DEPARTMENT OF LABOR
Occupational Safety and Health Administration

29 CFR Part 1904
[Docket No. R–02A]
RIN 1218–AC00

Occupational Injury and Illness Recording and Reporting Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), U.S. Department of Labor.

ACTION: Proposed delay of effective date; request for comments.

SUMMARY: The Occupational Safety and Health Administration (OSHA) issued a final rule on Occupational Injury and Illness Recording and Reporting Requirements (66 FR 5916, January 19, 2001), which is scheduled to become effective on January 1, 2002. Following a careful review conducted pursuant to White House Chief of Staff Andrew Card’s memorandum (66 FR 7702), the Agency has determined that all but a few of the provisions of the final rule should take effect as scheduled.

OSHA has also determined that it will reconsider the provisions in the final rule for: recording occupational hearing loss based on the occurrence of a Standard Threshold Shift (STS) in hearing acuity (Section 1904.10); and defining “musculoskeletal disorder” (MSD) and checking the column on the OSHA 300 Log identifying a recordable MSD (Section 1904.12). Accordingly, OSHA proposes to delay the effective date of Sections 1904.10 and 1904.12 until January 1, 2003. Employers should read carefully Section II. of this document. Effect of Proposal Delay on Employer Recordkeeping Obligations in Calendar Year 2002, to understand what their recordkeeping obligations would be during the period January 1, 2002 through January 1, 2003 if the proposed delay takes effect. OSHA is also asking for comment on the appropriate criteria for recording hearing loss cases. See Section III.

DATES: Written comments must be postmarked by September 4, 2001.

ADDRESSES: Comments are to be submitted in writing in triplicate. All comments shall be submitted to: Docket Officer, Docket No. R–02A, Occupational Safety and Health Administration, Room N–2625, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, telephone (202) 693–2350 (OSHA’s TTY number is (877) 889–5627). Comments of 10 pages or less may be faxed to (202) 693–1648. You may also submit your comments electronically through OSHA’s home page at www.osha.gov. Please note that you may not attach materials such as studies or journal articles to your electronic statement. If you wish to include such materials, you must submit three copies to the OSHA Docket Office at the address listed above. When submitting such materials to the OSHA Docket Office, you must clearly identify your electronic statement by name, date, and subject, so that we can attach the materials to your electronically submitted statement.

FOR FURTHER INFORMATION CONTACT: Jim Maddux, Occupational Safety and Health Administration, U.S. Department of Labor, Directorate of Standards Programs, Room N–3609, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION: Because OSHA’s final recordkeeping rule was published on January 19, 2001, with an effective date of January 1, 2002, it was subject to the regulatory review required by the Andrew Card memorandum. The Agency has carefully considered the rulemaking record and the submissions of interested parties, and has had several meetings with business and labor representatives. As a result of this process, the Secretary has determined that the final recordkeeping rule should be implemented in large part, on January 1, 2002, as scheduled. The final rule is the result of an effort begun in the 1980s, involving businesses, labor organizations, health professionals and others, to improve the quality of the injury and illness records maintained under the Occupational Safety and Health Act. The new rule simplifies the recordkeeping process by making the record requirements more logical and coherent, by explaining the requirements in plain language, by consolidating the interpretations and guidance previously found in a host of secondary sources, and by providing new recordkeeping forms that are easier to understand and complete. However, the Agency’s review has identified grounds for reconsidering two elements of the final rule, and for delaying the effective date of the requirements related to these elements, as explained below.

