and has obtained assurance from the staff responsible for maintaining the records (if the certifier does not personally keep the records) that all of OSHA's requirements have been met and all practices and policies followed. In most if not all cases, the certifier will be familiar with the details of some of the injuries and illnesses that have occurred at the establishment and will therefore be able to spot check the OSHA 300 Log to see if those cases have been entered correctly. In many cases, especially in small to medium establishments, the certifier will be aware of all of the injuries and illnesses that have been reported at the establishment and will thus be able to inspect the forms to make sure all of the cases that should have been entered have in fact been recorded.

The certification required by the final rule may be made by signing and dating the certification section of the OSHA 300-A form, which replaces the summary portion of the former OSHA 200 form, or by signing and dating a separate certification statement and appending it to the OSHA Form 300-A. A separate certification statement must contain the identical penalty warnings and employee access information as found on the OSHA Form 300-A. A separate statement may be needed when the certifier works at another location and the certification is mailed or faxed to the location where the Summary is posted.

The certification requirement modifies the certification provision of the former rule (former paragraph 1904.5(c)), which required a certification of the Annual Summary by the employer or an officer or employee who supervised the preparation of the Log and Summary. The former rule required that individual to sign and date the year-end summary on the OSHA Form 200 and to certify that the summary was true and complete. Alternatively, the recordkeeper could, under the former rule, sign a separate certification statement rather than signing the OSHA form.

Both the former rule (paragraph 1904.9 (a) and (b)) and the proposed rule (paragraph 1904.16(a) and (b))

contained penalty provisions for the falsification of OSHA records or for the failure to record recordable cases; these provisions do not appear in the final rule. OSHA believes, based on the record and the Agency's own recordkeeping and audit experience, that this deletion will not affect the accuracy or completeness of the records, employers' recording obligations, or OSHA's enforcement powers. The criminal penalties referred to in paragraph 1904.9(a) of the former rule are authorized by section 17(g) of the OSH Act and do not need to be repeated in the final rule to be enforced.

Similarly, the administrative citations and penalties referred to in paragraph 1904.9(b) of the former rule are authorized by sections 9 and 17 of the OSH Act. The warning statement on the final OSHA 300-A form or its equivalent should be sufficient to remind those who certify the forms of their legal obligations under the Act.

OSHA has revised the final rule's certification requirement in response to questions about its usefulness raised in the preamble to the proposal (61 FR 4047). In particular, the proposal noted that the person responsible for preparing the Log and Summary might, in some cases, have an incentive not to report injuries and illnesses, which would, of course, impair the accuracy of the Log. OSHA stated that "some employers mistakenly believe that recording a case implies fault on the part of the employer" and thus has the potential to adversely affect their ability to defend workers' compensation claims or lawsuits. Some employers also have established "accountability systems" that are based on the number of OSHA recordables, *i.e.*, that evaluate the safety performance of managers by the number of injuries and illnesses reported by workers in the departments or organizational units under their control. OSHA noted that individuals whose performance, promotions, compensation, and/or bonuses depend on the achievement of reduced injury and illness rates "may be discouraged from fully and accurately recording injuries and illnesses (61 FR 4047) * * *". Managers and supervisors being evaluated by the numbers" also may have an incentive to avoid recording as many cases as possible.

OSHA proposed to change the former rule's certification requirements. In the proposed rule, OSHA proposed to require that a responsible company official certify to the accuracy and completeness of the Log and Summary. According to the proposal, that person would sign the summary to certify that "he or she has examined the OSHA

Injury and Illness Log and Summary and that the entries on the form and the year-end summary are true, accurate, and complete" (61 FR 4060).

"Responsible company official" was defined in the proposal as "an owner of the company, the highest ranking company official working at the establishment, or the immediate supervisor of the highest ranking company official working at the establishment" (61 FR 4059). By requiring a high level individual to sign each establishment Log certification, the proposal sought to create an incentive for that official to take steps to ensure the accuracy and completeness of the information on the log or face penalties for failing to do so.

Several commenters (see, *e.g.*, Exs. 15: 50, 105, 415) confirmed that an underreporting incentive did exist under the former rule's certification system. For example, the International Chemical Workers' Union (Ex. 15: 415) and Mr. George Cook (Ex. 15: 50) noted the potential for this problem to arise in their comments to the record. Harsco Corporation (Ex. 15: 105) pointed out that a contractor's accident rate will affect its ability to bid for jobs, and there is thus an incentive to keep rates low by not recording all injuries and illnesses.

There were many responses to the proposed change in the certification requirement. In general, a broad cross-section of commenters (see, *e.g.*, Exs. 15: 70, 127, 136, 137, 141, 153, 163, 170, 224, 266, 278, 324, 371, 407, 418, 429) gave unqualified support to the proposal's certification by a "responsible corporate official." Typical of these comments was the New Jersey Department of Labor's statement that the proposed change would result in heightened awareness of health and safety problems by management, enhanced efforts to reduce workplace injuries and illnesses, and more accurate reporting (Ex. 15: 70). The AFL-CIO noted that requiring top corporate officials to be responsible "represents a fundamental change in the importance of data gathering in the workplace" (Ex. 15: 418).

A number of commenters expressed reservations about the definition of "responsible corporate official" and the extent of the responsibility and/or legal liability such certification might impose on certifying officials. Some commenters argued that it was unreasonable for a high corporate official, who might not be familiar with the recordkeeping function and its legal requirements, to certify to the accuracy and completeness of the Log and Summary. These commenters argued that it would be more appropriate for a

high level management official, industrial hygienist, or director of health and safety to certify the Log and Summary because these individuals are already responsible for ensuring the accuracy and completeness of the Log, especially in multi-establishment businesses where recordkeeping is centralized (see, *e.g.*, Exs. 21; 25; 27; 33; 15: 44, 48, 65, 122, 132, 133, 147, 154, 161, 169, 174, 176, 193, 194, 199, 203, 231, 242, 263, 269, 270, 272, 273, 283, 284, 289, 290, 292, 295, 297, 299, 301, 304, 305, 317, 325, 329, 332, 341, 345, 346, 348, 364, 368, 377, 385, 386, 387, 403, 405, 410, 412, 413, 420, 425, 442). Two commenters suggested that, if a high level official were to be responsible for the certification, he or she should only be required to certify that the "[c]ompany has * * * taken reasonable steps to ensure the accuracy of the logs" (Exs. 15: 200, 442). Several representatives from the construction industry (see, *e.g.*, Exs. 15: 126, 342, 355) urged OSHA to make sure that any certification provision reflect the operation of multi-employer construction sites. These commenters recommended that the certifying official either be the senior official on-site or that person's immediate superior.

Other employer representatives believed that the broad nature of the proposed certification could make the certification vulnerable to legal liability (see, *e.g.*, Exs. 20; 33; 15: 122, 133, 147, 149, 176, 193, 199, 201, 205, 220, 231, 236, 272, 273, 284, 290, 292, 297, 301, 304, 313, 318, 320, 335, 345, 346, 352, 353, 368, 373, 375, 389, 396, 424, 425, 427, 428, 430). The National Association of Manufacturers (Ex. 15: 305), in a statement that is representative of the views of these commenters, said that:

[t]he language of the certification is totally impractical and unreasonable in that it is written as a certification of absolute completeness and accuracy. This creates such an unreasonably high standard that no one should legitimately be asked or required to sign it. As a general rule, we believe an individual would be expected to have significantly better knowledge of the information on his/her personal income tax return than on the OSHA Form 300; yet even the certification on the personal income tax return includes the language "to the best of my knowledge and belief." This clause must be added to the certifying language.

Numerous commenters favored a dual level of accountability, with a first level certification by the "responsible company official," as defined in the proposal, and a second level certification required by a high level corporate official with safety and health responsibilities (see, *e.g.*, Exs. 20, 15: 65, 89, 182, 369, 380, 409, 415). These

participants recommended that OSHA require a more senior official, at a corporate level beyond the establishment keeping the records, additionally certify that the company had made a good faith effort to ensure accurate and complete records for all of the employer's establishments. The American Automobile Manufacturers Association (AAMA) stated that it:

[a]grees that a corporate official responsible for health and safety and the highest ranking company official at an establishment should certify that a good faith effort for proper recordkeeping has taken place, and the individual responsible for day-to-day OSHA recordkeeping should certify the accuracy and completeness of the log (Ex. 15-409).

OSHA has not adopted a dual certification requirement because one certification should be enough to make sure that the records are accurate. In addition, a dual certification requirement would increase the complexity and burdens of the final rule, without significantly adding incentives for employers to keep better records.

Some commenters wished OSHA to maintain the former rule's approach to certification. These participants were generally skeptical of senior management certification, characterizing it as impractical, onerous, burdensome, unrealistic, intrusive, and infringing on the prerogative of management to designate the appropriate person(s) to certify the Log (see, e.g., Exs. 15: 9, 15, 39, 45, 60, 89, 96, 132, 149, 156, 183, 184, 185, 195, 200, 201, 203, 204, 213, 218, 225, 239, 259, 260, 262, 265, 271, 272, 303, 304, 313, 317, 318, 320, 332, 335, 338, 344, 352, 353, 360, 373, 378, 389, 390, 392, 401, 406, 414, 423, 424, 427, 428, 430, 431). According to the Battery Council International, "[t]he threat of civil and criminal liability provides more than enough incentive to ensure the accuracy of the recordkeeping Log and Summary" (Ex. 15: 161). Mallinckrodt Chemical, Inc., and the Interconnecting and Packaging Electronic Circuits Corporation echoed this belief (Exs. 15: 69, 172). The Vulcan Chemical Company went so far as to recommend that OSHA delete certification requirements completely and rely only on the proposed penalty provisions (Ex. 15: 171).

Most commenters opposing high-level management certification argued that management-designated, well-qualified, lower level administrative personnel perform the recordkeeping function and can therefore best certify to the accuracy of the OSHA 300 Log (see, e.g., Exs. 15: 69, 220, 225, 227, 281, 297, 305, 313, 352, 353). According to the American

Textile Manufacturers Institute (Ex. 15: 156), "[a] corporate official (i.e., safety director, human resources director, Chief Executive Officer) should never be required to certify the accuracy of the logs. Commenters also stated that placing the responsibility on senior management would increase the economic and paperwork burden of the rule because these individuals would need additional training and would conduct audits, particularly at businesses with many work locations (see, e.g., Exs. 15: 213, 259, 375, 395). A few commenters stated that none of OSHA's proposed approaches, including the Log and Summary certification, would significantly decrease the financial incentives employers have for underreporting (see, e.g., Exs. 15: 39, 199, 406). The Ogletree, Deakins, Nash, Smoak & Stewart Coalition (ODNSSC) said that "[i]n the final analysis, the one measure that will have the greatest effect in fostering the maintenance of accurate logs is finally within the grasp of all interested parties: the promulgation of a final rule * * * that is well conceived, makes intuitive and analytical sense, and as such is largely accepted within the regulated community" (Ex. 15: 406).

Although OSHA believes that the final rule has many features that will enhance the accuracy and completeness of reporting, the Agency has included a company executive level of certification in the final rule. OSHA believes that company executive certification will raise employer awareness of the importance of the OSHA records, improve their accuracy and completeness (and thus utility), and decrease any underreporting incentive.

The final rule therefore requires a higher level company official to certify to their accuracy and completeness. Thus the final rule reflects OSHA's agreement with those commenters who stated that the Log and Summary must be actively overseen by higher level management and that certification by such an official would make management's responsibility for the accuracy and completeness of the system clear (see, e.g., Exs. 20: 15: 31, 65, 70, 89, 127, 136, 137, 141, 153, 163, 170, 182, 224, 266, 278, 324, 369, 371, 380, 396, 407, 409, 415, 418, 429). As the Union Carbide Company stated, having a higher authority sign a qualified certification of the summary "[w]ould encourage activities, such as training and periodic reviews/audits of the logs, to improve the accuracy and completeness of the data" (Ex. 15: 396). In the words of one safety consultant, "[u]ntil there is a Corporate

Commitment the information will be suspect" (Ex. 15: 31).

OSHA has slightly modified the proposed definition of responsible company official in the text of the final rule. In the final rule, the person who must perform the certification must be a company executive. OSHA does not believe that an industrial hygienist or a safety officer is likely to have sufficient authority to ensure the integrity of a company's recordkeeping process. Therefore, the final rule requires that the certification be provided by an owner of a sole proprietorship or partnership, an officer of the corporation, the highest-ranking official at the establishment, or that person's supervisor. OSHA believes that this definition takes into account and addresses the concerns of the comments received from construction employers (see, e.g., Exs. 15: 105, 126.342, 355).

OSHA is also aware that senior management officials cannot be expected to have hands-on experience in the details of the logs and summaries and therefore that their certification attests to the overall integrity of the recordkeeping process. In response to numerous comments that certification by the responsible company official be qualified by the addition to the certification of a clause such as "to the best of my knowledge and belief" (see, e.g., Exs. 20, 15: 122, 193, 199, 205, 220, 272, 273, 290, 305, 320, 335, 375, 396, 424, 425, 427, 428, 430), OSHA has added that the certification required by the final rule must be based on the official's "reasonable belief" that the Log and Summary are accurate and complete. Certification thus means that the certifying official has a general understanding of the OSHA recordkeeping requirements, is familiar with the company's recordkeeping process, and knows that the company has effective recordkeeping procedures and uses those procedures to produce accurate and complete records. The precise meaning of "reasonable belief" will be determined on a case-by-case basis because circumstances vary from establishment to establishment and decisions about the recordability of individual cases may differ, depending upon case-specific details.

2. *Number of employees and hours worked.* Injury and illness records provide a valuable tool for OSHA, employers, and employees to determine where and why injuries and illnesses occur, and they are crucial in the development of prevention strategies. The final rule requires employers to include in the Annual Summary (the OSHA Form 300-A) the annual average number of employees covered by the

Log and the total hours worked by all covered employees. In the proposal (61 FR 4037), OSHA stated that this information would facilitate hazard analysis and incidence rate calculations for each covered establishment. A number of commenters supported the proposed approach and felt that it would not be a burden on employers, as long as OSHA granted some flexibility to employers who did not have sophisticated recordkeeping systems (see, e.g., Exs. 15: 48, 61, 70, 78, 153, 163, 181, 262, 310, 350, 369, 429). For example, the Safety Services Administration of the City of Mesa, Arizona, a small employer, stated:

[f]or most employers, the average number of employees is readily available; the work hour totals may, or may not be so easily obtained, depending upon the book keeping methodology. For salaried employees, where detailed hourly records are not maintained, the 2,000 hr/yr would be used in any case. In our case, both employee numbers and total hours worked is available and presents no problem (Ex. 15: 48).

Other commenters stated that the total number of hours worked was readily available through payroll records and that calculating it would present only a minimal burden, but were opposed to the required inclusion of the annual average number of employees because this number is highly variable, difficult to assess where employment is seasonal and subject to high turnover, and not important to incidence calculations (see, e.g., Exs. 15: 123, 145, 170, 225, 359, 375).

