

(d) The Special Counsel's failure to file a complaint with respect to such charge with OCAHO within the 120-day period shall not affect the right of the Special Counsel to continue to investigate the charge or later to bring a complaint before OCAHO.

(e) The Special Counsel may seek to intervene at any time in any proceeding brought by a charging party before OCAHO.

#### § 44.304 Special Counsel acting on own initiative.

(a) The Special Counsel may, on the Special Counsel's own initiative, conduct investigations respecting unfair immigration-related employment practices when there is reason to believe that a person or other entity has engaged or is engaging in such practices, and shall notify a respondent by certified mail of the commencement of the investigation.

(b) The Special Counsel may file a complaint with OCAHO when there is reasonable cause to believe that an unfair immigration-related employment practice has occurred no more than 180 days prior to the date on which the Special Counsel opened an investigation of that practice.

#### § 44.305 Regional offices.

The Special Counsel, in accordance with regulations of the Attorney General, shall establish such regional offices as may be necessary to carry out the Special Counsel's duties.

Dated: December 14, 2016.

**Loretta E. Lynch,**  
Attorney General.

[FR Doc. 2016-30491 Filed 12-16-16; 8:45 am]

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## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

#### 29 CFR Part 1904

[Docket No. OSHA-2015-0006]

RIN 1218-AC84

#### Clarification of Employer's Continuing Obligation To Make and Maintain an Accurate Record of Each Recordable Injury and Illness

**AGENCY:** Occupational Safety and Health Administration (OSHA), Labor.

**ACTION:** Final rule.

**SUMMARY:** OSHA is amending 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 amendments consist of revisions to the titles of some existing sections and subparts and changes to the text of some existing provisions. The amendments add no new compliance obligations and do not require employers to make records of any injuries or illnesses for which records are not currently required to be made.

The amendments in this rule are adopted in response to a decision of the United States Court of Appeals for the District of Columbia Circuit. In that case, a majority held that the Occupational Safety and Health Act does not permit OSHA to impose a continuing recordkeeping obligation on employers. One judge filed a concurring opinion disagreeing with this reading of the statute, but finding that the text of OSHA's recordkeeping regulations did not impose continuing recordkeeping duties. OSHA disagrees with the majority's reading of the law, but agrees that its recordkeeping regulations were not clear with respect to the continuing nature of employers' recordkeeping obligations. This final rule is designed to clarify the regulations in advance of possible future federal court litigation that could further develop the law on the statutory issues addressed in the D.C. Circuit's decision.

**DATES:** This final rule becomes effective on January 18, 2017. *Collections of information:* There are collections of information contained in this final rule (see Section XI, Office of Management and Budget Review Under the Paperwork Reduction Act of 1995). Notwithstanding the general date of applicability that applies to all other requirements contained in the final rule, affected parties do not have to comply with the collections of information in the recordkeeping regulations (as revised by this final rule) until the Department of Labor publishes a separate document in the **Federal Register** announcing that the Office of Management and Budget has approved them under the Paperwork Reduction Act.

#### FOR FURTHER INFORMATION CONTACT:

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*Copies of this Federal Register notice and news releases:* Electronic copies of these documents are available at OSHA's Web page at <http://www.osha.gov>.

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## I. Background

### A. The OSH Act and Citation of OSH Act Violations

The Occupational Safety and Health Act of 1970 (OSH Act or Act) arose out of a Congressional finding that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments. *See* 29 U.S.C. 651(a). Accordingly, the purpose of the statute is to assure so far as possible every working man and woman in the Nation safe and healthful working conditions. *See* 29 U.S.C. 651(b).

To effectuate the Act's purpose, Congress authorized the Secretary of Labor to promulgate occupational safety and health standards (29 U.S.C. 655); a standard, as defined in the Act, requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably

necessary or appropriate to provide safe or healthful employment and places of employment. *See* 29 U.S.C. 652(8). The Act also grants broad authority to the Secretary to promulgate other types of regulations such as those related to employer self-inspections and keeping employees informed of matters related to occupational safety and health. 29 U.S.C. 657(c). The OSH Act specifically directs the Secretary to promulgate regulations requiring employers to make and maintain accurate records of work-related injuries and illnesses. 29 U.S.C. 657(c)(1) and (2), 673(a); *see also* 651(b)(12), 657(g)(2), 673(e).

