

August 28, 2001

**TO: SAFETY, HEALTH, ENVIRONMENTAL AND REGULATORY AFFAIRS
COMMITTEE
INDEPENDENT LUBRICANT MANUFACTURERS ASSOCIATION**

**FROM: KATHRYN M.T. MCMAHON-LOHRER
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**RE: REVISED OCCUPATIONAL INJURY AND ILLNESS RECORDING AND
REPORTING REQUIREMENTS; REQUEST FOR COMMENTS**

I. INTRODUCTION

On July 3, 2001, the Occupational Safety and Health Administration (“OSHA”) announced that its revised occupational injury and illness recording and reporting rule (“the Recordkeeping Rule”)¹ would go into effect on January 1, 2002, except for two provisions, which OSHA will reconsider.² These two provisions, which require recording of occupational hearing loss and musculoskeletal disorders (“MSDs”), are important for the industrial, metalworking and automotive lubricants industries. The remainder of the Recordkeeping Rule published in the *Federal Register* on January 19, 2001 will go into effect on January 1, 2002.

The Recordkeeping Rule imposes on employers new requirements, which are summarized below. Several of these requirements, such as recording cases of mental illness that are work-related, will present compliance issues and will, in effect, require employers to record injuries and illnesses that are caused by factors outside the scope of employment.

State Plan states must promulgate recording and reporting requirements that are the same as the federal requirements.³ Thus, Independent Lubricant Manufacturers Association (“ILMA”) members in State Plan states also will be subject to the new recording and reporting requirements.

Accordingly, we recommend that the ILMA take the following actions: (1) submit comments on the provisions the Recordkeeping Rule that are re-opened for comments; and (2) develop internal guidance to assist individual member company compliance efforts. Finally, we would urge all ILMA members individually to review their own injury and illness recordkeeping and reporting programs.

II. STATUS OF THE RECORDKEEPING RULE

¹Occupational Injury and Illness Recording and Reporting Requirements; Final Rule, 66 Fed. Reg. 6122 (January 19, 2001).

²Occupational Injury and Illness Recording and Reporting Requirements; Proposed Delay of Effective Date; Request for Comments, 66 Fed. Reg. 35,113 (July 3, 2001).

³29 C.F.R. § 1952.4(a).

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OSHA proposed changes to its recordkeeping and reporting requirements in 1996.⁴ ILMA submitted comments to OSHA and testified at a public hearing regarding the proposal. The final Recordkeeping Rule was published in the *Federal Register* on January 19, 2001, the last full day of the Clinton Administration. The Recordkeeping Rule is to take effect on January 1, 2002.

On January 20, 2001, White House Chief of Staff Andrew Card announced the Bush Administration's plan for managing the federal regulatory process.⁵ Under this plan, all regulations that were published in the *Federal Register* but had not yet taken effect were suspended for 60 days, (except for those allowing or emergency or other urgent situations relating to health or safety). Accordingly, the Recordkeeping Rule was suspended pending further review. On June 28, 2001, OSHA determined that all but the hearing loss and MSD recording requirements in the Recordkeeping Rule would take effect and proposed to delay the effective date of these remaining provisions until January 1, 2003.⁶ The deadline for submitting comments on the re-opened hearing loss and MSD recording provisions is September 4, 2001.

III. THE RECORDKEEPING RULE

A. Statutory Authority

Section 8(c)(2) of the Occupational Safety and Health Act ("OSH Act") requires the Secretary of Labor to adopt regulations requiring employers to "maintain accurate records of, and to make periodic reports on, work-related deaths, injuries, and illnesses other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job." Section 8(c)(1) also authorizes OSHA to develop regulations requiring employers to keep and maintain records regarding the causes and prevention of occupational injuries and illnesses. Section 24(a) of the OSH Act requires the Department of Labor ("DOL") to develop and maintain an effective program for collection, compilation, and analysis of occupational safety and health statistics. This provision also directs DOL to compile accurate statistics on work injuries and illnesses, regardless of whether they result in time away from work, unless the injuries are minor injuries requiring no treatment beyond first aid and do not involve loss of consciousness, restrictions of work or motion, or transfer to another job. OSHA and the Bureau of Labor Statistics ("BLS") have operated the injury and illness recordkeeping system jointly under a cooperative agreement since 1971. BLS conducts the nationwide statistical compilation of occupational injuries and illnesses (the Annual Survey of Occupational Injuries and Illnesses), while OSHA administers the regulatory components of the recordkeeping system.