Other commenters opposed including in the summary the average number of employees and the total number of hours worked because they believed the costs of compiling this information would outweigh its benefits, which they believed to be minimal (see, e.g., Exs. 15: 9, 44, 184, 195, 205, 214, 247, 272, 303, 308, 313, 335, 341, 352, 353, 412, 423, 431), especially in industries, like health care, with high turnover rates (Ex. 15: 341). One company estimated its cost of collecting data on total hours worked to be \$200,000 to \$300,000 and to take four to six months (Ex. 15: 423). Sprint Corporation proposed that “[i]ncidence rates continue to be calculated on an exception basis by the compliance officer at the time of the inspection. Larger employers, like Sprint, maintain such incidence rates by department or business unit and not by physical location as broken out on the OSHA log” (Ex. 15: 133).

Some commenters recommended alternatives, including permitting employers to estimate the total number of hours worked, possibly by using the ANSI Z16.4 standard of 173.33 hours

per month per employee, to minimize the burden (see, e.g., Exs. 15: 272, 303, 335, 359) or excluding establishments with fewer than 100 employees from the requirement altogether (Ex. 15: 375).

OSHA's view is that the value of the total hours worked and average number of employees information requires its inclusion in the Summary, and the final rule reflects this determination. Having this information will enable employers and employees to calculate injury and illness incidence rates, which are widely regarded as the best statistical measure for the purpose of comparing an establishment's injury and illness experience with national statistics, the records of other establishment, or trends over several years. Having the data available on the Form 300-A will also make it easier for the employer to respond to government requests for the data, which occurs when the BLS and OSHA collect the data by mail, and when an OSHA or State inspector visits the facility. In particular, it will be easier for the employer to provide the OSHA inspector with the hours worked and employment data for past years.

OSHA does not believe that this requirement creates the time and cost burden some commenters to the record suggested, because the information is readily available in payroll or other records required to be kept for other purposes, such as income tax, unemployment, and workers' compensation insurance records. For the approximately 10% of covered employers who participate in the BLS's Annual Survey of Occupational Injuries and Illnesses, there will be no additional burden because this information must already be provided to the BLS. Moreover, the rule does not require employers to use any particular method of calculating the totals, thus providing employers who do not maintain certain records—for example the total hours worked by salaried employees—or employers without sophisticated computer systems, the flexibility to obtain the information in any reasonable manner that meets the objectives of the rule. Employers who do not have the ability to generate precise numbers can use various estimation methods. For example, employers typically must estimate hours worked for workers who are paid on a commission or salary basis. Additionally, the instructions for the OSHA 300-A Summary form include a worksheet to help the employer calculate the total numbers of hours worked and the average number of.

3. *Extended posting period.* The final rule's requirement increasing the summary Form 300-A posting period

from one month to three months is intended to raise employee awareness of the recordkeeping process (especially that of new employees hired during the posting period) by providing greater access to the previous year's summary without having to request it from management. The additional two months of posting will triple the time employees have to observe the data without imposing additional burdens on the employer. The importance of employee awareness of and participation in the recordkeeping process is discussed in the preamble to sections 1904.35 and 1904.36.

The requirement to post the Summary on February 1 is unchanged from the posting date required by the former rule. As OSHA stated in the proposal (61 FR 4037) “one month (January) is a reasonable time period for completing the summary section of the form.” Only three commenters disagreed (see, e.g., Exs. 15: 347, 402, 409); two of these commenters suggested that 60 days were required to do so (Exs. 15: 347, 409). OSHA believes that, since the required process is simple and straightforward, 30 days will be sufficient. Delaying the posting any further would mean that employers would not have access to the Summary for a longer period, thus diminishing the timeliness of the posted information.

OSHA's proposal would have required employers to post the summary for one year, based on the Agency's preliminary conclusion that continuous posting presented no additional burden for employers and would be beneficial to employees (61 FR 4037-4038). The one-year posting period was unconditionally supported by a number of commenters (see, e.g., Exs. 15: 70, 153, 154, 199, 277) and was supported by others on the condition that no updating of the posted summary be required (see, e.g., Exs. 15: 262, 288, 435). The AAMA and the Ford Motor Co. supported a ten-month posting period (from March 1 to December 31) (Exs. 15: 347, 409).

A number of commenters stated that a one-year posting period was too long and would not be justified by the minimal benefits to be achieved by such year-long posting. Some of these participants contended that the Annual Summary does not continue to provide useful, accurate information after its initial posting and will not enhance employee awareness because, although posting of a new summary is noticed when it is done, it becomes “wallpaper” shortly thereafter, especially if it is on a cluttered bulletin board (see, e.g., Exs. 33: 15: 9, 23, 39, 40, 45, 60, 66, 98, 107, 119, 121, 122, 176, 203, 204, 231, 232,

273, 281, 289, 301, 317, 322, 329, 335, 341, 344, 347, 348, 356, 358, 381, 389, 399, 405, 409, 414, 428, 430, 431, 434, 441). For example, the Witco Corporation predicted that the 12-month posting requirement "[w]ill result in no one noticing the old Log's removal and the posting of a new one" (Ex. 15: 107). One commenter even suggested that continuous posting "[u]ndermines the Agency's intent in bringing the information to employees' attention" (Ex. 15: 428).

Other commenters argued that year-long posting was excessive because it created too great a burden on employers. They stated that extended posting would require employers to make periodic inspections to ensure that the summary had not been taken down, covered, or defaced (see, e.g., Exs. 37, 15: 57, 80, 97, 151, 152, 179, 180, 272, 303, 335, 346, 381, 410, 431), and that this additional administrative burden, especially to employers with large establishments that now voluntarily post Logs in multiple locations, could be significant (see, e.g., Exs. 15: 97, 184, 239, 272, 283, 297, 303, 304, 305, 348, 395, 396, 410, 424, 430). One suggestion made by commenters to minimize this burden was to post the Summary for one month at the establishment and then at a central location for the remaining eleven months (see, e.g., Exs. 15: 151, 152, 179, 180) or to permit electronic posting (Ex. 15: 184). Other employers opposed the extended posting period on the grounds that a one-month period posting was sufficient to achieve OSHA's objectives (see, e.g., Exs. 15: 9, 15, 39, 45, 49, 57, 69, 74, 80, 89, 97, 98, 116, 119, 133, 163, 182, 184, 195, 203, 287, 289, 335, 356, 396, 424, 427, 428, 441, 443), especially since employees have access to the summary at any time during the retention period (see, e.g., Exs. 15: 9, 15, 69, 80, 98, 119, 136, 137, 141, 161, 200, 204, 224, 225, 266, 272, 278, 303, 312, 317, 324, 348, 374, 395, 405, 406, 410, 412, 431). Still other commenters thought the one-year period was too long but supported a two or even three-month posting period as adding little, if any, additional burden (see, e.g., Exs. 37, 15: 78, 89, 199, 235, 256, 277).

After a review of all the comments received and its own extensive experience with the recordkeeping system and its implementation in a variety of workplaces, OSHA has decided to adopt a 3-month posting period. The additional posting period will provide employees with additional opportunity to review the summary information, raise employee awareness of the records and their right to access them, and generally improve employee

participation in the recordkeeping system without creating a "wallpaper" posting of untimely data. In addition, OSHA has concluded that any additional burden on employers will be minimal at best and, in most cases, insignificant. All the final rule requires the employer to do is to leave the posting on the bulletin board instead of removing it at the end of the one-month period. In fact, many employers preferred to leave the posting on the bulletin board for longer than the required one-month period in the past, simply to provide workers with the opportunity to view the Annual Summary and increase their awareness of the recordkeeping system in general and the previous year's injury and illness data in particular. OSHA agrees that the 3-month posting period required by the final rule will have these benefits which, in the Agency's view, greatly outweigh any minimal burden that may be associated with such posting. The final rule thus requires that the Summary be posted from February 1 until April 30, a period of three months; OSHA believes that the 30 days in January will be ample, as it has been in the past, for preparing the current year's Summary preparatory to posting.

4. *Review of the records.* The provisions of the final rule requiring the employer to review the Log entries before totaling them for the Annual Summary are intended as an additional quality control measure that will improve the accuracy of the information in the Annual Summary, which is posted to provide information to employees and is also used as a data source by OSHA and the BLS. Depending on the size of the establishment and the number of injuries and illnesses on the OSHA 300 Log, the employer may wish to cross-check with any other relevant records to make sure that all the recordable injuries and illnesses have been included on the Summary. These records may include workers' compensation injury reports, medical records, company accident reports, and/or time and attendance records.

OSHA did not propose that any auditing or review provisions be included in the final rule. However, several commenters suggested that OSHA include requirements that would require employers to audit the OSHA 300 Log information (see, e.g., Exs. 35; 36; 15: 31, 310, 418, 438). For example, the United Auto Workers (Ex. 15: 438) stated:

[t]he most important change OSHA could make in recordkeeping rules would be to

require employers to conduct an independent audit of the completeness of the record. The purpose of the audit would be to determine that no case went unrecorded, and that no disabling injury or illness was mislabeled as non lost workday. Such requirements were not in the proposal, but are desperately needed.

Linda Ballas (Ex. 15: 31), a safety consultant who performs audits of OSHA injury and illness records for employers, added [u]ntil there is Corporate Commitment the information will be suspect. * * * Audits are necessary." In fact, the Laborers' Health & Safety Fund of North America (Ex. 15: 310) recommended biennial third-party audits.

In the final rule, OSHA has not adopted regulatory language that requires formal audits of the OSHA Part 1904 records. However, the final rule does require employers to review the OSHA records as extensively as necessary to ensure their accuracy. The Agency believes that including audit provisions is not necessary because the high-level certification requirement will ensure that recordkeeping receives the appropriate level of management attention.

Some companies, especially larger ones, may choose to conduct audits, however, to ensure that the records are accurate and complete; many companies commented that they already perform records audits as part of their company's safety and health program. For example, the Ford Motor Company (Ex. 15: 347), Dow Chemical Company (Ex. 15: 335), and Brown & Root (Ex. 15: 423) reported that they audit their injury and illness records on a regular basis. Also, three commenters to the record were safety and health consultants who provide injury and illness auditing services to employers, in addition to other safety and health services (Exs. 15: 31, 345, 406). In the past, OSHA has entered into a number of corporate-wide settlement agreements with individual companies that included third-party audits of the employers' injury and illness records (e.g., Ford, General Motors, Union Carbide). OSHA expects that many of these companies will continue to audit their injury and illness records and their recordkeeping procedures, and to take any other quality control measures they believe to be necessary to ensure the quality of the records. However, OSHA has not required records audits in the final rule because the Agency believes that the combination of final rule requirements providing for employee participation (§ 1904.35), protecting employees against discrimination for reporting work-related injuries and illnesses to their employer (section

1904.36), requiring review by employers of the records at the end of the year, and mandating two level certification of the records will provide the quality control mechanisms needed to improve the quality of the OSHA records.

Deletions from the former rule. Except for the foregoing changes discussed above, the final rule is generally similar to the former rule in its requirements for preparing, certifying and posting of the year-end Summary. However, some provisions of the former rule related to the Summary have not been included in the final rule. For example, the former rule required employers with employees who did not report to or work at a single establishment, or who did not report to a fixed establishment on a regular basis, to hand-deliver or mail a copy of the Summary to those employees. OSHA proposed to maintain this requirement, which was supported by one commenter (Ex. 15: 298) but opposed by many others because of the administrative cost of preparing such mailings, especially in high turnover industries like construction (see, e.g., Exs. 15: 116, 132, 199, 200, 201, 312, 322, 329, 335, 342, 344, 355, 375, 395, 430, 440, 441). These commenters pointed out that employees who do not report to a single establishment still have the right to view the summary at a central location and to obtain copies of it.

In the final rule, OSHA has decided not to include the proposed requirement for individual mailings as unnecessary because final paragraph 1904.30(b)(3) requires that every employee be linked, for recordkeeping purposes, to at least one establishment keeping a Log and Summary that will be prepared and posted. In other words, every employee covered by the rule will have his or her injuries or illnesses recorded on a particular establishment's Log, even if that employee does not routinely report to that establishment or is temporarily working there. Thus every employee will have 3-month access to the Log and Summary at the posted location or may obtain a copy the next business day under paragraph 1904.35(b)(2)(iii), making the need for hand-delivery or mailing unnecessary.

Under the former rule, multi-establishment employers who closed an establishment during the year were not obligated to post an Annual Summary for that establishment. OSHA believes that this requirement is also unnecessary because it is obvious in such cases that there is no physical location at which to post the Summary. Closing an establishment does not, however, relieve an employer of the obligation to prepare and certify the Summary for whatever portion of the

calendar year the establishment was operating, retain the Summary, and make the Summary accessible to employees and government officials.

Other comments. Some commenters availed themselves of the opportunity to comment on portions of the recordkeeping rule that OSHA did not propose to change. Some of these comments addressed the issue of whether to post a year-end Summary at all. Posting the Summary was almost unanimously supported, but a few commenters opposed posting on the grounds that posting had "[a] de minimus effect on employee safety and accident prevention" (Ex. 15: 46), was not an accurate measure of current safety and health conditions (see, e.g., Exs. 15: 95, 126), or was unnecessary and burdensome for their industry (e.g., the maritime industry (Ex. 15: 95), construction industry (Ex. 15: 126), and retail store industry (Ex. 15: 367)). Although opposed to the posting of a year-end summary, one company urged OSHA to require that year-end summaries be submitted to OSHA (Ex. 15: 63).

Alternatives to posting were suggested by some commenters. One advocated annual informational meetings with employees instead (Ex. 15: 126), while others supported mailing the summary to each employee and providing the summary to new employees at orientation (Ex. 15: 154) or by e-mail (Ex. 15: 156). Three employers recommended excluding small establishments (fewer than 20, 50 or 100 employees) from posting if all column totals on the Log were zero (see, e.g., Exs. 15: 304, 358, 375).

OSHA believes, based on the record evidence and its own extensive recordkeeping experience, that posting the Summary is important to safety and health for all the reasons described above. Some of the suggested alternatives may be useful, and OSHA encourages employers to use any practices that they believe will enhance their own and employee awareness of safety and health issues, provided that they also comply fully with the final rule's posting requirements.

Another issue raised by commenters was whether multi-establishment employers should be required to post their summaries in each establishment, as required by the former rule. Employers generally supported posting at each establishment, although one commenter opposed posting at each establishment in multi-establishment companies as overly burdensome and without benefit (Ex. 15: 356). One construction employer argued that construction companies should be

allowed to post their summaries at a centralized location and only be required to do so at the establishment if it was a major construction site in operation for at least one year (Ex. 15: 116).

OSHA believes that permitting centralized posting only would substantially interfere with ready employee access to the Log, especially for employers operating many different sites. The record does not suggest that retaining the requirement for posting summaries at each establishment will be burdensome to employers and the final rule accordingly requires that multi-establishment employers post a Summary in each establishment relating that establishment's injury and illness experience for the preceding year.

Section 1904.33 Retention and Updating

Section 1904.33 of the final rule deals with the retention and updating of the OSHA Part 1904 records after they have been created and summarized. The final rule requires the employer to save the OSHA 300 Log, the Annual Summary, and the OSHA 301 Incident Report forms for five years following the end of the calendar year covered by the records. The final rule also requires the employer to update the entries on the OSHA 300 Log to include newly discovered cases and show changes that have occurred to previously recorded cases. The provisions in section 1904.33 state that the employer is not required to update the 300A Annual Summary or the 301 Incident Reports, although the employer is permitted to update these forms if he or she wishes to do so.

