

OSHA Request for an ACCSH Committee Recommendation
Proposed Revisions to 29 CFR Part 1904
Clarification of Employer’s Continuing Obligation to
Make and Maintain an Accurate Record of Each Recordable Injury and Illness

Summary

OSHA is proposing to amend its recordkeeping regulations to clarify that the duty to make and maintain accurate records of work-related injuries and illnesses is an ongoing obligation. The duty to record an injury or illness continues for as long as the employer must keep records of the recordable injury or illness; the duty does not expire just because the employer fails to create the necessary records when first required to do so. The proposed amendments to 29 CFR Part 1904 consist of revisions to the titles of some existing sections and subparts, and changes to the text of some existing provisions. The proposed action is in accord with OSHA’s longstanding position that the duty to make and maintain accurate records continues until the prescribed record-retention period expires, and is designed to clarify employers’ recordkeeping obligations after the decision of the United States Court of Appeals for the District of Columbia Circuit in *AKM LLC v. Secretary of Labor (Volks II)*, 675 F.3d 752 (D.C. Cir. 2012). The proposed amendments add no new compliance obligations; the proposal would not require employers to make records of any injuries or illnesses for which records are not currently required to be made.

Background

OSHA’s recordkeeping regulations require employers to record information about certain injuries and illnesses occurring in their workplaces, and to make that information available to employees, OSHA, and the Bureau of Labor Statistics. Employers must record work-related injuries and illnesses that meet certain recording criteria. *See* 29 C.F.R. § 1904.7. Employers

must document each recordable injury or illness on an “OSHA 300” form, which is a log of work-related injuries and illnesses. *See* 29 C.F.R. § 1904.29(a)-(b)(1). Employers also must prepare a supplementary “OSHA 301 Incident Report” or equivalent form, which provides additional details about the injuries and illnesses recorded in the Log. *See* 29 C.F.R. § 1904.29(b)(2). Employers must retain the OSHA Log and Incident Report Forms for five years following the end of the calendar year that they cover. *See* 29 C.F.R. § 1904.33(a).

OSHA’s longstanding position is that an employer’s duty to record an injury or illness continues for the full duration of the record-retention-and-access period, *i.e.*, for five years after the end of the calendar year in which the injury or illness became recordable. The Occupational Safety and Health Review Commission has upheld that position. *See, e.g., Sec’y of Labor v. Gen. Dynamics*, 15 BNA OSHC 2122 (Rev. Comm’n 1993); *Sec’y of Labor v. Jonson Controls, Inc.*, 15 BNA OSHC 2132 (Rev. Comm’n 1993). The Commission addressed this issue most recently in *Secretary of Labor v. AKM LLC (Volks I)*, 23 BNA OSHC 1414 (Rev. Comm’n 2011) confirming that an employer’s failure to make a required OSHA record is a continuing violation, and that an uncorrected violation continues until the employer is no longer required to keep OSHA records for the year at issue.

A panel of the D.C. Circuit reviewed the Commission’s *Volks I* decision, and on April 6, 2012, issued a decision – *Volks II* – reversing the Commission. The court rejected OSHA’s argument that a failure to record an injury or illness is a continuing violation. This decision has led to a need for OSHA to clarify employers’ obligations under the recordkeeping regulations.

OSHA believes the proposed changes to the recordkeeping regulations are necessary to fully effectuate the important purposes served by accurate injury and illness records. OSHA records are designed to be used by employers, employees, and the government to learn about the

injuries and illnesses that are occurring in American workplaces. Accurate OSHA records enable employers to identify, and correct, hazardous conditions, allow employees to learn about the hazards they face, and permit the government to determine where and why injuries are occurring so that appropriate regulatory or enforcement measures can be taken.

Proposed Revisions to 29 CFR Part 1904

OSHA plans to propose amendments to its recordkeeping regulations to clarify that employers covered by the recordkeeping requirements have a continuing obligation to make and maintain accurate records of all recordable injuries and illnesses. This obligation continues for as long as the employer must maintain the records, and it does not expire if the employer fails to create a record when first required to do so.

The proposed amendments would clarify the following: (1) OSHA 300 Log. Employers must record every recordable injury or illness on the Log. This obligation continues through the five year retention period. In addition, during that period, employers must update the Log by adding newly discovered cases and by showing changes to previously recorded cases. (2) OSHA 301 Incident Report. Employers must prepare a Form 301 Incident Report for each new recordable illness or injury. This obligation continues throughout the five year retention period. Employers are not required to update the form to show changes to the case that occur after the form is initially prepared. (3) Year-end records review, and preparation, certification, and posting of the Form 301A annual summary. These ancillary tasks are intended to be performed at particular times during each year. They are not continuing obligations.