OSHA uses injury and illness data for several purposes. Most importantly, OSHA typically reviews an establishment's injury and illness data before conducting an inspection to help determine where to focus inspection efforts. OSHA also uses the data to target intervention efforts on the most dangerous worksites and the worst safety and health hazards. Additionally, these data are the source of BLS national statistics, which track the magnitude and nature of occupational injuries and illnesses across the country. Federal, state and local government agencies use BLS statistics to make decisions regarding safety and health legislation, programs and standards. Therefore, OSHA's recordkeeping and reporting requirements for injuries and illnesses should be a priority for ILMA and its members.

B. OSHA's Current Recordkeeping and Reporting System

Under OSHA's current recordkeeping and reporting requirements, employers must record injuries and illnesses on OSHA Form 200 ("the OSHA 200 Log") which lists each injury and illness that occurred throughout the year. For each case on the Log, the employer also must prepare a supplementary record on OSHA Form 101, which requests more detailed

⁴Occupational Injury and Illness Recording and Reporting Requirements; Notice of Proposed Rule, 61 Fed. Reg. 4029 (Feb. 2, 1996).

⁵Memorandum from Andrew H. Card, Jr., Assistant to the President and Chief of Staff, to the Heads and Acting Heads of Executive Departments and Agencies (Jan. 20, 2001).

⁶66 Fed. Reg. 35,113.

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information regarding the nature and cause of the injury or illness. Most employers use the workers' compensation First Report of Injury in lieu of OSHA Form 101. A Summary of the Log must be posted in the establishment from February 1 to March 1 of the following year. The Log must be made available to OSHA inspectors upon request.

Recording requirements are limited to injuries and illnesses that are "work related." Under OSHA's interpretation, injuries and illnesses are work-related if events or exposures at work either caused or contributed to the problem.

Although employers are not required to submit OSHA 200 Logs routinely to the Government, they can be required to report injury and illness information to OSHA in one of three situations: (1) if a fatality or an incident involving the in-patient hospitalization of three or more employees occurs (in which case the employer must report the incident within eight hours); (2) if BLS randomly selects the establishment for its annual survey of occupational injuries and illnesses; or (3) if OSHA or the National Institute for Occupational Safety and Health ("NIOSH") send the employer a survey form requesting injury and illness data.

IV. SUMMARY OF THE CHANGES

The January, 2001 Recordkeeping Rule amends current recordkeeping and reporting requirements in several ways. OSHA will require completion of three new recordkeeping forms that replace the forms it currently uses: (1) the OSHA Form 300, OSHA Injury and Illness Log; (2) the OSHA Form 300A Summary, both of which will replace the OSHA Form 200 Log and Summary; and (3) the OSHA Form 301 Injury and Illness Incident Record, which will replace OSHA Form 101. (Copies of the new forms are in the attached OSHA guidance document, *OSHA Forms for Recording Work-Related Injuries and Illnesses*.) Employers must enter each recordable injury or illness within seven calendar days of receiving information that the recordable injury illness has occurred. Employers will be required to keep an OSHA 300 Log and prepare an OSHA 300A Summary for each establishment. They must post at the worksite the Form 300A Summary during the period February 1 to April 30 of the year following the year covered by the Summary. Employers will not be required to post the OSHA 300 Log, although they will have to make it available to OSHA inspectors, employees and former employees upon request.

The Recordkeeping Rule will add various new requirements to 29 C.F.R. Part 1904 that codify some of OSHA's guidance documents and letters of interpretation on recordkeeping. Under the new Recordkeeping Rule, OSHA will formally withdraw this guidance, including the *Recordkeeping Guidelines for Occupational Injuries and Illnesses, 1986*; *A Brief Guide to Recordkeeping Requirements for Occupational Injuries and Illnesses, 1986*; and all letters of interpretation regarding injury and illness recordkeeping requirements.⁷ OSHA's intention is to clarify employer requirements and make them easier to understand. Several of the new requirements, however, codify interpretive guidance that is unfavorable for employers. In the past, employers cited for noncompliance with recordkeeping requirements could use the more favorable OSHA guidance and letters of interpretation to argue in their favor. The codification of unfavorable guidance documents into OSHA regulations will make it more difficult for employers to argue that certain incidents are not recordable.