As this section makes clear, the final rule requires employers to retain their OSHA 300 and 301 records for five years following the end of the year to which the records apply. Additionally, employers must update their OSHA 300 Logs under two circumstances. First, if the employer discovers a recordable injury or illness that has not previously been recorded, the case must be entered on the forms. Second, if a previously recorded injury or illness turns out, based on later information, not to have been recorded properly, the employer must modify the previous entry. For example, if the description or outcome of a case changes (a case requiring medical treatment becomes worse and the employee must take days off work to recuperate), the employer must remove or line out the original entry and enter the new information. The employer also has a duty to enter the date of an employee's return to work or the date of an injured worker's death on the Form 301; OSHA considers the

entering of this information an integral part of the recordkeeping for such cases. The Annual Summary and the Form 301 need not be updated, unless the employer wishes to do so. The requirements in this section 1904.33 do not affect or supersede any longer retention periods specified in other OSHA standards and regulations, *e.g.*, in OSHA health standards such as Cadmium, Benzene, or Lead (29 CFR 1910.1027, 1910.1028, and 1910.1025, respectively).

The proposed rule (61 FR 4030, at 4061) would have reduced the retention and updating periods for these records to three years. The language of the proposal was as follows:

(a) Retention. OSHA Forms 300 and 301 or equivalents, year-end summaries, and injury and illness records for "subcontractor employees" as required under Sec. 1904.17 of this Part shall be retained for 3 years following the end of the year to which they relate.

(b) Updating. During the retention period, employers must revise the OSHA Form 300 or equivalent to include newly discovered recordable injuries or illnesses. Employers must revise the OSHA Form 300 to reflect changes which occur in previously recorded injuries and illnesses. If the description or outcome of a case changes, remove the original entry and enter the new information to reflect the more severe consequence. Employers must revise the year-end summary at least quarterly if such changes have occurred.

Note to Sec. 1904.9: Employers are not required to update OSHA Form 301 to reflect changes in previously recorded cases.

A number of commenters supported the proposed reduction in the retention period from five years to three years on the ground that it would reduce administrative burdens and costs without having any demonstrable effect on safety and health (see, *e.g.*, Exs. 22, 33, 37, 15: 9, 39, 61, 69, 82, 89, 95, 107, 121, 133, 136, 137, 141, 154, 173, 179, 181, 184, 201, 204, 213, 224, 225, 239, 242, 263, 266, 269, 270, 272, 278, 283, 288, 304, 307, 321, 322, 332, 334, 341, 347, 348, 368, 375, 377, 384, 387, 390, 392, 395, 396, 397, 409, 413, 424, 425, 427, 443). According to the American Iron and Steel Institute (AISI), whose views were typical of those of this group of commenters, a three-year retention period:

[s]hould reduce employers' administrative costs without sacrificing any accuracy in the records of serious illnesses and injuries. Additional cost savings could be accomplished by limiting the time period during which an employer must update its injury and illness records to one year. Such a change would allow employers to close the books sooner on the health and safety data for a particular year, without resulting in any loss of accuracy. In AISI's experience, it is

extremely rare that any new information on an illness or injury surfaces more than a few months after an injury is recorded, while the administrative cost of having to update a log and summary is significant for the rare cases that yield information after one year (Ex. 15: 395).

Several commenters, however, opposed the three-year retention period and favored the former rule's five-year retention period (see, *e.g.*, Exs. 20, 24, 15: 153, 350, 359, 379, 407, 415, 429). For example, the American Industrial Hygiene Association (AIHA) opposed the shorter retention period, stating:

[A]IHA opposes OSHA's proposed change of OSHA recordkeeping record retention from 5 to 3 years. There is little work in record retention, and much information lost if they are discarded. We recommend maintaining the 5 year retention for OSHA Logs and supporting 301 forms (Ex. 15: 153.)

According to NIOSH, which favored the longer retention period, retaining records for five years:

[a]llows the aggregation of data over time that is important for evaluating distributions of illnesses and injuries in small establishments with few employees in each department/job title. Also, the longer retention period is important for the observation of trends over time in the recognition of new problems and the evaluation of the effectiveness of intervention in large companies. In addition, the longer retention period makes possible the assessment of trends over time or to determine if a current cluster of cases is unusual for that industry. Reducing the retention period would thus have a detrimental effect on these types of analysis, which are frequently used by NIOSH in field studies (Ex. 15: 407).

The American Industrial Hygiene Association recommended a longer retention period (up to 30 years) for the OSHA 301 form to accommodate occupational diseases with long latency periods (Ex. 15: 153).

In this final rule, OSHA has decided to retain the five-year retention requirement for OSHA injury and illness records because the longer time period will enable employers, employees, and researchers to obtain sufficient data to discover patterns and trends of illnesses and injuries and, in many cases, to demonstrate the statistical significance of such data.

In addition, OSHA has concluded that the five-year retention period will add little additional cost or administrative burden, since relatively few cases will surface more than three years after the injury and illness occurred, and the vast majority of cases are resolved in a short time and do not require updating. In addition, OSHA believes that other provisions of the final rule (*e.g.*, computerization of records, centralized

recordkeeping, and the capping of day counts) will significantly reduce the recordkeeping costs and administrative burden associated with the tracking of long-term cases.

The comments on the proposed rule's updating requirements for individual entries on the OSHA Form 300 reflected a considerable amount of confusion about the proposed rule's requirements for updating. Because the proposed rule did not state how frequently the form was to be updated, some employers interpreted the proposed rule as permitting quarterly updates (proposed by OSHA for year-end summaries only) during the retention period (see, *e.g.*, Exs. 15: 9, 61, 89, 170, 181, 288, 389). Some participants argued for even less frequent updating (see, *e.g.*, Exs. 15: 151, 152, 179, 180, 317, 348). Several employers recognized that the Log is an ongoing document and that information must be updated on a regular basis, preferably at the same frequency as required for initial recording (see, *e.g.* Exs. 15: 65, 201, 313, 346, 352, 353, 430). The final rule requires Log updates to be made on a continuing basis, *i.e.*, as new information is discovered. For example, if a new case is discovered during the retention period, it must be recorded within 7 calendar days of discovery, the same interval required for the recording of any new case. If new information about an existing case is discovered, it should be entered within 7 days of receiving the new information. OSHA has also decided to require updating over the entire five-year retention period. OSHA believes that maintaining consistency in the length of the retention and updating periods will simplify the recordkeeping process without imposing additional burdens on employers, because most updating of the records occurs during the first year following an injury or illness.

The comments OSHA received on the proposed quarterly updating of year-end summaries were mixed. Some thought that such updating would provide timely and accurate information to employees at little cost (see, *e.g.* Exs. 15: 9, 89, 170, 260, 262, 265, 401), while others saw the requirement as burdensome and costly and without commensurate value (see, *e.g.* Exs. 15: 78, 225, 289, 337, 406, 412). Typical of those commenters who viewed such a requirement as burdensome was the American Automobile Manufacturing Association (AAMA), which stated "[u]pdating prior year totals on the annual summary(s) once posted, is of little value. The increase in total numbers is generally so modest as to not affect the overall magnitude of problems within an establishment" (Ex. 15: 409).

Some commenters recommended that the summaries be updated less frequently, such as semi-annually (see, e.g., Exs. 37, 15: 163). The National Safety Council (Ex. 15: 359) recommended quarterly updates the first year and annual updates thereafter. Others interpreted the proposed rule as requiring quarterly updates and recertification and re-posting of the year-end summaries after the posting period had ended; these commenters opposed such a requirement as being overly burdensome (see, e.g., Exs. 15: 181, 199, 201, 225, 272, 288, 303, 308, 351). Lucent Technologies (Ex. 15: 272), one of these commenters, urged OSHA to add the following qualifier to any requirement for the updating of the annual summary: “[t]he quarterly update of the summary is for tracking purposes only and will not require recertification or posting.”

After reviewing these comments and the evidence in the record, OSHA has decided not to require the updating of annual summaries. Eliminating this requirement from the final rule will minimize employers' administrative burdens and costs, avoid duplication, and avoid the complications associated with the certification of updated summaries, the replacement of posted summaries, and the transmission of summaries to remote sites. The Agency concludes that updating the OSHA Form 300 or its equivalent for a period of five years will provide a sufficient amount of accurate information for recordkeeping purposes. OSHA is persuaded that updating the year-end summary would provide little benefit as long as the information from which the summaries are derived (the OSHA Form 300) is updated for a full five-year period.

Very few comments were received on OSHA's proposed position not to require the updating of the 301 form. All of the comments received supported OSHA's proposed approach (see, e.g., Exs. 15: 260, 262, 265, 401). OSHA does not believe that updating the OSHA Form 301 will enhance the information available to employers, employees, and others sufficiently to warrant including such a requirement in the final rule. However, the final rule makes it clear that employers may, if they choose, update either the Summary or the Form 301.

Section 1904.34 Change in Business Ownership

Section 1904.34 of the final rule addresses the situation that arises when a particular employer ceases operations at an establishment during a calendar year, and the establishment is then

operated by a new employer for the remainder of the year. The phrase “change of ownership,” for the purposes of this section, is relevant only to the transfer of the responsibility to make and retain OSHA-required injury and illness records. In other words, if one employer, as defined by the OSH Act, transfers ownership of an establishment to a different employer, the new entity becomes responsible for retaining the previous employer's past OSHA-required records and for creating all new records required by this rule.

The final rule requires the previous owner to transfer these records to the new owner, and it limits the recording and recordkeeping responsibilities of the previous employer only to the period of the prior owner. Specifically, section 1904.34 provides that if the business changes ownership, each employer is responsible for recording and reporting work-related injuries and illnesses only for that period of the year during which each employer owned the establishment. The selling employer is required to transfer his or her Part 1904 records to the new owner, and the new owner must save all records of the establishment kept by the prior owner. However, the new owner is not required to update or correct the records of the prior owner, even if new information about old cases becomes available.

The former OSHA injury and illness recording and reporting rule also required both the selling and buying employers to record and report data for the portion of the year for which they owned the establishment. Although the former rule required the purchasing employer to preserve the records of the prior employer, it did not require the prior employer to transfer the OSHA injury and illness records to the new employer. Section 1904.11 of the former rule stated:

Where an establishment has changed ownership, the employer shall be responsible for maintaining records and filing reports only for that period of the year during which he owned such establishment. However, in the case of any change in ownership, the employer shall preserve those records, if any, of the prior ownership which are required to be kept under this part. These records shall be retained at each establishment to which they relate, for the period, or remainder thereof, required under § 1904.6.

The section of OSHA's proposed rule addressing “change of ownership” mirrored the former rule with only slight language changes, as follows:

Where an establishment has changed ownership, each employer shall be responsible for recording and reporting occupational injuries and illnesses only for that period of the year during which he or

she owned such establishment, but the new owner shall retain all records of the establishment kept by the prior owner, as required by § 1904.9(a) of this Part.

Some commenters felt that this proposed section suggested that new owners could be held responsible for obtaining OSHA injury and illness records, but that the former owners were not required to provide them (see, e.g., Exs. 15: 119 298, 323, 356, 397, 323). This interpretation, which would clearly place the new owner in an untenable position, was not accurate. Consequently, to avoid confusion in the future, the final rule requires former owners to transfer their Part 1904 records to the new owner. This requirement ensures that the continuity of the records is maintained when a business changes hands.

Sections 1904.35 Employee Involvement, and 1904.36, Prohibition Against Discrimination

One of the goals of the final rule is to enhance employee involvement in the recordkeeping process. OSHA believes that employee involvement is essential to the success of all aspects of an employer's safety and health program. This is especially true in the area of recordkeeping, because free and frank reporting by employees is the cornerstone of the system. If employees fail to report their injuries and illnesses, the “picture” of the workplace that the employer's OSHA forms 300 and 301 reveal will be inaccurate and misleading. This means, in turn, that employers and employees will not have the information they need to improve safety and health in the workplace.

Section 1904.35 of the final rule therefore establishes an affirmative requirement for employers to involve their employees and employee representatives in the recordkeeping process. The employer must inform each employee of how to report an injury or illness, and must provide limited access to the injury and illness records for employees and their representatives. Section 1904.36 of the final rule makes clear that § 11(c) of the Act prohibits employers from discriminating against employees for reporting work-related injuries and illnesses. Section 1904.36 does not create a new obligation on employers. Instead, it clarifies that the OSH Act's anti-discrimination protection applies to employees who seek to participate in the recordkeeping process.³

³ The relevant language of Section 11(c) that “No person shall discharge or in any manner discriminate against any employee * * * because of the exercise by such employee on behalf of himself or others of any rights afforded by this Act.”

Under the employee involvement provisions of the final rule, employers are required to let employees know how and when to report work-related injuries and illnesses. This means that the employer must establish a procedure for the reporting of work-related injuries and illnesses and train its employees to use that procedure. The rule does not specify how the employer must accomplish these objectives. The size of the workforce, employees' language proficiency and literacy levels, the workplace culture, and other factors will determine what will be effective for any particular workplace.

Employee involvement also requires that employees and their representatives have access to the establishment's injury and illness records. Employee involvement is further enhanced by other parts of the final rule, such as the extended posting period provided in section 1904.32 and the access statements on the new 300 and 301 forms.

These requirements are a direct outgrowth of the issues framed by OSHA in the 1996 proposal. In that **Federal Register** notice, OSHA proposed an employee access provision, § 1904.11(b), and discussed the issue at length in the preamble (61 FR 4038, 4047, and 4048). OSHA did not propose a specific provision for employee involvement in the reporting process, but raised the issue for discussion in the preamble (61 FR 4047-48) (*see* Issue 7. Improving employee involvement). The proposed rule did contain a reference to section 11(c) of the OSH Act and its applicability to retaliatory discrimination by employers against employees who report injuries or illnesses (61 FR 4062).

Specifically, OSHA noted in the NPRM that the Keystone Dialogue report (Ex. 5) advocated greater employee awareness and involvement in the recordkeeping process to improve the process and enhance safety and health efforts in general. There was agreement among members of the Dialogue group that, for a number of reasons, among them lack of knowledge, fear of reprisal, and apathy, "employees often do not seek access to injury/illness logs (to a sufficient extent) * * * [and] that overall workplace safety and health would benefit if the information in the logs were more widely known. * * *". In this regard, the group made several recommendations to modify the recordkeeping process and to involve employees in accident prevention efforts:

- OSHA should require employers to notify employees individually of log entries for each recordable case and

their right to access the records, either by providing them with a copy of the 101 form or the log, by having the employee initial or otherwise acknowledge the log entry, or by other means negotiated with a designated employee representative;

- Employers should inform employees of an affirmative duty to bring cases to the employer's attention;
- OSHA should add statements to the OSHA recordkeeping forms 101 and 200 that inform employees of their right to access the 200 form;
- OSHA should extend the posting period for the 200 form from one month to 12 months;
- Employers should share data with employees and members of safety committees;
- Employers should include more employees in accident investigations and analyses; and
- Detailed survey data systems should be developed so those employees could assist employers in evaluating accident and exposure risks associated with their work processes.