The following list describes the specific revisions OSHA plans to propose for Part 1904:

- Section 1904.0 – Purpose: OSHA is proposing to revise this section to clarify and emphasize employers' ongoing duties to make and maintain accurate records of each and every recordable injury and illness under Part 1904. OSHA proposes to add text to this provision reiterating that recordkeeping requirements are important in helping the Agency achieve its

mission of providing safe and healthful working conditions for the nation's workers. The Agency also proposes to add a sentence to this section to address what OSHA deems to be an "accurate" record. Records will be considered "accurate" if correct and complete records are made and maintained for each and every recordable injury and illness in accordance with the provisions of Part 1904.

- Subpart C – Making and Maintaining Accurate Records, Recordkeeping Forms, and Recording Criteria: OSHA is proposing to amend the title of this Subpart to better reflect the revisions being proposed to §§ 1904.4 and 1904.29, which address employer's duties to make and maintain accurate records, as well as recordkeeping forms and criteria.
- Paragraph (a) of § 1904.4 – Basic requirements: OSHA is proposing to revise this paragraph to reiterate the requirement that employers make and maintain accurate records of every injury and illness that meets OSHA's recording criteria. The current version of this paragraph is less explicit in expressing OSHA's intent that employers both create and keep accurate records. OSHA is not proposing to change the recording criteria.
- Note to paragraph (a) of § 1904.4: OSHA is proposing to add a note to § 1904.4 to clarify the Agency's longstanding position that the duty to make and maintain accurate injury and illness records continues throughout the entire record-retention period.
- Paragraph (b)(3) of § 1904.29 – How quickly must each injury or illness be recorded? OSHA is proposing minor word changes to this paragraph, which states the Agency's longstanding requirement that each and every recordable injury and illness must be recorded on both the OSHA 300 Log for that year and a 301 Incident Report within seven calendar days of when the employer gets information that the injury or illness occurred. Additionally, OSHA is proposing to add text to this paragraph to make clear that employers that miss the seven-day recording deadline are not excused from the recording obligations after the seven-day period expires.
- Section 1904.32 – Year-end review and annual summary: OSHA is proposing to amend the title of this section to more accurately describe the topics covered by § 1904.32, which include an employer's year-end review of records.
- Paragraph (a) of § 1904.32 – Basic requirement: OSHA is proposing revisions to paragraph (a)(1) of § 1904.32 to make clear that employers must examine each year's OSHA 300 Log at the end of the year to ensure that it includes all recordable injuries and illnesses. The proposed paragraph also clarifies that if an employer discovers, during this review, that an injury or illness is missing or that any aspect of an entry is inaccurate, the employer must correct the deficiency to ensure accuracy of the records.

OSHA is also proposing a new paragraph (a)(2) for § 1904.32. This proposed paragraph provides that after reviewing and verifying the Log entries, employers must verify that all entries on the Log, including any added after the year-end review of the log, are accurately recorded on OSHA 301 Incident Reports.

OSHA's proposal would move the language from existing paragraph (a)(2) in § 1904.32 to proposed paragraph (a)(3) in that same section. Proposed paragraph (a)(3) contains new language explaining that the annual summary should be created only after an employer verifies the accuracy of the Log.

The proposed rule would move existing paragraphs (a)(3) and (a)(4) of § 1904.32 to paragraphs (a)(4) and (a)(5), respectively, without substantive change.

- Paragraph (b)(1) of § 1904.32 – How extensively do I have to review the OSHA 300 Log at the end of the year? OSHA is proposing to amend paragraph (b)(1) of § 1904.32 to reflect the proposed revisions to § 1904.32(a)(1), *i.e.*, to reiterate that employers must review the Log and its entries sufficiently to verify that all recordable injuries and illnesses for the relevant year are entered, and that those entries are accurate.
- Section 1904.33 – Retention and maintenance of accurate records. OSHA is proposing to update the title of this section to more accurately reflect the obligations described in proposed § 1904.33.
- Paragraph (b)(1) of § 1904.33 – Other than the obligation identified in § 1904.32, do I have further recording duties with respect to OSHA 300 Logs and 301 Incident Reports during the five-year retention period? OSHA is proposing to amend the heading for this paragraph to reflect that employers have recording duties with respect to Incident Reports, as well as OSHA 300 Logs, during the five-year retention period. The Agency is also proposing to amend the text of paragraph (b)(1) of § 1904.33 to provide an introduction stating that, during the five-year retention period, employers must make the listed additions and corrections to the OSHA Log and Incident Reports.

OSHA is proposing to add paragraphs (b)(1)(i) through (iii) to § 1904.33 to provide further guidance to employers on the existing duties to update, add to, and correct Log entries and Incident Reports. These proposed paragraphs are not intended to change, but rather to state more clearly, what is required under the existing rule.

Proposed paragraph (b)(1)(i) clarifies employers' duties to make and keep OSHA 300 Log entries for each and every recordable injury and illness that occurs during the year to which the Log relates. The proposed paragraph also clarifies that each and every recordable injury and illness must be recorded on an Incident Report. The proposed language would make explicit that these duties continue until the five-year retention period ends.

Proposed paragraph (b)(1)(ii) addresses changes that must be made to OSHA Logs throughout the retention period. The proposed paragraph provides that employers must make any additions and corrections to the Log that are necessary to accurately reflect any changes that have occurred with respect to previously recorded injuries and illnesses since the year-end review for that Log. In other words, If the classification, description, or outcome of a previously-recorded case changes, the employer would need to remove or line out the original entry and enter the new information.