A. Recording Criteria

Under the new Recordkeeping Rule, an injury or illness will have to be recorded if it: (1) is work-related; (2) is a new case; and (3) meets one of the recording criteria. The recording criteria include an injury or illness that results in one or more of the following: death; days away from work; restricted work or transfer to another job; medical treatment beyond first aid; loss of consciousness; or a significant injury or illness diagnosed by a physician or other licensed health care professional, even if it does not result in death, days away from work, restricted work or job transfer, medical treatment beyond first aid, or loss of consciousness.⁸ Thus, the mere diagnosis of a work-related injury or illness will be sufficient to trigger the recording requirement. The employee need not have taken any time off work. This is a change from the current recordkeeping requirements.

⁷These documents are available on OSHA's Web site at <http://www.osha.gov> and will be removed when the Recordkeeping Rule takes effect.

⁸29 C.F.R. § 1904.7(a).

Employers are not required to record first aid.⁹ Any procedure labeled “first aid,” even if administered by a doctor, will not be considered medical treatment for purposes of the Recordkeeping Rule. Examples of first aid are:

- Using a non-prescription medication at nonprescription strength;
- Administering tetanus immunizations (other immunizations, such as Hepatitis B vaccine or rabies vaccine, are considered medical treatment);
- Cleaning, flushing or soaking wounds on the surface of the skin;
- Wound coverings such as bandages, Band-Aids, or gauze pads, etc.; (other wound closing devices such as sutures or staples, are considered medical treatment);
- Hot or cold therapy;
- Any non-rigid means of support, such as elastic bandages, wraps, non-rigid back belts, etc. (devices with rigid stays or other systems designed to immobilize parts of the body are considered medical treatment for recordkeeping purposes);
- Temporary immobilization devices while transporting an accident victim (*e.g.*, splints, slings, neck collars, back boards, etc.).
- Drilling of a fingernail or toenail to relieve pressure, or draining fluid from a blister;
- Eye patches;
- Removing foreign bodies from the eye using only irrigation or a cotton swab;
- Removing splinters or foreign material from areas other than the eye by irrigation, tweezers, cotton swabs or other simple means;
- Finger guards;
- Massages (physical therapy or chiropractic treatment are considered medical treatment); or
- Drinking fluids for relief of heat stress.

Any case in which an employee must be medically removed from the workplace under the requirements of an OSHA health standard, such as lead removal standard, must be recorded. If, however, the employer voluntarily removes the employee from exposure before the medical removal criteria are met, the employer will not be required to report the removal.¹⁰ The Recordkeeping Rule also specifies that occurrences of a Standard Threshold Shift (“STS”) in hearing acuity of 10 decibels (“dB”) or more and incidents of MSDs must be recorded, although OSHA more recently proposed that the effective date of these two recording criteria be delayed while OSHA reconsiders them (see below).

B. New Case

To trigger the recording requirement, the injury or illness must be a “new” case.¹¹ Generally, it will not be difficult to determine whether an injury or illness is a new case. In certain instances, however, it will be difficult to distinguish between a sign or symptom due to a new event or exposure from one that is the continuance of an injury or illness that has already been recorded. In the case of the latter, the employer will not need to record a new entry, but will need to update the old record. Employers will not be required to record as a “new” case previously recorded cases of a chronic, work-related illness where the signs or symptoms have recurred or continued in the absence of exposure in the workplace. This provision is intended to apply to diseases that progress without further workplace exposure to the substance that caused the disease, such as silicosis and asbestosis. Other chronic, work-related illnesses, such as occupational asthma and contact dermatitis, which are triggered by exposures to particular substances in the workplace, are considered new cases each time the illness is triggered.¹² Thus, if an employee develops work-related contact dermatitis, fully recuperates, and develops contact dermatitis again upon contact with the material in the workplace that caused the disease, this would be a “new” case and would have to be recorded again.

⁹29 C.F.R. § 1904.7(b)(5)(ii).

¹⁰29 C.F.R. § 1904.9(b)(3).

¹¹29 C.F.R. § 1904.6(a).

¹²29 C.F.R. § 1904.6(b)(2).

Employers may request the recommendation of a licensed health care professional to determine whether a case is “new,” but the employer then must follow the recommendation. Employers are permitted to obtain a second opinion, but they will have to determine which opinion is more authoritative, if the two health care professionals disagree.