OSHA also noted that the General Accounting Office (GAO) report (Ex. 3) identified employee lack of knowledge and understanding of the recordkeeping system as one cause of the underreporting of occupational injuries and illnesses. Based on these and other reports and OSHA's compliance experience, OSHA requested comment in the proposal on (1) whether employers should notify employees that their injuries or illnesses have been entered into the records, (2) if so, how employers could meet such a requirement and the degree of flexibility OSHA should give employers, (3) any other ideas for improving employee involvement in the recordkeeping system, and (4) the costs and benefits of alternate proposals.

These issues drew considerable comment during the rulemaking. With few exceptions (*see, e.g.,* Exs. 15: 13, 78, 201, 389, 406), commenters generally supported increasing employee awareness and involvement in the recordkeeping process in some form (*see, e.g.,* Exs. 15: 26, 85, 87, 154, 170, 199, 234, 310, 341, 357, 378, 414, 415, 418, 426). For example, some commenters supported increasing employee awareness by requiring year-round posting of the OSHA 300 Log (*see, e.g.,* Exs. 15: 154, 170, 199, 415, 426), adding an employee accessibility statement to the OSHA 300 Log (Ex. 15: 418), and requiring employee training on recordkeeping issues and procedures (Ex. 15: 418). A number of commenters also discussed their own efforts to involve employees in various

recordkeeping activities, such as in filling out accident forms (*see, e.g.,* Exs. 15: 23, 87, 225), assisting in accident investigations (*see, e.g.,* Exs. 15: 170, 357, 425), and reviewing accident data (*see, e.g.,* Exs. 15: 260, 262, 265, 310, 357, 401, 414).

However, most employers, including many who supported various methods to increase employee awareness and involvement in the process, opposed a provision requiring employers to notify individual employees that their injuries have been recorded on the Log because, in their views, such a requirement would not be likely to achieve OSHA's stated objective and would be too burdensome and costly for employers (*see, e.g.,* Exs. 15: 9, 49, 60, 76, 82, 85, 95, 109, 123, 145, 154, 170, 172, 199, 204, 218, 225, 262, 281, 283, 288, 324, 341, 357, 374, 393, 406, 426). Representative of these comments were those of AT&T and Lucent Technologies, which pointed out that workers are currently required to be notified about the status of job-related incidents by workers' compensation regulations and company benefit programs and that separate notification of an OSHA 300 Log entry would therefore be confusing and redundant (Exs. 15: 272 and 15: 303).

On the other hand, individual notification of employees was supported by commenters from the unions and professional organizations, as well as by some employers (*see, e.g.,* Exs. 15: 156, 181, 233, 247, 310, 350, 369, 414). For example, the American Association of Occupational Health Nurses (Ex. 15: 181) supported notification "[a]s a means of improving employee cooperation and helping employees recognize their role in working safely and promoting a safe workplace." Those supporting notification suggested that reasonable means of providing such notification would be direct mail, including a notice in a pay envelope, or e-mailing a notice and/or the OSHA 301 form to affected employees (*see, e.g.,* Exs. 15: 310, 350).

The National Safety Council's comment (Ex. 15: 359) typifies the views of these commenters:

[w]e believe that employee involvement in occupational safety and health issues is highly desirable and that notification is one aspect of employee involvement. * * * If OSHA were to require notification, then OSHA should require each employer to create and comply with its own written notification policy—perhaps subject to some limitation such as notification within 7-14 days of entry on the Log. The OSHA compliance officer can verify compliance with the company's policy on a test basis during an inspection.

Other commenters (see, e.g., Exs. 15: 234, 283, 348, 426) agreed that the final rule should not specify how employee notification should be accomplished. For example, E. I. du Pont de Nemours Corporation (Ex. 15: 348) stated:

[l]egislating how people communicate is confining. Many companies do a fine job of notifying employees about injuries, investigation findings, hazard reduction, and ways to contribute to a safer workplace. Mandating a particular method would be counterproductive to those organizations already doing a good job. * * * We suggest that unless full implications of involving employees in the process are clearly understood (and are not prohibited by any other federal agency) no guideline should be written—but perhaps suggestions of ways successful companies have worked with their employees to improve safety performance could be provided and would be useful.

One participant suggested a policy of having the injured employee view the Log to verify its accuracy, noting that “[t]his procedure * * * does not appear to place additional costs or undue burden on the employer” (Ex. 15: 163). Another recommended a “face-to-face advisory” after an investigation of the accident had been completed (Ex. 15: 414). The American Textile Manufacturers Institute (Ex. 15: 156) suggested more proactive approaches:

[o]ther methods for improving employee involvement in the injury and illness recordkeeping system include giving employees accident causation and prevention information from the records. In addition, information about departments, accident types, injury types, hazards and contributing factors, etc., could and should be shared for the benefit of employer and employees.

The AFL-CIO, United Auto Workers (UAW), Services Employees International Union (SEIU), and MassCOSH addressed the reporting disincentive that occurs when employees are threatened, disciplined, or discriminated against for reporting injuries or illnesses (Exs. 58X, 15: 79, 418, 438). MassCOSH recounted how health care workers were disciplined for reporting multiple needle stick injuries, and the United Auto Workers noted that some injury victims were subject to drug testing (Ex. 15: 438). The unions recommended that discriminatory treatment of employees who report injuries should be presumed to be a violation of section 11(c), the anti-discrimination provision of the OSH Act (see, e.g., Exs. 48, 58X, 15: 379, 418, 438). Specifically, the UAW (Ex. 15: 438) recommended that the following regulatory text be added to the final rule:

[r]eporting * * * an injury or illness to management is an activity in support of the

purposes of the Act. Since an injury report may trigger an employer's responsibility to abate a hazard, such report is an exercise of an employee's right under the Act and therefore protected activity under Section 11(c) of the Act. Adverse action by an employer following such a report shall be presumed to be discrimination. Examples of adverse action are verbal warnings, disparate treatment, additional training provided only to injury victims, disciplinary action of any kind, or drug testing. Suffering an injury or illness by itself shall not be considered probable cause to trigger a drug test. An employer may rebut the presumption of discrimination by showing substantial evidence that injured employees receive consistent treatment to those who have not suffered injuries. Granting of prizes or compensation to employees or groups of employees who do not report injuries is discrimination against those employees who do report injuries. Therefore, such programs are violations of Section 11(c) of the Act.

The AFL-CIO (Ex. 15: 4218) supported this language and, along with the Union of Needletrades, Industrial and Textile Employees (UNITE) (Ex. 15: 380), also recommended that the rule include a prohibition against retaliation or discrimination that would be enforced in the same manner as other violations of the recordkeeping rule (Ex. 15: 418). The AFL-CIO (Ex. 15: 418) also requested that OSHA include in the final rule:

[a]n affirmative obligation on employers to inform employees of their right to report injuries or illnesses without fear of reprisal and to gain access to the Log 300 and to the Form 301 with certain limitations. At a minimum, the Log 300 should contain a statement, which informs employees of their rights and protections afforded under the rule. We recommend the following language be added to the log: ‘Employees have a right to report work-related injuries and illnesses to their employer and to gain access to the Log 300 and Form 301.’

OSHA has concluded that the rulemaking record overwhelmingly demonstrates that employee awareness and involvement is a crucial part of an effective recordkeeping program, as well as an overall safety and health program. There was little disagreement over this point among participants in the rulemaking, whether they represented management, labor, government or professional associations (see, e.g., Exs. 15: 26, 85, 87, 154, 170, 199, 234, 310, 341, 357, 378, 414, 415, 426). There was also no disagreement with the unions' contention that employees should not be retaliated against for reporting work-related injuries and illnesses and for exercising their right of access to the Log and Incident Report forms. The prominent employee involvement issues in the rulemaking were thus not whether employee involvement should

be strengthened but to what extent and in what ways employees should be brought into the process.

In response to this support in the record, OSHA has strengthened the final rule to promote better injury and illness information by increasing employees' knowledge of their employers' recordkeeping program and by removing barriers that may exist to the reporting of work-related injuries and illnesses. To achieve this goal, the final rule establishes a simple two-part process for each employer who is required to keep records, as follows:

- Set up a way for employees to report work-related injuries and illnesses promptly; and
- Inform each employee of how to report work-related injuries and illnesses.

OSHA agrees with commenters that employees must know and understand that they have an affirmative obligation to report injuries and illnesses. Additionally, OSHA believes that many employers already take these actions as a common sense approach to discovering workplace problems, and that the rule will thus, to a large extent, be codifying current industry practice, rather than breaking new ground.

OSHA is convinced that a performance requirement, rather than specific requirements, will achieve this objective effectively, while still giving employers the flexibility they need to tailor their programs to the needs of their workplaces (see, e.g., Exs. 15: 234, 283, 348, 359, 426). The Agency finds that employee awareness and participation in the recordkeeping process is best achieved by such provisions of the final rule as the requirement to extend the posting period for the OSHA 300 summary, the addition of accessibility statements on the OSHA Summary, and requirements designed to facilitate employee access to records.

Many of the specific suggestions made by commenters have not been adopted in the final rule in favor of the more performance-based approach to employee involvement supported by so many commenters. For example, OSHA has decided not to require employers to devise a method of notifying individual employees when a case involving them has been entered on the OSHA 300 Log. An employee notification requirement would be very burdensome and costly, and the potential advantages of an employee notification system have not been shown in the record for this rule. Thus, OSHA is not sure that employee notification would improve the quality of the records enough to justify the

added burdens. Additionally, employees and their representatives have a right to access the records under the final rule, if they wish to review the employer's recording of a given occupational injury or illness case. OSHA believes that the improved recordkeeping that will result from the changes being made to the final rule, the enhanced employee involvement reflected in many of the rule's provisions, and the prohibition against discrimination will all work in concert to achieve the goal envisioned by those commenters who urged OSHA to require employee notification: more and better reporting and recording.

Several of the other suggestions made by participants—such as including employees in accident investigations and involving employees in program evaluation—are beyond the scope of the Part 1904 regulation, which simply requires employers to record and report occupational deaths, injuries and illnesses. OSHA encourages employers and employees to work together to determine how best to communicate the information that workers need in the context of each specific workplace. Moreover, OSHA encourages employers to involve their workers in activities such as accident investigations and the analysis of accident, injury and illness data, as suggested by some commenters, but believes that requiring these activities is beyond the scope of this rule.

OSHA has also included in the final rule, in section 1904.36, a statement that section 11(c) of the OSH Act protects workers from employer retaliation for filing a complaint, reporting an injury or illness, seeking access to records to which they are entitled, or otherwise exercising their rights under the rule. This section of the rule does not impose any new obligations on employers or create new rights for employees that did not previously exist. In view of the evidence that retaliation against employees for reporting injuries is not uncommon and may be "growing" (see, e.g., Ex. 58X, p. 214), this section is intended to serve the informational needs of employees who might not otherwise be aware of their rights and to remind employers of their obligation not to discriminate. OSHA concurs with the International Chemical Workers Union, which, while discussing the issue of whether personal identifiers should be used on the Log, stated (Ex. 15: 415), "We have never heard of [personal identifiers] being an issue for our members, except when management used the reports as an excuse to discipline 'unsafe' workers. The addition of language notifying workers

of their rights to 11(c) protection * * * should help alleviate any such concerns."

Employee access to OSHA injury and illness records

The Part 1904 final rule continues OSHA's long-standing policy of allowing employees and their representatives access to the occupational injury and illness information kept by their employers, with some limitations. However, the final rule includes several changes to improve employees' access to the information, while at the same time implementing several measures to protect the privacy interests of injured and ill employees. Section 1904.35 requires an employer covered by the Part 1904 regulation to provide limited access to the OSHA recordkeeping forms to current and former employees, as well as to two types of employee representatives. The first is a personal representative of an employee or former employee, who is a person that the employee or former employee designates, in writing, as his or her personal representative, or is the legal representative of a deceased or legally incapacitated employee or former employee. The second is an authorized employee representative, which is defined as an authorized collective bargaining agent of one or more employees working at the employer's establishment.

Section 1904.35 accords employees and their representatives three separate access rights. First, it gives any employee, former employee, personal representative, or authorized employee representative the right to a copy of the current OSHA 300 Log, and to any stored OSHA 300 Log(s), for any establishment in which the employee or former employee has worked. The employer must provide one free copy of the OSHA 300 Log(s) by the end of the next business day. The employee, former employee, personal representative or authorized employee representative is not entitled to see, or to obtain a copy of, the confidential list of names and case numbers for privacy cases. Second, any employee, former employee, or personal representative is entitled to one free copy of the OSHA 301 Incident Report describing an injury or illness to that employee by the end of the next business day. Finally, an authorized employee representative is entitled to copies of the right-hand portion of all OSHA 301 forms for the establishment(s) where the agent represents one or more employees under a collective bargaining agreement. The right-hand portion of the 301 form

contains the heading "Tell us about the case," and elicits information about how the injury occurred, including the employee's actions just prior to the incident, the materials and tools involved, and how the incident occurred, but does not contain the employee's name. No information other than that on the right-hand portion of the form may be disclosed to an authorized employee representative. The employer must provide the authorized employee representative with one free copy of all the 301 forms for the establishment within 7 calendar days.

Employee privacy is protected in the final rule in paragraphs 1904.29(b)(7) to (10). Paragraph 1904.29(b)(7) requires the employer to enter the words "privacy case" on the OSHA 300 Log, in lieu of the employee's name, for recordable privacy concern cases involving the following types of injuries and illnesses: (i) an injury from a needle or sharp object contaminated by another person's blood or other potentially infectious material; (ii) an injury or illness to an intimate body part or to the reproductive system; (iii) an injury or illness resulting from a sexual assault; (iv) a mental illness; (v) an illness involving HIV, hepatitis; or tuberculosis, or (vi) any other illness, if the employee independently and voluntarily requests that his or her name not be entered on the log. Musculoskeletal disorders (MSDs) are not considered privacy concern cases, and thus employers are required to enter the names of employees experiencing these disorders on the log. The employer must keep a separate, confidential list of the case numbers and employee names for privacy cases.

The employer may take additional action in privacy concern cases if warranted. Paragraph 1904.29(b)(9) allows the employer to use discretion in describing the nature of the injury or illness in a privacy concern case, if the employer has a reasonable basis to believe that the injured or ill employee may be identified from the records even though the employee's name has been removed. Only the six types of injuries and illnesses listed in Paragraph 1904.29(b)(7) may be considered privacy concern cases, and thus the additional protection offered by paragraph 1904.29(b)(9) applies only to such cases.

Paragraph 1904.29(b)(10) protects employee privacy if the employer decides voluntarily to disclose the OSHA 300 and 301 forms to persons other than those who have a mandatory right of access under the final rule. The paragraph requires the employer to remove or hide employees' names or

other personally identifying information before disclosing the forms to persons other than government representatives, employees, former employees or authorized representatives, as required by paragraphs 1904.40 and 1904.35, except in three cases. The employer may disclose the forms, complete with personally identifying information, (2) only: (i) to an auditor or consultant hired by the employer to evaluate the safety and health program; (ii) to the extent necessary for processing a claim for workers' compensation or other insurance benefits; or (iii) to a public health authority or law enforcement agency for uses and disclosures for which consent, an authorization, or opportunity to agree or object is not required under section 164.512 of the final rule on Standards for Privacy of Individually Identifiable Health Information, 45 CFR 164.512.