OSHA issues citations and assesses monetary penalties when it finds that employers are not complying with the Act or with applicable standards and regulations. 29 U.S.C. 658, 659, 666. Section 9(c) of the OSH Act contains a statute of limitations providing that no citation may be issued after the expiration of six months following "the occurrence of any violation." 29 U.S.C. 658(c). Generally, OSH Act violations continue to occur for as long as employees are exposed to the condition posed by the non-compliant workplace. *See Sec'y of Labor v. Cent. of Georgia R.R. Co.*, 5 BNA OSHC 1209, 1211 (Rev. Comm'n 1977) (explaining that a violation occurs "whenever . . . [a] standard is not complied with and an employee has access to the resulting zone of danger"). Thus, employers have an ongoing obligation to correct conditions that violate OSHA standards and regulations, and under section 9(c), violations are subject to citations and penalties for up to six months after the last instance of employee exposure to the violative condition.

### B. OSHA's Recordkeeping Regulations and the Importance of Accurate Workplace Injury and Illness Data

In 1971, OSHA issued its first recordkeeping regulations at 29 CFR part 1904. OSHA promulgated revisions to these regulations in 2001 in an effort to improve the quality of workplace injury and illness records by making OSHA's recordkeeping system easier to use and understand. *See* 66 FR 5916 (January 19, 2001).

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 (BLS). Employers must record work-related injuries and illnesses that meet one or more recording criteria, including injuries and illnesses resulting in death, loss of consciousness, days away from work,

restricted work activity or job transfer, medical treatment beyond first aid, or a diagnosis of a significant injury or illness by a physician or other licensed health care professional. 29 CFR 1904.7. Employers must document each recordable injury or illness on an "OSHA 300" form, which is a log of all work-related injuries and illnesses. 29 CFR 1904.29(a) through (b)(1). Employers also must prepare a supplementary "OSHA 301 Incident Report" or equivalent form for each recordable injury and illness; the Incident Reports provide additional details about the injuries and illnesses recorded in the 300 Log. 29 CFR 1904.29(b)(2).

At the end of each calendar year, employers must review their 300 Logs to verify that the entries are complete and accurate. 29 CFR 1904.32(a)(1). Employers also must correct any deficiencies identified during this annual review. *Id.* By February 1 of each year, employers must create, certify, and post annual summaries of the cases listed on their 300 Logs for the prior calendar year. 29 CFR 1904.32(a), (b). Annual summaries must remain posted until April 30 each year. 29 CFR 1904.32(b)(6). Employers must retain their OSHA Logs, Incident Reports, and annual summaries for five years following the end of the calendar year that they cover. 29 CFR 1904.33(a). The regulations contain provisions explaining when records need to be revised during the retention period.

Accurate injury and illness records serve several important purposes. *See* 66 FR at 5916–17, January 19, 2001. One purpose is to provide information to employers. The information in the OSHA-required records makes employers more aware of the kinds of injuries and illnesses occurring and the hazards that cause or contribute to them. When employers analyze and review the information in their records, they can identify and correct hazardous workplace conditions. Injury and illness records are essential for employers to manage their safety and health programs effectively; these records permit employers to track injuries and illnesses over time so they can evaluate the effectiveness of protective measures implemented in response to identified hazards.

Similarly, employees—who have access to OSHA injury and illness records throughout the five-year retention period (*see* 29 CFR 1904.35)—can use information about the occupational injuries and illnesses occurring in their workplaces to become better informed about, and more alert to, the hazards they face. Employees who

are aware of the hazards around them may be more likely to follow safe work practices and to report workplace hazards to their employers. When employees are aware of workplace hazards, and participate in the identification and control of those hazards, the overall level of safety and health in the workplace can improve.

OSHA also has access to employer injury and illness records during the retention period (see 29 CFR 1904.40 and 1904.41), and these records are an important source of information for OSHA and enhance its enforcement efforts. During the initial stages of an inspection, an OSHA representative reviews the employer's injury and illness data so that OSHA can focus its inspection on the hazards revealed by the records. In some years, OSHA has also surveyed a subset of employers covered by the OSH Act for their injury and illness data, and used that information to help identify the most dangerous types of worksites and the most prevalent types of safety and health hazards.

Additionally, BLS uses data derived from employers' injury and illness records to develop national statistics on workplace injuries and illnesses. These statistics include information about the source, nature, and type of the injuries and illnesses that are occurring in the nation's workplaces. To obtain the data to develop national statistics, BLS and participating State agencies conduct an annual survey of employers in almost all sectors of private industry. BLS makes the aggregate survey results available for research purposes and for public information. This data provides information about the incidence of workplace injuries and illnesses and the nature and magnitude of workplace safety and health problems. Congress, OSHA, and safety and health policymakers in Federal, State, and local governments use BLS statistics to make decisions concerning safety and health legislation, programs, and standards. And employers and employees can use BLS statistics to compare the injury and illness data from their workplaces with data from the nation as a whole.