C. Work-Relatedness

In the new Recordkeeping Rule, OSHA applies the same liberal standard for determining work-relatedness that it uses in the current recordkeeping requirements. We believe this standard, combined with the reporting criteria, will lead to the recording of many injuries and illnesses that really should not be considered work-related. OSHA’s causation standard incorporates two principles: the “geographic presumption” and the principle that work need only be a causal factor for an injury or illness to be work-related.

1. Geographic Presumption

The geographic presumption is that, if an injury or illness occurred in the work environment, then it is presumed to be work-related — unless one or more specified situations is present.¹³ An example of a situation that would overcome the geographic presumption is an injury resulting solely from an employee performing personal tasks unrelated to employment, at the employer’s establishment. Injuries that are the result of personal grooming, self-medication for a non-work-related condition, or that are intentionally self-inflicted also need not be recorded. Another example is injury or illness resulting from ingestion of food or drink for personal consumption, which is not recordable, regardless of whether or not the employer provided the food or drink. (If, however, an employee is made ill by ingesting food contaminated with workplace contaminants, such as lead, or develops food poisoning from food supplied by the employer, then the illness must be recorded.) Injuries caused by motor vehicle accidents in company parking lots or company access roads when the employee is commuting to or from work also are not presumed to be work-related. Additionally, if the employee was at the establishment as a member of the general public rather than as an employee, any illnesses or injuries sustained would not be recordable.

Under the new Recordkeeping Rule, mental illness normally would not be recordable. While mental illness is listed as one of the exceptions to the geographic presumption, it is recordable if “*the employee voluntarily provides the employer an opinion from a physician or other licensed health care professional with appropriate training and experience (psychiatrist, psychologist, psychiatric nurse practitioner, etc.) stating that the employer has a mental illness that is work-related.*”¹⁴ This means that if an employee with a mental illness provides his or her employer the opinion of a health care professional — who is not necessarily a medical doctor — concluding that the illness is work-related, the employer will be required to record the illness on the OSHA 300 Log.

Injuries and illnesses resulting from employee participation in illegal activities, horseplay or failing to follow established work rules and procedures will *not* be exempt from recording requirements. OSHA decided not to exempt these causes of injuries and illnesses from the Recordkeeping Rule because it believes that recording may serve to alert employers and employees to workplace safety and health issues. Additionally, cases of workplace violence will be recordable, even if the act of violence was committed by a family member or ex-spouse. If any of the exceptions to the geographic presumption apply, however, the employer will not be required to report the act of violence. For example, if the violent act occurs when the employee is engaged in personal tasks not related to his or her employment, such as arriving at work early to attend a civic function, it would not be recordable. Similarly, self-inflicted acts of violence will not be recordable. Employers will be required to record violent acts occurring in company parking lots or access roads, because the parking lot/access road exemption applies only to motor vehicle accidents that occur when the employee is commuting to and from work. Likewise, slips and falls in company parking lots and access roads are recordable. OSHA’s reasoning is that this will encourage employers to provide lighting, security and other controls to prevent violent assaults and accidents in parking lots and access roads.

¹³The Recording Criteria are listed in 29 C.F.R. § 1904.5(b)(2)(i)-(ix).

¹⁴29 C.F.R. § 1904.5(b)(2)(ix) (emphasis added).

2. Work Need Only Be A Causal Factor

Under the Recordkeeping Rule, an injury or illness is considered work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness.¹⁵ The rule requires neither precise quantification of the occupational cause nor an assessment of the relative weight of the occupational and non-occupational causal factors.¹⁶ In other words, if work is a tangible, discernable causal factor, OSHA considers the injury or illness to be work-related. In many cases, it will be difficult for the employer to tell whether an injury or illness is work-related, especially if there was a preexisting injury or illness. In these cases, OSHA will require employers to apply a “but for” causation standard to determine whether a new injury or illness is work-related.¹⁷ For example, if a death occurs, the employer must determine whether the preexisting injury or illness would likely not have resulted in death, but for the occupational event or exposure.

OSHA requires employers to apply the same standard for loss of consciousness or an injury or illness requiring one or more days away from work or days of restricted work, (*i.e.*, if the loss of consciousness would not have occurred, but for the workplace event or exposure, then the loss of consciousness is work-related). In the case of medical treatment, where no medical treatment is needed for the injury or illness before the workplace event or exposure, the medical treatment is recordable. Generally, if causation is unclear, or if the employee reports a symptom, such as swelling in a joint but cannot say whether the symptom first arose at work or during recreational activities at home, the employer will be obligated to examine the employees’ workplace and duties to determine whether it was more likely than not that the workplace factors caused or contributed to the condition.