The former rule. The access provisions of the former recordkeeping regulation required employers to provide government representatives, as well as employees, former employees, and their representatives, with access to the OSHA Logs and year-end summaries, including the names of all injured and ill employees. The former regulation permitted only government representatives to have access to the supplemental incident reports (the former Form 101). *Id.* Employees, former employees and their representatives had no right to inspect and copy the incident reports, although employers were permitted to disclose these forms if doing so was included in the terms of a collective bargaining agreement. *Id.*

The proposed rule. The proposed rule would have required employers to provide government representatives, and employees, former employees, and their representatives, with access to the unredacted OSHA Logs and summaries (61 FR 4061). The proposal would have expanded the scope of the former rule's access provisions by requiring employers to make available the incident reports (former OSHA Form 101, renumbered Form 301 in the final rule) to employees, former employees, and their designated representatives. *Id.* At the same time, OSHA did not intend to provide access to the general public. The proposed standard stated: "OSHA asks for input on possible methodologies for providing easy access to workers while restricting access to the general public" (61 FR 4048).

The access provisions of the proposed rule attracted considerable comment. Many industry representatives argued that disclosure of information contained in the injury and illness records to

employees, former employees and their representatives would violate an injured or ill employee's right, under the Constitution and several statutes, to privacy. On the other hand, a number of commenters emphasized the importance of the information contained in the records to employees and unions in their voluntary efforts to uncover and eliminate workplace safety and health hazards. The following paragraphs discuss privacy and access issues, and their relationship to the recordkeeping rule.

The Privacy Interest of the Injured or Ill Employee

Whether, and to what extent, the U.S. Constitution grants individuals a right of privacy in personal information has not been firmly established. In *Whalen v. Roe*, 429 U.S. 589 (1977), the Supreme Court considered whether a New York law creating a central computer record of the names and addresses of persons taking certain dangerous but lawful drugs violated the constitutional privacy interest of those taking the drugs. The Court rejected the claim, primarily because the state statute required that government employees with access keep the information confidential and there was no basis to assume that the requirement would be violated. 429 U.S. at 601, 605–606. Although the decision does not say whether the Constitution affords protection against disclosure of personal information, some language suggests that it does, at least in some circumstances. The Court stated:

The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of decisions. 429 U.S. at 598, 599.

Recognizing that in some circumstances th[e] duty [to avoid unwarranted disclosure of personal matters] arguably has its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy. 429 U.S. at 605

A subsequent case, *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), lends further support to the existence of a constitutional right of privacy in personal information. At issue in *Nixon* was a statute that required the former president to turn over both public and private papers to an archivist who would review them and return any personal materials. The Court appeared to acknowledge that Nixon had a Constitutionally protected privacy right in personal information.

433 U.S. at 457. It upheld the statute because of the strong public interest in preserving the documents and because the statute's procedural safeguards made it unlikely that truly private materials would be disclosed to the public.

A number of federal circuit courts of appeals, building on *Whalen* and *Nixon*, have held that individuals possess a qualified constitutional right to confidentiality of personal information, including medical information. See, e.g., *Paul v. Verniero*, 170 F.3d 396, 402 (3d Cir. 1999); *Norman-Bloodsay v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1269 (9th Cir. 1998); *F.E.R. v. Valdez*, 58 F.3d 1530, 1535 (10th Cir. 1995); *John Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994); *Fadjo v. Coon*, 633 F.2d 1172, 1175 (5th Cir. 1981). See also *Anderson v. Romero*, 72 F.3d 518, 522 (7th Cir. 1995) (noting holdings of federal circuits, including seventh circuit, recognizing qualified constitutional right to confidentiality in medical records, but finding it "not clearly established" that prison inmate enjoyed such right in 1992).

Of the remaining circuits that have addressed the issue, only the Sixth has squarely rejected a general constitutional right to nondisclosure of personal information. E.g., *J.P. v. DeSanti*, 653 F.2d 1080, 1089 (6th Cir. 1981). Two circuits have expressed skepticism as to the existence of such a right. See *American Federation of Government Employees, AFL-CIO v. Department of Housing and Urban Development*, 118 F.3d 786, 788 (D.C. Cir. 1997) (expressing "grave doubt" whether the Constitution protects against disclosure of personal information); *Borucki v. Ryan*, 827 F.2d 836, 845–846 (1st Cir. 1987) (noting lack of concrete guidance by Supreme Court and disagreement among circuits on constitutional right of confidentiality). See also *Ferguson v. City of Charleston, S.C.*, 186 F.3d 469, 483 (4th Cir. 1999) (declining to decide whether individuals possess a general constitutional right to privacy, noting circuit conflict).

Where the right to privacy is recognized, protection extends to information that the individual would reasonably expect to remain confidential. *Fraternal Order of Police Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 112 (3d Cir. 1987); *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986). "The more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny." *Fraternal Order of Police*, 812 F.2d at 105. Thus, information about the state of a person's health, including his or her medical

treatment, prescription drug use, HIV status and related matters, is entitled to privacy protection. See *Paul v. Verniero*, 170 F.3d at 401–402 (collecting cases). See also *Doe v. City of New York*, 15 F.3d at 267 (“[T]here are few matters that are quite so personal as the status of one’s health, and few matters the dissemination of which one would prefer to maintain greater control over.”)

The right to privacy is not limited only to medical records. Other types of records containing medical information are also covered. See, e.g., *Whalen*, (computer tapes containing prescription drug information); *Fraternal Order of Police*, 812 F.2d at 112 (police questionnaire eliciting information about employee’s physical and mental condition); *Doe v. SEPTA*, 72 F.3d 1133 (3d Cir. 1995) (utilization report listing prescription drugs dispensed to employees under employer health plan). Moreover, personal financial data and other types of private information may be subject to privacy protection in certain cases. See *Nixon v. Administrator of General Services*, 433 U.S. 425, 455 (1977) (personal matters, including personal finances, reflected in presidential papers); *Paul v. Verniero*, 170 F.3d at 404 (home address of sex offender subject to disclosure under “Megan’s Law”); *Fadjo v. Coon*, 633 F.2d at 1175 (private details contained in subpoenaed testimony).

A finding that information is entitled to privacy protection is only the first step in determining whether a disclosure requirement is valid. A balancing test must be applied, which weighs the individual’s interest in confidentiality against the public interest in disclosure. *Fraternal Order of Police*, 812 F.2d at 113. In evaluating the government’s interest, at least two factors must be considered; the purpose to be served by disclosure of personal information to individuals authorized by law to receive it, and the adverse effect of unauthorized public disclosure of such information. *Id.* at 117, 118. *Accord*, *Barry v. City of New York*, 712 F.2d 1554, 1561–5162 (2d Cir. 1983). Thus, the fact that disclosure of highly personal information to parties who have need for it serves an important public interest is not sufficient justification for a disclosure requirement in the absence of adequate safeguards against broader public access. *Fraternal Order of Police*, 812 F.2d at 118 (“It would be incompatible with the concept of privacy to permit protected information and material to be publicly disclosed. The fact that protected information must be disclosed to a party who has need for it * * * does not strip the information of its

protection against disclosure to those who have no similar need.”)

Balancing the Interests of Privacy and Access

OSHA historically has recognized that the Log and Incident Report (Forms 300 and 301, respectively) may contain information of a sufficiently intimate and personal nature that a reasonable person would wish it to remain confidential. In its 1978 records access regulation (29 CFR 1910.1020), OSHA addressed the privacy implications of its decision to grant employee access to the Log. The agency noted that while Log entries are intended to be brief, they may contain medical information, including diagnoses of specific illnesses, and that disclosure to other employees, former employees or their representatives raised a sensitive privacy issue. 43 FR 31327 (1978). However, OSHA concluded that disclosure of the Log to current and former employees and their representatives benefits these employees generally by increasing their awareness and understanding of the health and safety hazards to which they are, or have been, exposed. OSHA found that this knowledge “will help employees to protect themselves from future occurrences,” and that “[i]n such cases, the right of privacy must be tempered by the obvious exigencies of informing employees about the effects of workplace hazards.” *Id.* at 31327, 31328.

The proposed rule would have expanded the right of access of employees, former employees, and their designated representatives beyond the Log to include the Incident Report (Form 301) (61 FR 4061). OSHA discussed the potentially conflicting interests involved, and explained its preliminary balancing of these interests, as follows:

OSHA’s historical practice of allowing employee access to all of the information on the log permits employees and their designated representatives to be totally informed about the employer’s recordkeeping practices, and the occupational injuries and illnesses recorded in the workplace. However, this total accessibility may infringe on an individual employee’s privacy interest. At the same time, the need to access individual’s Incident Records to adequately evaluate the safety and health environment of the establishment has been expressed.

These two interests—the privacy interests of the individual employee versus the interest in access to health and safety information concerning one’s own workplace—are potentially at odds with one another. For injury and illness recordkeeping purposes, OSHA has taken the position that an employee’s interest in access to health and

safety information on the OSHA forms concerning one’s own workplace carries greater weight than an individual’s right to privacy. More complete access to the detailed injury and illness records has the potential for increasing employee involvement in workplace safety and health programs and therefore has the potential for improving working conditions. Analysis of injury and illness data provides a wealth of information for injury and illness prevention programs. Analysis by workers, in addition to analyses by the employer, lead to the potential of developing methods to diminish workplace hazards through additional or different perspectives (61 FR 4048).

The proposal asked for comment on alternatives that would preserve broad access rights while protecting fundamental privacy interests, including requiring omission of personal identifying information for certain specific injury and illness cases recorded on the Log, and restricting non-government access to the Incident Reports to that portion of the Form 301 that does not contain personal information. *Ibid.*

OSHA continues to believe that granting employees a broad right of access to injury and illness records serves important public interests. There is persuasive evidence that access by employees and their representatives to the Log and the Incident Report serves as a useful check on the accuracy of the employer’s recordkeeping and promotes greater employee involvement in prevention programs that contribute to safer, more healthful workplaces. For example, the Building and Construction Trades Department, AFL–CIO stated that:

In the main, the name of the employee is critically important to understanding and verifying recordable cases. It is often necessary to speak with the employee to explore the conditions that lead to the injury or illness, and this is impossible without employee names. In addition, employees and unions play an important role in assuring the proper administration of the recordkeeping rule, and they cannot audit an employer’s recordkeeping performance without having access to employee names, which are necessary to verify that all properly recordable cases are actually on the log, and to verify that recorded cases are properly classified. (Ex. 15: 394, p. 35)

Similarly, the American Federation of State, County and Municipal Employees, AFL–CIO stated that “[w]hen employees and their representatives have complete access to the detailed injury and illness records, employee involvement in workplace safety and health programs increases. Worker representatives use the data on the forms to assist in the identification of specific hazards, as well as other

factors affecting workplace safety” (Ex. 15: 362, p. 7).

The United Auto Workers (Ex. 15: 438) argued that the OSHA 301 incident reports are as valuable as the log is in aiding voluntary enforcement efforts. The UAW stated:

The OSHA 101 (proposed 301) form is an available data source on circumstances of an injury or illness. The collected data contains information for prevention, and also indicates the effectiveness of management’s health and safety program. The information on the OSHA [301] relevant to hazard identification and control should be made available to employee representatives on the same basis as they are made available to OSHA compliance officers. Personal data on treatment details, physician’s name, personal information on employee can be recorded on the “other” side of the form and blanked out.

The Laborers’ Health and Safety Fund (Ex. 15: 310) also emphasized the practical value of the information contained in the Form 301:

We wholeheartedly support the specific language in the proposed rule allowing designated representatives access to the OSHA 300 and 301 forms. In a project we administered to determine the major causes of serious injuries and illnesses in road construction under a Federal Highway Administration grant, several employers would not allow access to even information from the injured person’s 101 workers compensation equivalent form, because the form contained other information such as the employee’s age and salary. The event information contained in the 301 form is critical in determining the hazards and possible preventive measures.

Other commenters also supported the proposal’s approach of broadening employee access to records (see, e.g. Exs. 24; 36; 15: 350, 380, 418).

Recognition of the important purpose served by granting access to injury and illness records does not end the analysis. The public interest that is served when information contained in the records is used to promote safety and health must be balanced against the possible harm that would result from the misuse of private information. There are two ways in which harm could occur. First, the information could be used for unauthorized purposes, such as to harass or embarrass employees. Second, employees and their representatives with access to records could, deliberately or inadvertently, disclose private information to others who have no need for it.

Several commenters indicated concern about the unauthorized disclosure of private material contained in the injury and illness records. The joint comments filed by the National Broiler Council and the National Turkey

Council express the view shared by many employers:

There is universal support among employees and employers for the communication of information about workplace illnesses and injuries. It also seems apparent that there is universal opposition to the communication of personal information about individuals involved in those incidents. There are many circumstances in the workplace where employees have no desire for fellow employees to know the extent, description, or type of injury or illness they have incurred. The reasons for an employee’s concern about his or her personal privacy may vary but almost always find their foundation in very strong and personal emotions. One example that clearly illustrates this point would be the employee who has experienced an exposure incident under the bloodborne pathogens standard. Most people would not want it to be known that they may have been exposed to HIV, let alone if they tested positive for HIV. * * * In addition to the concerns about how this information could be used by other individuals, employers also have very serious concerns about the misuse of this information by individuals or organizations for purposes in no way related to the issue of workplace health and safety (Ex. 15: 193, pp. 4–5).

A number of commenters argued that granting access to the Log and Incident Report to employees, former employees and their representatives will deter employees from reporting their injuries and illnesses, especially in cases involving exposure to bloodborne pathogens and injuries and illnesses involving reproductive organs (see, e.g., Exs. 15–185, 15–193, 15–238, 15–239, 15–305). A representative of the Middlesex Convalescent Center wrote:

[R]equiring employers to disclose personal identifiers (which include name and occupation) will result in fewer people reporting injuries and illnesses because employees will feel shame or embarrassment for being involved in an accident. * * * Additionally, employees who do not want co-workers to know their physical handicaps and other personal business will choose not to report accidents, including those in which the employee is not at fault (Ex. 15: 23 (emphasis in original)).

There exist at present no mechanisms to protect against unwarranted disclosure of private information contained in OSHA records. While Agency policy is that employees and their representatives with access to records should treat the information contained therein as confidential except as necessary to further the purposes of the Act, the Secretary lacks statutory authority to enforce such a policy against employees and representatives (e.g. 29 U.S.C. §§ 658, 659) (Act’s enforcement mechanisms directed solely at employers). Nor are there

present here other types of safeguards that have been held to be adequate to protect against misuse of private material. See *Whalen*, 589 U.S. at 605 (“The right to collect and use [private] data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures.”) See also *Fraternal Order of Police*, 812 F.2d at 118 (appropriate safeguards could include statutory sanctions for unauthorized disclosures, security provisions to prevent mishandling of files, coupled with express regulatory prohibition on disclosure, or procedures such as storage of private material in locked cabinets with automatic removal and destruction within six months); *In re Search Warrant (Sealed)*, 810 F.2d 67, 72 (3d Cir. 1987) (district court order that medical records and related information be kept confidential except as disclosure was reasonably required in connection with criminal investigation).