I. Why OSHA Is Proposing To Delay the Effective Date of the Final Rule Requirements on Hearing Loss and the MSD Definition and Column

A. Recording occupational hearing loss cases: Section 1904.10 of the final rule requires employers to record, by
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\begin{verbatim}
35114 Federal Register not require testing of employees
has occurred. An STS is defined as
Threshold Shift (STS) in hearing acuity
(audiogram) reveals that a Standard
OSHA relies on evidence
and 25dB. The final rule used the STS
Hertz in one or both ears.” Section
OSHA would cite employers for failing
OSHA agrees that reconsideration of the
amplitude, at 2000, 3000 and 4000
OSHA will provide
OSHA believes that
10dB requirement for 2002, only to change
to a new requirement in 2003. On the other hand,
continuing the 25dB recording
requires employers in general industry
to conduct periodic audiometric testing
of employees when employees’ noise
exposures are equal to, or more than, an
8-hour time-weighted average 85dB. If
such testing reveals that an employee
has sustained hearing loss equal to an
STS, the employer must take protective
measures, including requiring the use of
hearing protectors, to prevent further
hearing loss.

The current recordkeeping rule,
which remains in effect until January 1,
2002, contained no specific threshold for
recording hearing loss cases. In 1991,
OSHA issued an enforcement policy on the
criteria for recording occupational
hearing loss, to remain in effect until
new criteria were established by
rulemaking. The 1991 policy stated that
OSHA would cite employers for failing
to record work related shifts in hearing
of an average of 25dB or more at 2000,
3000, and 4000 Hertz in either ear.

One of the major issues in the
recording rulemaking was to quantify the
level of hearing loss that should be recorded as a “significant” health condition. This was critical
because OSHA determined that minor
or insignificant health conditions
should no longer be recordable. See,
e.g., 66 FR 5931. OSHA proposed a
requirement to record hearing loss
averaging 15dB at 2000, 3000 and 4000
Hertz in one or both ears. The agency
asked for comment on several alternative
criteria, including, 10, 20 and
25dB. The final rule used the STS
criterion of 10dB instead of the
proposed 15dB level.

In selecting an STS as the appropriate
criterion for recording hearing loss,
OSHA relied heavily on evidence
submitted by the Coalition to Preserve
OSHA and NIOSH and Protect Workers’
Hearing that a 10dB loss in hearing
acuity represents a serious health
problem. “OSHA [was] particularly
persuaded by the Coalition’s argument
that ‘An age-corrected STS is a large
hearing change that can affect
communicative competence’ because an
age-corrected STS represents a
significant amount of cumulative
hearing change from baseline hearing
levels.” 66 FR 6008. Based on this and
other evidence, OSHA found that an
STS “represents a non-minor injury or
illness of the type Congress identified as
appropriate for recordkeeping
purposes.” 66 FR 6009.

Following publication of the final rule
in January 2001, OSHA received
submissions from interested parties
criticizing the finding that an STS
represents a significant health
condition. Exhibits 1–2, 1–3, 1–4, 1–5,
1–6, 1–7. These parties argue that an
STS is not necessarily considered a
serious health problem by the medical
community, by State workers
compensation systems, or by the
occupational noise standard (29 CFR
1910.95). The American Iron and Steel
Institute noted that, “According to the
AMA, a person has suffered material
impairment when testing reveals a 25dB
average hearing loss from audiometric
zero at 500, 1000, 2000, and 3000
hertz.” AISI and other commenters
assert that an STS is merely a precursor
event indicating the need for follow-up
actions, not a material health
impairment standing alone.

OSHA has reviewed the record and
agrees that reconsideration of the
criteria for recording hearing loss is
warranted. There is evidence in the
record suggesting that an STS can
constitute a serious health problem for
individuals with pre-existing hearing
loss. See 66 FR 6008 (“For an individual
with pre-existing high frequency
hearing loss as the baseline,” STS
usually involves substantial progression
into the critical speech frequencies.”)
There is also evidence that an STS is not
necessarily a serious condition, and
some commenters have questioned
whether it is even a reliable criterion
under real-world testing conditions.
See, e.g., Exhibit 1–2. Finally, NIOSH
notes in its Criteria for a Recommended
Standard—Noise Exposure, “the
incipient permanent threshold shift may
manifest itself with the same order of
magnitude as typical audiometric
measurement variability; about a 10-dB
change in hearing thresholds.” In view
of this uncertainty, OSHA believes that
the record should be reopened to permit
consideration of additional medical and
other relevant evidence, and to explore
alternative approaches. For example,
Organization Resources Counselors, Inc.
(ORC) in its post-promulgation
submissions urged the Agency to
consider a sliding scale which would
take account of an individual’s existing
level of impairment to determine
whether further occupational hearing
loss warrants recording. (Exhibits 1–6,
1–7). ORC’s suggested approach, which
was not addressed in the rulemaking,
also deserves careful consideration.