The injury or illness must be reported only if it *significantly* aggravates a preexisting condition.¹⁸ Cases in which the workplace event or exposure affects a pre-existing injury or illness in only a minor way — in a way that does not appreciably worsen the preexisting condition, alter its nature, change to the extent of medical treatment, trigger lost time or job transfer — are not work-related. For example, an incident in which a chain smoker with asthma or another obstructive airway disease experiences shortness of breath while climbing stairs would not be recordable. OSHA also states in the preamble to the Recordkeeping Rule that non-occupational degenerative conditions, such as high blood pressure, arthritis, coronary artery disease, heart attacks, and cancer, that develop regardless of workplace exposure are not recordable.¹⁹ But, if work contributes to the illness *in some way*, then it is work-related and must be recorded. Employers often will have to use their best judgment to determine whether to record.

This causation standard is problematic in several ways. It places a substantial burden on employers to determine the causes of injuries and illnesses when a medical professional would be find it difficult or even impossible to do so. It requires employers to record injuries and illnesses that have only a tenuous connection to workplace factors. And, it requires employers to determine whether an injury or illness, assuming it is caused by workplace factors, significantly aggravated a pre-existing condition or had only a minor effect. We anticipate that many employers, faced with the impossibility of proving a negative — that the employee’s workplace did not contribute whatsoever to the employee’s symptoms — will opt to err on the side of recording incidents that really should not be recorded, to avoid enforcement liability. This will lead to overreporting and result in data that do not reflect actual workplace risks. The effect of this causation standard is that OSHA will regulate workplaces for injuries and illnesses that are not work-related. Arguably, OSHA has exceeded its scope of authority under the OSH Act.

¹⁵29 C.F.R. § 1904.5(a).

¹⁶*See* 66 Fed. Reg. at 5929.

¹⁷29 C.F.R. § 1904.5(b)(4).

¹⁸29 C.F.R. § 1904.45(a).

¹⁹66 Fed. Reg. at 5958.

V. Other Provisions**A. Recording of Days Away from Work**

As under the current recordkeeping rule, employers will be required to record the number of days that employees are away from work because of recordable work-related injuries and illnesses. Under both the current requirements and the new Recordkeeping Rule, employers are not to count the first day of the injury or illness occurred, even if the employee had to take time off that day.²⁰ Rather, the employer is to begin counting days away on the day following the onset of the injury or illness. Additionally, employers are required to follow the recommendations of health care professionals when recording. In cases where a health care professional recommends that an employee take days off work, but the employee insists on working, the days the employee was supposed to stay home still must be recorded as days away from work.²¹

The new Recordkeeping Rule will change the requirements covering weekends, holidays, and other days during which the employee is not scheduled to work. Under the current requirements, if the employee was not scheduled to work on a particular day, that day could not be considered a day away from work. Under the new Recordkeeping Rule, the employer will have to determine whether the employee *could* have worked on the days he or she was not at work because of the weekend, holiday or what was otherwise would have been a day off work notwithstanding the injury or illness.²² Thus, if an employee is injured on a Friday afternoon and is never scheduled to work a weekend shift, but would not have been able to work over the weekend because of a work-related injury, then, for recording purposes, lost workdays will include those weekend days.

The new Recordkeeping Rule also introduces a 180-day cap on lost workdays. Employers are not required to record lost workdays after an employee is away from work for 180 calendar days. The employer simply should enter "180+" on the OSHA 300 Log for these entries.

B. Privacy

Employers are not permitted to enter an employee's name on the OSHA 300 Log if the incident is a "privacy concern case."²³ A privacy concern case arises under the following circumstances: the injury or illness to an intimate body part or to the reproductive system; an injury or illness resulting from a sexual assault; mental illness; case of HIV infection, hepatitis or tuberculosis; a needlestick injury or cut from a sharp object that is contaminated with blood or other potentially infectious material; or other illness, if the employee independently and voluntarily requests that his or her name not be entered onto the OSHA 300 Log. Employers do not have the discretion to classify other types of incidents as privacy concern cases. Employers who believe that the employee can be identified, based on information recorded in any of OSHA's recordkeeping forms, even if the employee's name is not provided, may use discretion in describing the injury. For example, a sexual assault could be described as "injury from assault."