The degree of harm that could result from unauthorized use or disclosure of information on the Log and Incident Report varies depending upon the nature and sensitivity of the injury or illness involved. An employee might reasonably have little to fear from disclosure of a garden-variety injury or illness of the kind that one might sustain in everyday life. Cf. *Wilson v. Pennsylvania State Police Department*, 1999 WL 179692 (E.D.Pa) (vision-related information not as intimate as other types of medical information, and less likely to result in harm if disclosed to the public). However, there is a much greater risk that social stigma, harassment and discrimination could result from public knowledge that one has, or may have, AIDS, has been the victim of a sexual assault, or has suffered an injury to a reproductive organ or other intimate body part. See, e.g. *Doe v. SEPTA*, 712 F.2d at 1140 (AIDS); *New Jersey Bell Telephone Co. v. NLRB*, 720 F.2d 789, 790 (3d Cir. 1983) (reasons given by employees for absence or tardiness included colitis, insertion of urethral tubes, vaginal infections, scalded rectal areas, and heart problems).

OSHA has concluded that the disclosure of occupational injury and illness records to employees and their representatives serves important public policy interests. These interests support a requirement for access by employees and their representatives to personally identifiable information for all but a limited number of cases recorded on the Log, and to all information on the right-hand side of the Form 301. However, OSHA also concludes that prior Agency access policies may not have given

adequate consideration to the harm which could result from disclosure of intimate medical information. In the absence of effective safeguards against unwarranted use or disclosure of private information in the injury and illness records, confidentiality must be preserved for particularly sensitive cases. These "privacy concern cases" listed in paragraph 1904.29 (b)(7) of the final rule involve diseases, such as AIDS and hepatitis, other illnesses if the employee voluntarily requests confidentiality, as well as certain types of injuries, the disclosure of which could be particularly damaging or embarrassing to the affected employee. MSDs are not included in privacy concern cases because OSHA's ergonomics rule independently provides for access by employees and their representatives to the names of workers who report work-related MSDs. (See 29 CFR 1910.900(v)(1) and (2).)

The record supports this approach. For example, API recommended that OSHA protect employee confidentiality for cases involving HIV, fertility problems, bloodborne pathogens, seroconversions, and impotence (Ex. 15: 375). OSHA agrees that employee confidentiality should be protected in these and similar cases. Therefore, the final rule requires that the employer withhold the employee's name from the OSHA 300 Log for each "privacy concern case," and maintain a separate confidential list of employee names and case numbers. In all other respects, the final rule ensures full access to the OSHA Log by employees, former employees, personal representatives and authorized employee representatives.

Protections Against Broad Public Access

In the proposal, OSHA noted that the access requirements were intended as a tool for employees and their representatives to affect safety and health conditions at the workplace, not as a mechanism for broad public disclosure of injury and illness information. (61 FR 4048.) A number of commenters suggested that OSHA should include specific language in the final rule protecting employee confidentiality whenever injury and illness data are disclosed for other than safety or health purposes, or to persons other than those who have a legitimate need to know. Dow argued that:

OSHA should allow an employer to develop a system that will protect personal identifiers and other non-safety or health related information. Further, such information should only be available for the specific use by an OSHA inspector who is reviewing an employer's logs during an inspection, medical personnel, the

employer's incident investigation designated officials, and the individual's supervisor. Outside of these individuals, access should be granted only after written authorization from the injured or ill employee has been obtained. This approach would allow those individuals who have a legitimate "need to know" limited access to the information (Ex. 15: 335).

Other commenters suggested requiring that employee names be shielded if the forms are disclosed to third parties (see, e.g., Exs. 15: 374, 375).

OSHA agrees that confidentiality of injury and illness records should be maintained except for those persons with a legitimate need to know the information. This is a logical extension of the agency's position that a balancing test is appropriate in determining the scope of access to be granted employees and their representatives. Under this test, "the fact that protected information must be disclosed to a party who has need for it * * * does not strip the information of its protection against disclosure to those who have no similar need." *Fraternal Order of Police*, 812 F2d at 118.

OSHA has determined that employees, former employees and authorized employee representatives have a need for the information that justifies their access to records, including employee names, for all except privacy concern cases. While the possibility exists that employees and their representatives with access to the records could disclose the information to the general public, OSHA does not believe that this risk is sufficient to justify restrictions on the use of the records by persons granted access under sections 1904.40 and 1904.35. As discussed in the following section, strong policy and legal considerations militate against placing restrictions on employees' and employee representatives' use of the injury and illness information.

There is also a concern that employers may voluntarily grant access to OSHA records to persons outside their organization, who do not need the information for safety and health purposes. To protect employee confidentiality in these circumstances, paragraph 1904.29(b)(10) requires employers generally to remove or shield employee names and other personally identifying information when they disclose the OSHA forms to persons other than government representatives, employees, former employees or authorized employee representatives. Employers remain free to disclose unredacted records for purposes of evaluating a safety and health program or safety and health conditions at the

workplace, processing a claim for workers' compensation or insurance benefits, or carrying out the public health or law enforcement functions described in section 164.512 of the final rule on Standards for Privacy of Individually Identifiable Health Information.

OSHA believes that this provision protects employee privacy to a reasonable degree consistent with the legitimate business needs of employers and sound public policy considerations. The record does not demonstrate that routine access by the general public to personally identifiable injury and illness data is necessary or useful. Indeed, several prominent industry representatives stated that the OSHA log should not be made available to the general public. See Ex. 335 (Dow); Ex. 15-375 (API). Furthermore, employers are always free to seek authorization from employees to disclose their names in particular cases. Thus, employers retain a degree of flexibility to tailor their voluntary disclosure policies to meet exigent circumstances.

Misuse of the Records by Employees and Their Representatives

Several commenters were concerned about inappropriate uses of the records once they are released to employees (see, e.g., Exs. 15: 9, 39, 102, 185, 193, 201, 304, 305, 317, 321, 330, 341, 346, 359, 363, 375, 389, 397, 412, 413, 423, 424, 431). The American Petroleum Institute stated: "API has concerns about potentials for uncontrolled and unscrupulous use of these data for purposes unrelated to safety and health—uses such as for plaintiff-lawyer "fishing expeditions", in union organizing attempts, to create adverse publicity as contracts expire, or to foster other special interests" (Ex. 15: 375). Several commenters stated that information requests could be used as a harassment by unions (see, e.g., Exs. 15: 9, 201, 317, 423, 424), and the Caterpillar Corporation (Ex. 15: 201) related its labor management difficulties during a recent strike (Ex. 15: 201). The American Crystal Sugar Company (Ex. 15 363) expressed concern that "there have been instances where an employee is paid a finder's fee to identify possible cases for personal injury lawyers." A few commenters suggested methods to solve these potential misuse problems, including a requirement for all information requests to be made in writing (see, e.g., Exs. 15: 163, 235, 281, 397). Two commenters suggested requirements for the employee or employee representative to sign a pledge not to misuse the information (Exs. 15: 359, 389). For example, the Waste

Management, Inc. Company suggested that "OSHA should require the individual(s) obtaining a copy of the log or record to certify that the information will be maintained in confidence and will not be released to a third party under any circumstances under penalty of law. OSHA shall also promulgate severe penalties for violation" (Ex. 15: 389).

While there may be instances where employees share the data with third parties who normally would not be allowed to access the data directly, the final rule contains no enforceable restrictions on use by employees or their representatives. Employees and their representatives might reasonably fear that they could be found personally liable for violations of such restrictions. This would have a chilling effect on employees' willingness to use the records for safety and health purposes, since few employees would voluntarily risk such liability. Moreover, despite the concerns of commenters about abuse problems, OSHA has not noted any significant problems of this type in the past. This suggests that, if such problems exist, they are infrequent. In addition, as noted in the privacy discussion above, a prohibition on the use of the data by employees or their representatives is beyond the scope of OSHA's enforcement authority. For these reasons, the employer may not require an employee, former employee or designated employee representative to agree to limit the use of the records as a condition for viewing or obtaining copies of records.

OSHA has added a statement to the Log and Incident Report forms indicating that these records contain information related to employee health and must be used in a manner that protects the confidentiality of employees to the extent possible while the information is used for occupational safety and health purposes. This statement is intended to inform employees and their representatives of the potentially sensitive nature of the information in the OSHA records and to encourage them to maintain employee confidentiality if compatible with the safety and health uses of the information. Encouraging parties with access to the forms to keep the information confidential where possible is reasonable and should not discourage the use of the information for safety and health purposes. OSHA stresses, however, that the statement does not reflect a regulatory requirement limiting the use of records by those with access under sections 1904.35 and 1904.40.

The Records Access Requirement and the ADA

Several commenters alleged that a requirement that individually identifiable injury and illness records be disclosed to employees and union representatives would conflict with the confidentiality provisions of the Americans With Disabilities Act, 42 U.S.C. §§ 12112 (d)(3)(B), (d)(4)(C) (1994 ed. and Supp. III) (ADA) (see, e.g., Exs. 15: 64, 290, 304, 315, 397).

Section 12112(d)(3)(B) of the ADA permits an employer to require a job applicant to submit to a medical examination after an offer of employment has been made but before commencement of employment duties, provided that medical information obtained from the examination is kept in a confidential medical file and not disclosed except as necessary to inform supervisors, first aid and safety personnel, and government officials investigating compliance with the ADA. Section 12112(d)(4)(C) requires that the same confidentiality protection be accorded health information obtained from a voluntary medical examination that is part of an employee health program.

By its terms, the ADA requires confidentiality for information obtained from medical examinations given to prospective employees, and from medical examinations given as part of a voluntary employee health program. The OSHA injury and illness records are not derived from pre-employment or voluntary health programs. The information in the OSHA injury and illness records is similar to that found in workers' compensation forms, and may be obtained by employers by the same process used to record needed information for workers' compensation and insurance purposes. The Equal Employment Opportunity Commission (EEOC) recognizes a partial exception to the ADA's strict confidentiality requirements for medical information regarding an employee's occupational injury or workers' compensation claim. See *EEOC Enforcement Guidance: Workers' Compensation and the ADA*, 5 (September 3, 1996). Therefore, it is not clear that the ADA applies to the OSHA injury and illness records.

Even assuming that the OSHA injury and illness records fall within the literal scope of the ADA's confidentiality provisions, it does not follow that a conflict arises. The ADA states that "nothing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law. * * *" 29 U.S.C. 12201(b). In enacting the ADA, Congress was aware

that other federal standards imposed requirements for testing an employee's health, and for disseminating information about an employee's medical condition or history, determined to be necessary to preserve the health and safety of employees and the public. See H.R. Rep. No. 101-485 pt. 2, 101st Cong., 2d Sess. 74-75 (1990), reprinted in 1990 U.S.C.A.N. 356, 357 (noting, e.g. medical surveillance requirements of standards promulgated under OSH Act and Federal Mine Safety and Health Act, and stating "[t]he Committee does not intend for [the ADA] to override any medical standard or requirement established by Federal * * * law * * * that is job-related and consistent with business necessity"). See also 29 CFR part 1630 App. p. 356. The ADA recognizes the primacy of federal safety and health regulations; therefore such regulations, including mandatory OSHA recordkeeping requirements, pose no conflict with the ADA. Cf. *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555, (1999) ("When Congress enacted the ADA, it recognized that federal safety and health rules would limit application of the ADA as a matter of law.")

The EEOC, the agency responsible for administering the ADA, has recognized both in the implementing regulations at 29 CFR part 1630, and in interpretive guidelines, that the ADA yields to the requirements of other federal safety and health standards. The implementing regulation codified at 29 CFR 1630.15(e) explicitly states that an employer's compliance with another federal law or regulation may be a defense to a charge of violating the the ADA:

(e) Conflict with other Federal laws. It may be a defense to a charge of discrimination under this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this part.

Interpretive guidance provided by the EEOC further underscores this point. The 1992 Technical Assistance Manual on Title I of the ADA states as follows:

4.6 Health and Safety Requirements of Other Federal or State Laws

The ADA recognizes employers' obligations to comply with requirements of other laws that establish health and safety standards. However, the [ADA] gives greater weight to Federal than to state or local law.

1. Federal Laws and Regulations

The ADA does not override health and safety requirements established under other Federal laws. If a standard is required by another Federal law, an employer must

comply with it and does not have to show that the standard is job related and consistent with business necessity (emphasis added).

U.S. Equal Employment Opportunity Commission, *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans With Disabilities Act*, IV-16 (1992) (Technical Assistance Manual). The Technical Assistance Manual also states that, while medical-related information about employees must generally be kept confidential, an exception applies where “[o]ther Federal laws and regulations * * * require disclosure of relevant medical information.”

Assistance Manual at VI-12. See also Assistance Manual at VI-14-15 (actions taken by employers to comply with requirements imposed under the OSH Act are job related and consistent with business necessity). For these reasons, OSHA does not believe that the mandatory employee access provisions of the final recordkeeping rule conflict with the provisions of the ADA.

Times Allowed To Provide Records

In its proposal, OSHA would have required the employer to allow the employee to view the 300 Log and the Form 301 records by the end of the next business day and provide copies within seven calendar days. An employer would have been required to provide access to the 301 forms for all injuries and illnesses “in a reasonable time” (61 FR 4061). Several commenters agreed with OSHA’s proposed times for providing copies of the records to employees and their representatives (see, e.g., Exs. 15: 213, 277, 359). For example, Consolidated Edison (Ex. 15: 213) stated that “[t]he time limits in the proposal are acceptable but [Con Ed] recommends that a time limit of seven days be included at [proposed] paragraph 1904.11(b)(5) [which addressed the copying of 301 forms] rather than the vague “reasonable time” included in the text.”

A number of commenters disagreed with OSHA’s proposed times for providing copies of the records (see, e.g., Exs. 15: 195, 201, 213, 218, 226, 235, 326, 347, 369, 370, 389, 409, 423, 425, 440). These commenters suggested a variety of times, including four hours (Ex. 15: 369), 24 hours (Ex. 15: 425), two workdays (Ex. 15: 226), five working days (Ex. 15: 235), within seven calendar days or one week (Ex. 15: 195, 370), 15 days to match the requirements of the OSHA medical records access rule (Ex. 15: 218, 347, 409, 423), and 21 days (Ex. 15: 389). The International Brotherhood of Teamsters (Ex. 15: 369) suggested that “[e]mployees and their designated representatives be provided

with the same access rule as proposed for governmental officials, RE: obtain copies of logs four hours after the request.”

The Tennessee Valley Authority (TVA) argued that “[a]ll requests for records should be made in writing and the information provided to the authorized requester within five working days. This provides the documentation for who received the information and reduces the burden on the employer” (Ex. 15: 235). Bell Atlantic Network Services, Inc. (Ex. 15: 218) recommended that “OSHA should simplify the very confusing and differing “access” and “copies” schedule to an uniform 15 working days as is the requirement in 29 CFR 1910.20, Access to Employee Exposure and Medical Records.”

In addition, the Caterpillar Company (Ex. 15: 201) recommended that the final rule should not establish time frames at all, stating that “The time limit of providing access by the close of business on the next scheduled workday is unnecessarily restrictive. Noncompliance situations could be generated by simple work schedule conflicts or other minor difficulties. The access period should be stated as a reasonable time period allowing employees and employers adequate flexibility.”

Under the final rule, an employer must provide a copy of the 300 Log to an employee, former employee, personal representative or authorized employee representative on the business day following the day on which an oral or written request for records is received. Likewise, when an employee, former employee or personal representative asks for copies of the 301 form for an injury or illness to that employee, the employer must provide a copy by the end of the next business day. OSHA finds that these are appropriate time frames for supplying a copy of the existing forms, which in the case of the Form 301 is a single page. The average 300 Log is also only one page, although employers who have a larger number of occupational injuries and illnesses will have more than one page.