Proposed paragraph (b)(1)(iii) explains the principle currently stated in existing § 1904.33(b)(3) that an employer is not required to update or correct existing Incident Reports during the retention period.

- Paragraph (b)(2) of § 1904.33 – Do I have to make additions or corrections to the annual summary during the five-year retention period? OSHA is proposing nonsubstantive changes to paragraph (b)(2) of § 1904.33. Under neither the proposed nor the existing rules are employers required to update or make changes to annual summaries during the five-year retention period.
- Paragraph (b)(3) of § 1904.33: OSHA is proposing to delete this paragraph of the existing standard. In the proposal, this paragraph would be moved, in slightly modified form, to paragraph (b)(1)(iii) in § 1904.33.
- Paragraph (b)(2) of § 1904.35 – Do I have to give my employees and their representatives access to the OSHA injury and illness records? Paragraph (b)(2) of existing § 1904.35 addresses employee access to records. OSHA is proposing only one minor change to this paragraph – the addition of the word “accurate” to describe the records to which employees, former employees, and their representative must be given access.
- Paragraph (b)(2)(iii) of § 1904.35 – If an employee or representative asks for access to the OSHA 300 Log, when do I have to provide it? OSHA is proposing to add the term “accurate” to this paragraph to describe the OSHA 300 Logs to which employees, former employees, and their representatives must be given access.
- Paragraph (b)(2)(v) of § 1904.34 – If an employee or representative asks for access to the OSHA 301 Incident Report, when do I have to provide it? OSHA is proposing to add the term “accurate” to paragraph (b)(2)(v)(A) of § 1904.35 to describe the Incident Reports to which employees, former employees, and their personal representatives must be given access. The Agency is also proposing a similar change to paragraph (b)(2)(v)(B) of § 1904.35, which describes the Incident Reports that must be distributed to authorized employee representatives upon request.
- Subpart E – Reporting Accurate Fatality, Injury, and Illness Information to the Government: OSHA is proposing to revise the title of Subpart E to more precisely reflect the requirement in the Subpart that government representatives be given access to accurate information as required by Part 1904.
- Section 1904.40 – Providing accurate records to government representatives: OSHA is proposing to revise the title of § 1904.40 to reflect the proposed changes to paragraph (a) of that section.
- Paragraph (a) of § 1904.40 – Basic requirements: OSHA is proposing to add the term “accurate” to paragraph (a) of § 1904.40(a) to reflect OSHA’s longstanding expectation that

government representatives be provided with correct and complete records in response to their requests.

Costs

The proposed changes to OSHA's recordkeeping rules simply reiterate and clarify employers' existing obligations to record work-related injuries and illnesses. This proposal would not require employers to make records of any injuries or illnesses for which records are not currently required. OSHA estimated the costs to employers of these requirements when the existing standards were promulgated in 2001, *see* 69 FR 6081-120. The proposed revisions impose no new cost burden.

Moreover, even if the proposed revisions to OSHA's recordkeeping rules would result in some costs beyond those the Agency estimated in 2001, any such costs would be nominal. Earlier this year, OSHA prepared a Final Economic Analysis for a final rule addressing the industries entitled to a partial exemption from recordkeeping requirements and the reporting of injuries and fatalities to the Agency. In that analysis, OSHA estimated that it takes .38 of an hour to record an injury or illness on all required OSHA forms, taking into account requirements for providing access to records. *See* 79 FR 56130, 56165 (Sept. 18, 2014). And according to OSHA's 2014 request to the Office of Management and Budget for an extension of the approval of the information collection requirements in the recordkeeping rules, the average hourly rate for an Occupational Health and Safety Specialist (Standard Occupational Classification code 29-9011) is estimated to be \$46.72 (which includes a 43% addition for benefits). *See* http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201405-1218-003. Thus, the total estimated cost of preparing OSHA records is \$17.75 per injury or illness.

The 2014 ICR estimated that there are 2.44 million injuries and illnesses that must be recorded on OSHA logs each year. If the Agency assumes that one percent of those 2.44 million

injuries and illnesses (24,400) would be recorded as a result of the proposal – an assumption that OSHA deems high (or conservative) – recording those injuries at a cost of \$17.75 per injury or illness would result in total estimated costs of approximately \$433,100 per year.¹ And if the Agency makes the even more conservative assumption that five percent of 2.44 million injuries and illnesses (122,000) would be recorded as a result of the proposal, the total estimated cost of the proposed rule, across all affected employers, would be under \$2.2 million per year.

Request for Recommendation

OSHA is formally requesting that the ACCSH committee submit a recommendation on whether the Agency should proceed with the proposed amendments to the recordkeeping regulations in 29 CFR Part 1904.

¹ The full cost of recording an injury or illness that occurred in year 1, but is recorded in a later year, will be spread out unevenly over the five-year retention period.