C. Access to Records

The final Recordkeeping Rule requires employers to provide limited access to OSHA recordkeeping forms to current and former employees and two types of employee representatives. The first type of representative is an individual whom 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 type of representative is one defined as an authorized collective bargaining agent of the employee. Employees and their representatives have rights to copy the current or

²⁰29 C.F.R. § 1904.7(b)(3).

²¹29 C.F.R. § 1904.7(b)(3)(iii).

²²29 C.F.R. § 1904.7(b)(3)(ii) & (iii).

²³29 C.F.R. § 1904.29(b)(6).

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stored²⁴ OSHA 300 Log(s) for any establishment in which the employee worked. Employers are required to provide one free copy of the OSHA 300 Log by the end of the next business day. Employees, former employees, and representatives are not permitted to see confidential lists of names and case numbers used in privacy concern cases, however. An employee, former employee or personal representative (not the authorized collective bargaining representative) also is permitted to see the employee's own OSHA 301 Injury and Illness Record. Finally, employers are required to provide an employee's or former employee's authorized collective bargaining representative a copy of the right-hand portion of the OSHA 301 Record containing the heading "Tell us about the case," upon request. No other information, other than the right hand portion of the form, may be disclosed to this representative.

VI. PROVISIONS OPEN TO COMMENT

On July 3, 2001, OSHA announced that it is soliciting additional public comments on the hearing loss and MSD recording criteria and that it proposes to delay the effective date of these criteria until January 1, 2003. Both of these new recording criteria are of particular importance to the industrial and automotive lubricant industry, and we encourage ILMA to comment on them.

A. Changes to the STS Reporting Requirements

Under the current Recordkeeping Rule, if an employee's hearing test or audiogram reveals that a STS has occurred, then the employer must record it in the hearing loss column of the OSHA 300 Log. A STS will be defined, under the new Recordkeeping Rule, as a change in hearing threshold, relative to the most recent audiogram, of an average of 10 dB or more at 2000, 3000, and 4000 hertz in one or both ears.²⁵ The audiogram results may be adjusted for age in accordance with the Age Correction Values in 29 C.F.R. § 1910.95, Tables F-1 and F-2. If the employee has never previously experienced a recordable hearing loss, the employer must compare the employee's current audiogram with the employee's baseline audiogram. Employers do not have to record the hearing loss if a retest of the employee's hearing within 30 days does not confirm the STS. Although the Recordkeeping Rule does not require employers to test employees' hearing, employers in general industry are required to conduct periodic audiometric testing of employees when employees' noise exposures are at levels equal to, or more than, the Occupational Noise Standard (an 8-hour time-weighted average 85dB(A) or greater or total noise dose of 50 percent).²⁶ For workers who are exposed to noise levels at or exceeding the Occupational Noise Standard, OSHA presumes that any hearing loss is work-related. Furthermore, it is not necessary, under both the old and new recordkeeping rules, for the workplace to be the sole cause, or even the predominate cause, of hearing loss for OSHA to consider it to be work-related.

The recordkeeping requirements currently in effect contain no specific threshold for recording hearing loss cases. In 1991, OSHA issued an enforcement policy stating that OSHA would cite employers for failing to record work-related shifts in hearing of an average of 25 dB or more. A major issue in the new Recordkeeping Rule is quantifying the level of hearing loss that should be recorded as a "significant" health condition, because OSHA has determined that minor or insignificant health conditions should not be recordable.²⁷ In response to comments submitted after the final rule was issued, arguing that an STS is merely a precursor event indicating the need for follow-up actions and not a material health impairment standing alone, OSHA agreed that it needs to reconsider the criteria for recording hearing loss. In light of its decision to reconsider this recording criteria, OSHA proposes to delay its effective date until January 1, 2003 and to remove the "hearing loss" column from the new OSHA 300 Form to be used during calendar year 2002. Employers still will be required to comply with the 25 dB standard, however, while OSHA reconsiders the 10 dB standard. This proposed change could affect any ILMA member companies that are required to conduct periodic audiometric testing. On the other hand, it could provide an incentive for employers that exceed the noise standard to use industrial lubricants that reduce noise in the workplace.