The final rule allows the employer seven business days to provide copies of the OSHA 301 forms for all occupational injuries and illnesses that occur at the establishment. Several commenters stated that there is additional burden for these large requests (see, e.g., Exs. 15: 172, 260, 262, 265, 294, 297, 401). For example, the Boeing Corporation stated that “[s]ince Boeing is a large employer with several thousand employees at several sites, (up to 30,000 at one site), the

administrative burden could be immense, particularly, if large numbers of records are requested by several employees. For example, if 100 employees requested ten thousand 301 forms, one million records would have to be available. This requirement is simply not administratively realistic.” OSHA agrees that, because these records may involve more copying, the employer needs more time to produce copies of the 301 forms. In addition, as stated in the final rule, the employer may not provide the authorized employee representative with the information on the left side of the 301 form, so the employer needs additional time to redact this information. Because the final rule only provides a right of access to an authorized employee representative (authorized collective bargaining agent), the number of requests should not exceed the number of unions representing employees at the establishment. Thus, the multiple request problem envisioned by Boeing should not surface. In addition, OSHA expects that, in large plants such as the one described by Boeing, the authorized employee representatives will ask for the data on a periodic basis, either monthly or quarterly, so the data requested at one time will be limited. In addition, the employer must provide only one free copy. If additional copies are requested, the employer may charge for the copies.

Charging Employees for Copies of the OSHA Records

The proposal also required the employer to provide copies without cost, or provide access to copying facilities without charge, or allow the employee or representative to take the records off site to make copies (61 FR 4061). Linda Ballas (Ex. 15: 31) commented that the copies should be provided at no cost to the employee. Several commenters stated that employees who access the records should pay for them (see, e.g., Exs. 15: 151, 152, 179, 180, 201, 226, 317, 397, 424). Atlantic Marine, Inc. stated: “Providing copies of records without cost to individuals may produce an undue administrative and financial burden for some employers. Although there is merit to providing information access to employees, the charging of a fee not to exceed the actual cost for duplicating the documents may deter unnecessary or frivolous requests” (Ex. 15: 151). The United Parcel Service Company (Ex. 15: 424) stated that:

[i]f expanded access to safety and health records is afforded, certainly such access should not be at the employer’s cost. This is an unfair burden on the employer, and will

encourage improper, harassing requests. These risks are not alleviated by the alternative of permitting the employer to give its records to the requesting party to copy, Proposed § 1904.11(b)(3)(iii), 61 Fed. Reg. at 4061, since employers often will be reluctant to entrust their only original copies to a current or former employee. (Ex. 15: 424)

In the final rule, OSHA has implemented the proposed provision requiring employers to provide copies free of charge to employees who ask for the records. The costs of providing copies is a minimal expense, and employees are more likely to access the data if it is without cost. In addition, allowing the employer to charge for copies of the OSHA records would only serve to delay production of the records. Providing free copies for employees thus helps meet one of the major goals of this rulemaking; to improve employee involvement. However, OSHA agrees that there are some circumstances where employers should have the option of charging for records. After receiving an initial, free copy of requested records, an employee, former employee, or designated representative may be charged a reasonable search and copying fee for duplicate copies of the records. However, no fee may be charged for an update of a previously requested record.

Section 1904.37 State Recordkeeping Regulations

Section 1904.37 addresses the consistency of the recordkeeping and reporting requirements between Federal OSHA and those States where occupational safety and health enforcement is provided by an OSHA-approved State Plan. Currently, in 21 States and 2 territories, the State government has been granted authority to operate a State OSHA Plan covering both the private and public (State and local government) sectors under section 18 of the OSH Act (see the State Plan section of this preamble for a listing of these States). Two additional States currently operate programs limited in scope to State and local government employees only. State Plans, once approved, operate under authority of State law and provide programs of standards, regulations and enforcement which must be "at least as effective" as the Federal program. (State Plans must extend their coverage to State and local government employees, workers not otherwise covered by Federal OSHA regulations.) Section 1904.37 of the final rule describes what State Plan recordkeeping requirements must be identical to the Federal requirements, which State regulations may be different, and provides cross references

to the State Plan regulations codified in Section 1902.3(k), 1952.4, and 1956.10(i). The provisions of Subpart A of 29 CFR part 1952 specify the regulatory discretion of the State Plans in general, and section 1952.4 spells out the regulatory discretion of the State Plans specifically for the recordkeeping regulation.

In the final rule, OSHA has rewritten the text of the corresponding proposed section and moved it into Subpart D of the final rule. Under Section 18 of the OSH Act, a State Plan must require employers in the State to make reports to the Secretary in the same manner and to the same extent as if the Plan were not in effect. Final section 1904.37 makes clear that States with approved State Plans must promulgate new regulations that are substantially identical to the final Federal rule. State Plans must have recording and reporting regulations that impose identical requirements for the recordability of occupational injuries and illnesses and the manner in which they are entered. These requirements must be the same for employers in all the States, whether under Federal or State Plan jurisdiction, and for State and local government employers covered only through State Plans, to ensure that the occupational injury and illness data for the entire nation are uniform and consistent so that statistics that allow comparisons between the States and between employers located in different States are created.

For all of the other requirements of the Part 1904 regulations, the regulations adopted by the State Plans may be more stringent than or supplemental to the Federal regulations, pursuant to paragraph 1952.4(b). This means that the States' recording and reporting regulations could differ in several ways from their Federal Part 1904 counterparts. For example, a State Plan could require employers to keep records for the State, even though those employers are within an industry exempted by the Federal rule. A State Plan could also require employers to keep additional supplementary injury and illness information, require employers to report fatality and multiple hospitalization incidents within a shorter timeframe than Federal OSHA does, require other types of incidents to be reported as they occur, or impose other requirements. While a State Plan must assure that all employee participation and access rights are assured, the State may provide broader access to records by employees and their representatives. However, because of the unique nature of the national recordkeeping program, States must

secure Federal OSHA approval for these enhancements.

The final rule eliminates paragraph (b) of section 1904.14 of the proposed rule. Proposed paragraph (b) stated that records maintained under State Plan rules would be considered to be in compliance with the Federal rule. OSHA has eliminated paragraph (b) as unnecessary because it is redundant to state that the records kept under State law will be acceptable; since State regulations must be identical to, or more stringent than the Federal regulations, compliance by private sector employers with approved State laws would by definition constitute compliance with the Federal regulations. Paragraph (c), which deals with public sector recording and reporting requirements in both comprehensive State Plans (those covering both the private and public sector employees) and those which are limited to the public sector (State and local government), has been reworded and moved to 1904.37(b)(3).

Because Federal OSHA does not provide coverage to State and local government employees, the State-Plan States may grant State recordkeeping variances to the State and local governments under their jurisdiction. However, the State must obtain concurrence from Federal OSHA prior to issuing any such variances. In addition, the State-Plan States may not grant variances to any other employers and must recognize all 1904 variances granted by Federal OSHA. These steps are necessary to ensure that the injury and illness data requirements are consistent from State to State.

Rulemaking comments on this issue were unanimous in supporting identical State and Federal regulations for recordkeeping. Multi-State employers and their representatives, such as US West, Lucent Technologies, AT&T, and the National Association of Manufacturers, thought that identical State regulations would simplify and reduce their recordkeeping burdens (see, e.g., Exs. 15: 194, 272, 303, 305, 346, 348, 358, 375).

OSHA understands the advantages to multi-State businesses of following identical OSHA rules in both Federal and State Plan jurisdictions, but also recognizes the value of allowing the States to have different rules to meet the needs of each State, as well as the States' right to impose different rules as long as the State rule is at least as effective as the Federal rule. Accordingly, the Part 1904 rules impose identical requirements where they are needed to create consistent injury and illness statistics for the nation and allows the States to impose

supplemental or more stringent requirements where doing so will not interfere with the maintenance of comprehensive and uniform national statistics on workplace fatalities, injuries and illnesses.

Section 1904.38 Variances From the Recordkeeping Rule

Section 1904.38 of the final rule explains the procedures employers must follow in those rare instances where they request that OSHA grant them a variance or exception to the recordkeeping rules in Part 1904. The rule contains these procedures to allow an employer who wishes to maintain records in a manner that is different from the approach required by the rules in Part 1904 to petition the Assistant Secretary. Section 1904.8 allows the employer to apply to the Assistant Secretary for OSHA and request a Part 1904 variance if he or she can show that the alternative recordkeeping system: (1) Collects the same information as this Part requires; (2) Meets the purposes of the Act; and (3) Does not interfere with the administration of the Act.

The variance petition must include several items, namely the employer's name and address; a list of the State(s) where the variance would be used; the addresses of the business establishments involved; a description of why the employer is seeking a variance; a description of the different recordkeeping procedures the employer is proposing to use; a description of how the employer's proposed procedures will collect the same information as would be collected by the Part 1904 requirements and achieve the purpose of the Act; and a statement that the employer has informed its employees of the petition by giving them or their authorized representative a copy of the petition and by posting a statement summarizing the petition in the same way notices are posted under paragraph 1903.2(a).

The final rule describes how the Assistant Secretary will handle the variance petition by taking the following steps:

- The Assistant Secretary will offer employees and their authorized representatives an opportunity to comment on the variance petition. The employees and their authorized representatives will be allowed to submit written data, views, and arguments about the petition.
- The Assistant Secretary may allow the public to comment on the variance petition by publishing the petition in the **Federal Register**. If the petition is published, the notice will establish a public comment period and may

include a schedule for a public meeting on the petition.

- After reviewing the variance petition and any comments from employees and the public, the Assistant Secretary will decide whether or not the proposed recordkeeping procedures will meet the purposes of the Act, will not otherwise interfere with the Act, and will provide the same information as the Part 1904 regulations provide. If the procedures meet these criteria, the Assistant Secretary may grant the variance subject to such conditions as he or she finds appropriate.
- If the Assistant Secretary grants the variance petition, OSHA will publish a notice in the **Federal Register** to announce the variance. The notice will include the practices the variance allows, any conditions that apply, and the reasons for allowing the variance.

The final rule makes clear that the employer may not use the proposed recordkeeping procedures while the Assistant Secretary is processing the variance petition and must wait until the variance is approved. The rule also provides that, if the Assistant Secretary denies the petition, the employer will receive notice of the denial within a reasonable time and establishes that a variance petition has no effect on the citation and penalty for a citation that has been previously issued by OSHA and that the Assistant Secretary may elect not to review a variance petition if it includes an element which has been cited and the citation is still under review by a court, an Administrative Law Judge (ALJ), or the OSH Review Commission.

The final rule also states that the Assistant Secretary may revoke a variance at a later date if the Assistant Secretary has good cause to do so, and that the procedures for revoking a variance will follow the same process as OSHA uses for reviewing variance petitions. Except in cases of willfulness or where necessary for public safety, the Assistant Secretary will: Notify the employer in writing of the facts or conduct that may warrant revocation of a variance and provide the employer, employees, and authorized employee representatives with an opportunity to participate in the revocation procedures.

The final rule differs somewhat from the variance section of the former rule. The text of the previous rule gave the Bureau of Labor Statistics authority to grant, deny, and revoke recordkeeping variances and exceptions. Under the former rule, applicants were required to petition the Regional Commissioner of the Department of Labor's Bureau of

Labor Statistics (BLS) for the region where the establishment was located. Petitions that stretched beyond the regional boundary were referred to the BLS Assistant Commissioner. These responsibilities were transferred to OSHA in 1990 (Memorandum of Understanding between OSHA and BLS, 7/11/90) (Ex. 6), but the variance section of the rule itself was not amended at that time. This section of the final rule codifies the shift in responsibilities from the BLS to OSHA with regard to variances.

Like the former variance section of the rule, the final rule does not specifically note that the states operating OSHA-approved state plans are not permitted to grant recordkeeping variances. Paragraph (b) of former section 1952.4, OSHA's rule governing the operation of the State plans, prohibited the states from granting variances, and paragraph (c) of that rule required the State plans to recognize any Federal recordkeeping variances. The same procedures continue to apply to variances under section 1904.37 and section 1952.4 of this final rule. OSHA has not included the provisions from these two sections in the variance sections of this recordkeeping rule, because doing so would be repetitive.

The final rule adds several provisions to those of the former rule. They include (1) the identification of petitioning employers' pending citations in State plan states, (2) the discretion given to OSHA not to consider a petition if a citation on the same subject matter is pending, (3) the clarification that OSHA may provide additional notice via the **Federal Register** and opportunity for comment, (4) the clarification that variances have only prospective effect, (5) the opportunity of employees and their representatives to participate in revocation procedures, and (6) the voiding of all previous variances and exceptions.

Variance procedures were not discussed in the *Recordkeeping Guidelines* (Ex. 2), nor have there been any letters of interpretations or OSHRC or court decisions on recordkeeping variances. As noted in the proposal, at 61 FR 4039, only one recordkeeping variance has ever been granted by OSHA. This variance was granted to AT&T and subsequently expanded to its Bell subsidiaries to enable them to centralize records maintenance for workers in the field.

The final rule does not adopt the approach to variances proposed by OSHA in 1996 (see section 1904.15 of the proposal). OSHA proposed to eliminate the variance and exception procedure from the recordkeeping rules

altogether and instead to require all variances and exceptions to the recordkeeping rule to be processed under OSHA's general variance regulations, which are codified at 29 CFR Part 1905. As stated in the proposal, OSHA believed that this change would streamline the final recordkeeping rule and eliminate duplicate procedures for obtaining variances. OSHA also proposed to amend paragraph 1952.4(c) to make clear that employers were required to obtain all recordkeeping variances or exceptions from OSHA instead of from the BLS.

OSHA received very few comments on the proposed changes to the variance procedures. Some commenters approved the proposed approach but did not comment on its merits (see, e.g., Exs. 15: 133, 136, 137, 141, 224, 266, 278). The International Dairy Foods Association (IDFA) supported the change if "it is indeed * * * a duplicative section" and "no significant change will occur by deleting the provision" (Ex. 15: 203). Another commenter stated that "no employer should be exempt from record keeping and I cannot imagine what kind of variance for record keeping exceptions could exist. I am requesting that this proposal be removed from the standard" (Ex. 15: 62). The Air Transport Association urged "OSHA * * * [to] permit [airline] companies to keep records according to location or division * * * and without the need to seek and acquire variances, so long as records can be retrieved in a reasonable time for OSHA oversight purposes" (Ex. 15: 378).

OSHA has decided, after further consideration, to continue to include a specific recordkeeping variance section in the final rule, and not to require employers who wish a recordkeeping variance or exception to follow the more rigorous procedures in 29 CFR part 1905. The procedures in Part 1905, which were developed for rules issued under sections 6 and 16 of the OSH Act, may not be appropriate for rules issued under section 8 of the Act, such as this recordkeeping rule.