In light of the decision to reconsider the
10dB criterion, OSHA is proposing
to delay the effective date of Section
1904.10 until January 1, 2003, and to
remove the “Hearing loss” column from the
version of the Log to be used during
calendar year 2002. OSHA believes that
this proposed action is appropriate for
several reasons. If OSHA decides to
change the hearing loss criterion
beginning in 2003, records of hearing
loss cases based on the 10dB level for
2002 will be of little value since they
could not be compared to records
maintained either under the former
rule’s 25dB level or any new level
effective in 2003. On the other hand,
continuing the 25dB recording
requirement for 2002 will yield data
comparable to that for earlier years even
if OSHA implements a new requirement
for 2003. Furthermore, the proposed
delay of the effective date would avoid
the confusion and additional paperwork
burden that would result if employers
were required to implement the 10dB
requirement for 2002, only to change
over to a new requirement in 2003.
These factors appear to outweigh any
potential benefit to be gained by
permitting Section 1904.10 to become
effective while OSHA is reconsidering
the 10dB criterion. If implementation of
Section 1904.10 is delayed as proposed
in this document, OSHA will provide
new forms to be used for calendar year
2002 that do not contain a “Hearing
loss” column.

B. Defining an MSD and checking the
MSD column: Section 1904.12 of the
final rule states that if an employee
experiences a recordable
musculoskeletal disorder (MSD), the
employer must record it on the OSHA
Log and must check the MSD column.
For recordkeeping purposes, the rule
defines MSDs as disorders of the
muscles, nerves, tendons, ligaments,
joints, cartilage and spinal discs that are
not caused by slips, trips, falls, motor
vehicle accidents or other similar
accidents (see Section 1904.12(b)(1)).
The Section also explains that in
determining whether an MSD is
recordable, the employer must use the
same criteria that apply to other injuries
or illnesses. To be recordable, the
disorder must be work-related, must be
a new case, and must meet one or more
of the general recording criteria. Section
1904.12(b)(2) states that “[t]here are no
special criteria for determining which
musculoskeletal disorders to record...”,
and refers the reader to other sections of
the rule in which the basic recording
criteria are found.
\end{verbatim}
OSHA’s purpose in including an MSD column on the Log was to gather data on “musculoskeletal disorders” as that term is defined in Section 1904.12. Following Congressional disapproval of OSHA’s ergonomics standard (PL 107-5, Mar. 20, 2001), the Secretary announced that she intends to develop a comprehensive plan to address ergonomic hazards and scheduled a series of forums to consider basic issues related to ergonomics (66 FR 31694, 66 FR 33578). One of the key issues to be considered in connection with the Secretary’s comprehensive plan is the approach to defining an ergonomic injury.

Based on these developments, the Secretary believes that it is premature to define an MSD for recordkeeping purposes. Any definition of “musculoskeletal disorder” or other term for soft tissue injuries in the recordkeeping rule should be informed by the views of business, labor, and the public health community on the problem of ergonomic hazards in the workplace, which the Secretary’s forums are intended to elicit.

Furthermore, to require employers to implement a new definition of MSD while the Agency is considering the issue in connection with the comprehensive ergonomics plan could create unnecessary confusion and uncertainty. Therefore, OSHA is proposing to delay the effective date of § 1904.12. Accordingly, the Log to be used for calendar year 2002 would not contain a definition for MSD or an MSD column. When the Department has progressed further in developing its comprehensive approach to ergonomic hazards, it will be in a better position to consider how employers will be required to report work-related ergonomics injuries.