²⁴Employers still are required to retain OSHA 200 and 201 Forms for five years. This requirement continues to apply to the OSHA 300 and 301 forms. 29 C.F.R. § 1904.44. Employers are not required to update the old 200 and 201 Forms, however.

²⁵29 C.F.R. § 1904.10(b)(1).

²⁶29 C.F.R. § 1910.95.

²⁷66 Fed. Reg. at 5931.

B. Recording of Musculoskeletal Disorders

The new Recordkeeping Rule also would have required employers to record employee MSDs in a separate column on the OSHA 300 Log.²⁸ Pursuant to this requirement, even MSD signs and symptoms, such as pain, tingling, burning or numbness, would have been considered recordable. OSHA had defined MSDs as “disorders of the muscles, nerves, tendons, ligaments, joints, cartilage and spinal discs that are not caused by skips, trips, falls, motor vehicle accidents or other similar accidents.”²⁹ Yet, the Recordkeeping Rule states that there are no special criteria for determining which MSDs to record.

The MSD recording requirement would have been especially problematic in light of OSHA’s requirement that employers record “new” injury and illness cases. If an employee developed a work-related MSD, recuperated, and was exposed to the MSD risk factor to a degree that it triggered the MSD sign or symptom, the employer would have been required to report it as new case. Effectively, this would apply to an employee who developed back pain from heavy lifting tasks in the workplace and recuperated. If this employee were to lift a heavy object and thereby trigger the back pain, this would be considered recordable as a new case, even though the back pain was related to a chronic condition.

After the United States Congress enacted legislation repealing the OSHA ergonomics standard on March 20, 2001, the Secretary of Labor announced her intention to develop a comprehensive plan to address ergonomic hazard in the workplace.³⁰ To avoid confusion associated with requiring employers to implement a new definition of MSDs while OSHA is considering how to define MSDs within the context of a comprehensive ergonomics program, OSHA also proposes to delay the effective date of the MSD recording requirement. We advise ILMA to support this delay in written comments to OSHA and to object to the reporting of MSDs at all until there is additional research on the causes of MSDs and the existence of dose-response relationships. In the meantime, employers still are required to record all injuries and illnesses that meet the recording criteria, including those involving subjective symptoms such as pain which may be symptomatic of an MSD.

C. Compliance Schedule

ILMA members will have to comply with all requirements in the Recordkeeping Rule, except for those re-opened for comment, beginning January 1, 2002. For the requirements open to comment, OSHA proposes to delay the effective date until January 1, 2003. Accordingly, there may be some confusion regarding employer compliance obligations beginning January 1, 2002. Essentially, employers will be required to use the OSHA 300 Log to record specific details about work-related injuries and illnesses and why and how they happened. OSHA will not allow employers to use the old forms (*i.e.*, the OSHA 200 Log and Summary and OSHA Form 101). The columns for hearing loss and MSDs on the right side of the OSHA 300 Log should be left blank, unless and until OSHA issues a temporary form that would apply only to the 2002 calendar year. In this case, the columns for hearing loss and MSDs would be omitted.

VII. CONCLUSION

Several provisions in the new Recordkeeping Rule will impose unnecessarily onerous requirements on ILMA members. By applying a “caused or contributed to” standard, the rule effectively will require employers to record injuries and illnesses that are not at all work-related because of the difficulty in proving a negative. Furthermore, the requirement to record mental illness, based on a health care practitioner’s opinion, extend beyond the scope of what the OSH Act requires and allows OSHA to do.

OSHA believes that employers generally underrecord injuries and illnesses.³¹ In cases where OSHA inspectors have found evidence that an employer willfully understated an establishment’s injury and illness experience, OSHA has levied large

²⁸29 C.F.R. § 1904.12.

²⁹29 C.F.R. § 1904.12(b)(1).

³⁰Announcement of Public Forums on Ergonomics, 66 Fed. Reg. 31,694 (June 12, 2001).

³¹66 Fed. Reg. at 5918-19.

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penalties and fines under its special citation policy for egregious violations. Accordingly, ILMA member companies should review their occupational injury and illness recording systems and the various changes that will take effect for the 2001 calendar year. Additionally, it would benefit all ILMA members for the Health and Safety Committee to develop internal guidance on the new recordkeeping requirements. Finally, we would advise ILMA to conduct a quarterly occupational injury and illness data collection and reporting program to assist ILMA members in benchmarking and in compliance efforts.

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Please contact us if you have any questions.