The final rule thus retains a section on variance procedures for the recordkeeping rule. OSHA believes that few variances or exceptions will be granted under the variance procedures of the final rule because other provisions of the final rule already reflect many of the alternative recordkeeping procedures that employers have asked to use over the years, such as electronic storage and transmission of data, centralized record maintenance, and the use of alternative

recordkeeping forms. Because these changes have been made to other sections of the final rule, there should be little demand for variances or exceptions. As OSHA noted in the proposal (61 FR 4039) in relation to the AT&T variance, "[t]he centralization of records provision contained in this proposal [and subsequently adopted in the final rule] will eliminate the continued need for this variance." Similarly, the changes in paragraphs 1904.3(e) and (f) of the final rule that permit substitute forms and computerization of recordkeeping by employers, combined with the changes in paragraph 1904.30(c) that allow for recordkeeping at a central location will accommodate the Air Transport Association's request that OSHA "permit airline companies to keep records according to location or division * * * without the need to seek and acquire variances" (Ex. 15: 378). Under the final rule, companies are still required to summarize their injury and illness records for individual establishments, but may also produce records for separate administrative units if they wish to do so. Centralized and computerized recordkeeping systems make this a relatively simple task when compared to paper-driven and decentralized systems.

The final changes to the variance section of the former rule are minor. The primary change is to make clear that OSHA, rather than the BLS, has the responsibility for granting recordkeeping variances or exceptions. The other changes reflected in the final rule follow from the proposed rule and are intended to add several provisions from OSHA's general variance procedures in Part 1905. For example, paragraph (e) of section 1904.38 of the final rule is a modification of § 1905.11(b)(8), and paragraph (i) of this section of the final rule derives from section 1905.5. The objective of this paragraph is to give OSHA discretionary authority to decline to act on a petition where the petitioner has a pending citation. OSHA concludes that it would not be appropriate to consider granting a recordkeeping variance to an employer who has a pending recordkeeping violation before OSHRC or a State agency.

Paragraph (i) of the final rule supports paragraph (c)(7) from this same section because it provides a mechanism for giving OSHA notice of a citation pending before a state agency. Paragraph (i) also clarifies that variances only apply to future events, not to past practices. Paragraph (j) of section 1904.38 of the final rule nullifies all prior variances and exceptions. OSHA

believes that it is important to begin with a "clean slate" when the final recordkeeping rule goes into effect. Employers with existing variances can re-petition the agency if the final rule does not address their needs. Another addition to the final rule makes explicit that OSHA can provide additional public notice via the **Federal Register** and may offer additional opportunity for public comment. A final addition recognizes and makes clear that employees can participate in variance revocation proceedings.

Subpart E. Reporting Fatality, Injury and Illness Information to the Government

Subpart E of this final rule consolidates those sections of the rule that require employers to give recordkeeping information to the government. In the proposed rule, these sections were not grouped together. OSHA believes that grouping these sections into one Subpart improves the overall organization of the rule and will make it easier for employers to find the information when needed. The four sections of this subpart of the final rule are:

(a) Section 1904.39, which requires employers to report fatality and multiple hospitalization incidents to OSHA.

(b) Section 1904.40, which requires an employer to provide his or her occupational illness and injury records to a government inspector during the course of a safety and health inspection.

(c) Section 1904.41, which requires employers to send their occupational illness and injury records to OSHA when the Agency sends a written request asking for specific types of information.

(d) Section 1904.42, which requires employers to send their occupational illness and injury records to the Bureau of Labor Statistics (BLS) when the BLS sends a survey form asking for information from these records.

Each of these sections, and the record evidence pertaining to them, is discussed below.

Section 1904.39 Reporting Fatality or Multiple Hospitalization Incidents to OSHA

Paragraph (a) of section 1904.39 of the final rule requires an employer to report work-related events or exposures involving fatalities or the in-patient hospitalization of three or more employees to OSHA. The final rule requires the employer, within 8 hours after the death of any employee from a work-related incident or the in-patient hospitalization of three or more

employees as a result of a work-related incident, to orally report the fatality/multiple hospitalization by telephone or in person to the Area Office of the Occupational Safety and Health Administration (OSHA), or to OSHA via the OSHA toll-free central telephone number, 1-800-321-6742.

The final rule makes clear in paragraph 1904.39(b)(1) that an employer may not report the incident by leaving a message on OSHA's answering machine, faxing the Area Office, or sending an e-mail, but may report the fatality or multiple hospitalization incident using the OSHA 800 number. The employer is required by paragraph 1904.39(b)(2) to report several items of information for each fatality or multiple hospitalization incident: the establishment name, the location of the incident, the time of the incident, the number of fatalities or hospitalized employees, the names of any injured employees, the employer's contact person and his or her phone number, and a brief description of the incident.

As stipulated in paragraph 1904.39(b)(3), the final rule does not require an employer to call OSHA to report a fatality or multiple hospitalization incident if it involves a motor vehicle accident that occurs on a public street or highway and does not occur in a construction work zone. Employers are also not required to report a commercial airplane, train, subway or bus accident (paragraph 1904.39(b)(4)). However, these injuries must still be recorded on the employer's OSHA 300 and 301 forms, if the employer is required to keep such forms. Because employers are often unsure about whether they must report a fatality caused by a heart attack at work, the final rule stipulates, at paragraph 1904.39(b)(5), that such heart attacks must be reported, and states that the local OSHA Area Office director will decide whether to investigate the incident, depending on the circumstances of the heart attack.

Paragraph 1904.39(b)(6) of the final rule clarifies that the employer is not required to report a fatality or hospitalization that occurs more than thirty (30) days after an incident, and paragraph 1904.39(b)(7) states that, if the employer does not learn about a reportable incident when it occurs, the employer must make the report within 8 hours of the time the incident is reported to the employer or to any of the employer's agents or employees.

Section 1904.39 of the final rule includes several changes from the proposed rule and section 1904.17 of the former rule. First, OSHA has rewritten the requirements of the former

rule using the same plain-language question-and-answer format that is used throughout the rest of the rule. Second, this section clarifies that the report an employer makes to OSHA on a workplace fatality or multiple hospitalization incident must be an oral report. As the regulatory text makes clear, the employer must make such reports to OSHA by telephone (either to the nearest Area Office or to the toll-free 800 number) or in person. Third, the employer may not merely leave a message at the OSHA Area Office; instead, the employer must actually speak to an OSHA representative. Fourth, this section of the rule lists OSHA's 800 number for the convenience of employers and to allow flexibility in the event that the employer has difficulty reaching the OSHA Area Office. Fifth, this section eliminates the former requirement that employers report fatalities or multiple hospitalizations that result from an accident on a commercial or public transportation system, such as an airplane accident or one that occurs in a motor vehicle accident on a public highway or street (except for those occurring in a construction work zone, which must still be reported).

OSHA's proposal would have made three changes to the former rule: (1) it would have clarified the need for employers to make oral reports, (2) it would have included OSHA's 800 number in the text of the regulation, and (3) it would have required a site-controlling employer at a major construction site to report a multiple hospitalization incident if the injured workers were working at that site under the control of that employer.

A number of commenters supported all three of these proposed changes (see, e.g., Exs. 15: 133, 136, 137, 141, 204, 224, 266, 278, 369, 378, 429). However, many commenters discussed the changes OSHA proposed, raised additional issues not raised in the proposal, and made various suggestions for the final rule. Comments are discussed below for each of the proposed changes.

Making oral reports of fatalities or multiple hospitalization incidents and the OSHA 800 number. The former rule required an employer to "orally report" fatality or multiple hospitalization incidents to OSHA by telephone or in person, although the rule did not specify that messages left on the Area Office answering machine or sent by e-mail would not suffice. Since the purpose of this notification is to alert OSHA to the occurrence of an accident that may warrant immediate investigation, such notification must be

made orally to a "live" person. The changes made to the final rule are consistent with those proposed, except that the proposal would have required employers to report to the Area Office either by telephone or in person during normal business hours and to limit use of the toll-free 800 number to non-business hours.

A few commenters suggested ways for OSHA to make the 800 number more available to employers and to ensure that reports are made orally (see, e.g., Exs. 15: 9, 154, 203, 229, 238, 239, 389). For example, the National Pest Control Association suggested that:

[t]he agency print OSHA's emergency toll free number on the OSHA 300 and 301 forms and explain that employers are to call the number in the case of a fatality or multiple hospitalization during non-business hours. We would also urge OSHA to define "non-business" hours both in the regulatory text and on the forms (Ex. 15: 229).

Waste Management, Inc. (WMI) (Ex. 15: 389) recommended full reliance on the 800 number, proposing that:

[t]he 800 number be used at all times. A recent event entailing an attempt to report to the local area office illustrates the difficulty in complying with this proposal. The caller was away from the office out-of-town and attempted to rely on information obtained from the local telephone information service. No local OSHA telephone number was identified as the local emergency number. The city had multiple area offices and telephone numbers without adequate identification at the telephone company information desk. The local number which was finally identified as the local OSHA emergency number could not be accessed from outside the calling area even if the caller was willing to pay the charges. After numerous calls and involvement of several levels of telephone management, the normal business day was completed and so the 800 number in Washington was called. The use of a single, nationwide 800 number has worked for EPA and other agencies. WMI believes it would simplify reporting requirements and ensure more timely reporting.

Houston Lighting and Power (Ex. 15: 239) suggested that OSHA allow employers to report either to the local OSHA Office or to the 800 number:

[r]eporting of an incident either to the nearest Area Office or through the use of the 1-800 number should be available alternatives to the reporting requirement. The proposal limits when the 1-800 number may be used. In many cases the person reporting the incident may not be at the incident site. It is much more efficient to use a number that does not change from location to location than to attempt to identify each area office.

Tri/Mark Corporation (Ex. 15: 238) asked about reporting using fax or e-mail: "If a live person is available to answer the 800 number, there is no

problem with this item. Could a fax or e-mail message be an appropriate notification tool?"

It is essential for OSHA to speak promptly to any employer whose employee(s) have experienced a fatality or multiple hospitalization incident to determine whether the Agency needs to begin an investigation. Therefore, the final rule does not permit employers merely to leave a message on an answering machine, send a fax, or transmit an e-mail message. None of these options allows an Agency representative to interact with the employer to clarify the particulars of the catastrophic incident. Additionally, if the Area Office were closed for the weekend, a holiday, or for some other reason, OSHA might not learn of the incident for several days if electronic or facsimile transmission were permitted. Paragraph 1904.39(b)(1) of the final rule makes this clear.

As noted, OSHA allows the employer to report a fatality or multiple hospitalization incident by speaking to an OSHA representative at the local Area Office either on the phone or in person, or by using the 800 number. This policy gives the employer flexibility to report using whatever mechanism is most convenient. The employer may use whatever method he or she chooses, at any time, as long as he or she is able to speak in person to an OSHA representative or the 800 number operator. Therefore, there is no need to define business hours or otherwise add additional information about when to use the 800 number; it is always an acceptable option for complying with this reporting requirement.

This final rule also includes the 800 number in the text of the regulation. OSHA has decided to include the number in the regulatory text at this time to provide an easy reference for employers. OSHA will also continue to include the 800 number in any interpretive materials, guidelines or outreach materials that it publishes to help employers comply with the reporting requirement.

Reporting by a site-controlling employer at a major construction site. The proposed rule would have required a "site controlling employer or designee" to report a case to OSHA "if no more than two employees of a single employer were hospitalized but, collectively, three or more workers were hospitalized as in-patients." This provision was designed to capture those cases where three or more employees of different employers were injured and hospitalized in a single incident. Because a site-controlling employer was

defined in the proposed rule as a construction firm with control of a project valued at \$1,000,000 or more, the proposed rule would have applied only to those employers. Under the former rule, employers only needed to report if three of their own employees were hospitalized.

A number of commenters opposed the proposed change (see, e.g., Exs. 25, 15: 9, 126, 199, 289, 305, 312, 335, 346, 356, 389, 406, 420). Several commenters argued that the provision would be unworkable because individual employers often do not know about the post-accident condition of the injured employees of other employers (see, e.g., Exs. 15: 126, 346). Other commenters objected to placing the burden of such reporting on the general contractor on a construction site rather than on the individual employers of the affected employees (see, e.g., Exs. 15: 312, 356). Still other commenters noted that, since the term "site-controlling employer" is defined by OSHA as an employer in the construction industry, this provision would have no apparent application in multi-employer settings outside the construction industry (see, e.g., Exs. 15: 199, 335, 346).

After considering the issue further, OSHA agrees that it would be impractical to impose on one employer a duty to report cases of multiple hospitalizations of employees who work for other employers. Although such a reporting requirement would provide OSHA with information that the Agency could use to inspect some incidents that it might otherwise not know about, OSHA believes that the fatality and catastrophe provisions of the final rule will capture most such incidents. Accordingly, OSHA has not included this proposed provision in the final rule.

Eight hours to report. A number of commenters asked OSHA to extend the 8-hour period allowed for employers to report a fatality or a multiple hospitalization incident to OSHA. Most of the commenters who believe that this interval is too short recommended a 24- or 48-hour reporting time (see, e.g., Exs. 33, 15: 35, 37, 176, 203, 218, 229, 231, 273, 301, 335, 341, 423, 425). For example, the International Dairy Foods Association (IDFA) (Ex. 15: 203) recommended that "the reporting period be extended from 8 hours to 24 hours after the event. We feel this is appropriate because the resultant devastation in this type of situation would clearly overshadow the need to inform OSHA of an event that, with all due respect, could not be remedied by reporting it within 8 hours or less." The American Health Care Association (AHCA) (Ex. 15: 341) stated:

[r]eporting workplace fatalities or multiple employee hospitalization within 8 hours is unrealistic and unreasonable because the employer's first concern should be to the employee(s) injured or killed, his/her family or damage to the building when others may be in imminent danger (e.g., a fire in a health care facility may require evacuating and finding alternative placement for frail, elderly residents). AHCA recommends that OSHA revise the regulation by extending the time period for reporting fatalities or hospitalization of 3 or more employees to "within 48 hours."

After considering these comments, and reviewing the comments received during the comment period for the April 1, 1994 rulemaking on this issue (59 FR 15594-15600), OSHA has decided to continue the 8-hour requirement. The 1994 rulemaking noted the support of many commenters for the 8-hour rule, as well as support for 4-hours, 24 hours, and 48 hours. As OSHA discussed in the April 1, 1994 rulemaking, prompt reporting enables OSHA to inspect the site of the incident and interview personnel while their recollections are immediate, fresh and untainted by other events, thus providing more timely and accurate information about the possible causes of the incident. The 8-hour reporting time also makes it more likely that the incident site will be undisturbed, affording the investigating compliance officer a better view of the worksite as it appeared at the time of the incident. Further, from its enforcement experience, OSHA is not aware that employers have had difficulty complying with the 8-hour reporting requirement.

Motor vehicle and public transportation accidents. Several commenters recommended that OSHA not require employers to report to OSHA fatalities and multiple hospitalization catastrophes caused by public transportation accidents and motor vehicle accidents (see, e.g., Exs. 33, 15: 176, 199, 231, 272, 273, 301, 303, 375). The comments of NYNEX (Ex. 15: 199) are typical:

[t]he primary purpose of this section is to provide OSHA with timely information necessary to make a determination whether or not to investigate the scene of an incident. To NYNEX's knowledge, OSHA has not investigated public transportation accidents or motor vehicle accidents occurring on public streets or highways. In order to reduce unnecessary costs for both employers and OSHA, NYNEX recommends that fatalities and multiple hospitalizations resulting from these types of accidents be exempt from the reporting requirement.

OSHA agrees with these commenters that there is no need for an employer to report a fatality or multiple hospitalization incident when OSHA is