This proposed action does not affect the employer’s obligation to record all injuries and illnesses that meet the criteria set out in Sections 1904.4–1904.7, regardless of whether a particular injury or illness meets the definition of MSD found in Section 1904.12. Employers will be required to record soft-tissue disorders, including those involving subjective symptoms such as pain, as injuries or illnesses if they meet the general recording criteria that apply to all injuries and illnesses. The proposed delay of the effective date of Section 1904.12 does not affect this basic requirement. It simply means that employers will not have to determine which injuries should be classified under the category of “MSDs” or “ergonomic injuries” during the calendar year 2002.

II. Effect of the Proposed Delay of the Effective Date on Employer’s Recordkeeping Obligations in Calendar Year 2002

A one-year delay of the effective date of the specified recordkeeping provisions would have the following effect on an employer’s recordkeeping obligations during the 2002 calendar year:

Hearing loss cases: Employers would continue to record work-related shifts of an average of 25 dB or more at 2000, 3000, and 4000 hertz (Hz) in either ear on the OSHA 300 Log. When a recordable hearing loss occurs, the audiogram indicating the hearing loss would become the new baseline for determining whether future additional hearing loss by the individual must be recorded. Employers would check either the “injury” or the “all other illness” column, as appropriate.

Soft-tissue disorder: Employers would record disorders affecting the muscles, nerves, tendons, ligaments and other soft tissue areas of the body in accordance with the general criteria in Sections 1904.4–1904.7 applicable to any injury or illness. Employers would also treat the symptoms of soft-tissue disorders the same as symptoms of any other injury or illness. Soft-tissue cases would be recordable only if they are work-related (Sec. 1904.5), are a new case (Sec. 1904.6), and meet one or more of the general recording criteria (Sec. 1904.7). Employers would check either the “injury” or the “all other illness” column, as appropriate.

III. Issues for Public Comment

OSHA particularly invites comment on the following issues. Issue 1. What is the appropriate criterion for recording cases of occupational hearing loss? OSHA is particularly interested in comments on the advantages and disadvantages of various hearing loss levels, including 10, 15, 20 and 25 dB, on alternative approaches such as the use of a sliding scale in which smaller incremental shifts would be recordable for employees with significant pre-existing hearing loss, and on the frequency of “false positive” results or other errors in audiometric measurements associated with each of these levels and approaches. Issue 2. What is the variability of audiometric testing equipment and how should this variability be taken into account, if at all, in the recordkeeping rule? Issue 3. What is the appropriate benchmark against which to measure hearing loss, e.g., the employee’s baseline audiogram, audiometric zero, or some other measure? Issue 4. Should the recordkeeping rule treat subsequent hearing losses in the same employee as a new case for recording purposes?

Paperwork Reduction Act

On January 22, 2001, the Office of Management and Budget (OMB) received OSHA’s request under the Paperwork Reduction Act of 1995 for approval of the information collection requirements in the final recordkeeping rule. This request for approval was withdrawn by the Agency on March 26, 2001, before OMB acted on it. OSHA will resubmit a request for OMB approval of the information collection requirements in the final rule, including appropriate changes in such requirements resulting from this proposal.

Regulatory Flexibility Certification

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601), the Acting Assistant Secretary certifies that the proposed rule will not have a significant adverse impact on a substantial number of small entities.

Executive Order

This document has been deemed significant under Executive Order 12866 and has been reviewed by OMB.

Authority

This document was prepared under the direction of R. Davis Layne, Acting Assistant Secretary for Occupational Safety and Health. It is issued under Section 8 of the Occupational Safety and Health Act (29 U.S.C. 657), and 5 U.S.C. 553.

Issued at Washington, DC this 28th day of June, 2001.

R. Davis Layne,
Acting Assistant Secretary of Labor.
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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 61 and 63

[FRL–7006–7]

Proposed Approval of the Clean Air Act, Section 112(l), Delegation of Authority to Washington Department of Ecology and Four Local Air Agencies in Washington

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Pursuant to the authority of Clean Air Act (CAA), section 112(l), EPA proposes to approve the State of