### C. An Employer's Failure To Record a Recordable Illness or Injury Is a Failure To Maintain Accurate Injury and Illness Records and Is a Continuing Violation

A continuing violation exists when there is noncompliance with "the text of . . . [a] pertinent law [that] imposes a continuing obligation to act or refrain from acting." *Earle v. Dist. of Columbia*, 707 F.3d 299, 307 (D.C. Cir. 2012). Where there is an ongoing obligation to

act, each day the action is not taken results in a continuing, ongoing violation. In other words, "a new claim accrues each day the violation is extant." *Interamericas Inv., Ltd. v. Fed. Reserve Sys.*, 111 F.3d 376, 382 (5th Cir. 1997). For example, in *United States v. Edelkind*, 525 F.3d 388 (5th Cir. 2008), the Fifth Circuit found that willfully failing to pay child support as required by federal law was a continuing offense because "each day's acts . . . [brought] a renewed threat of the substantive evil Congress sought to prevent." *Id.* at 394–95 (internal quotation marks and citations omitted). And in *Postow v. OBA Federal Savings & Loan Association*, 627 F.2d 1370 (D.C. Cir. 1980), the D.C. Circuit held that a lender's failure to provide required disclosures to borrowers was a continuing violation of the Truth-in-Lending Act because the violation subverted the goals of the statute every day the borrowers did not have the information. *Id.* at 1379–80. See also, e.g., *United States v. Bailey*, 444 U.S. 394, 413 (1980) (escape from federal custody is a continuing offense in light of "the continuing threat to society posed by an escaped prisoner"); *United States v. George*, 625 F.3d 1124 (9th Cir. 2010) (failure to comply with statute requiring registration as a sex offender is a continuing offense), *vacated on other grounds*, 672 F.3d 1126 (9th Cir. 2012); *United States v. Franklin*, 188 F.2d 182 (7th Cir. 1951) (Alien Registration Act imposes ongoing registration obligation; failure to register is a continuing violation).

OSHA has long treated recordkeeping violations under the OSH Act as continuing violations—and, as explained below in Section II.B.1 of this preamble—this view is consistent with section 8(c) of the Act, in which Congress instructed the Secretary to require employers to make and maintain accurate records of workplace injuries and illnesses. 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. This means that if an employer initially fails to record a recordable injury or illness, the employer still has an ongoing duty to record that case; the recording obligation does not expire simply because the employer failed to record the case when it was first required to do so. As long as an employer fails to comply with its ongoing duty to record an injury or illness, and therefore with

its obligation to maintain accurate records, there is an ongoing violation of OSHA's recordkeeping requirements that continues to occur every day employees work at the site. Therefore, OSHA can cite employers for such recordkeeping violations for up to six months after the five-year retention period expires without running afoul of the OSH Act's statute of limitations.<sup>1</sup> OSHA has consistently issued such citations since it enacted its first recordkeeping regulations, as evidenced by the case law in the following paragraph. The purpose of this final rule is simply to clarify what has always been OSHA's interpretation of its recordkeeping regulations.

The Occupational Safety and Health Review Commission has upheld OSHA's position on the continuing nature of recordkeeping violations. See, e.g., *Sec'y of Labor v. Gen. Dynamics*, 15 BNA OSHC 2122 (Rev. Comm'n 1993) (recordkeeping violations "occur" at any point during the retention period when records are inaccurate, so citations for those violations are not barred simply because they are issued more than six months after the obligation to record first arose); *Sec'y of Labor v. Johnson Controls, Inc.*, 15 BNA OSHC 2132 (Rev. Comm'n 1993) (recordkeeping violations continue until correction or expiration of the retention period). The Commission addressed this issue most recently in *Secretary of Labor v. AKM LLC*, 23 BNA OSHC 1414 (Rev. Comm'n 2011) (*Volks I*), 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.<sup>2</sup>

### D. The D.C. Circuit's Decision in *Volks II*

A panel of the D.C. Circuit reviewed the Commission's *Volks I* decision, and on April 6, 2012, issued a decision—

<sup>1</sup> Of course, OSHA may not issue a citation more than six months after the employer corrects the violation. See, e.g., *Sec'y of Labor v. Mangans Painting Co.*, 21 BNA OSHC 2043, 2048 (Rev. Comm'n 2007) (citation was time-barred where the employer abated the violation more than six months prior to the issuance date).

<sup>2</sup> Although the Coalition for Workplace Safety stated that OSHA has never expressed a policy of treating recordkeeping violations as ongoing, Ex. 0013, OSHA's citation history—and the Commission decisions upholding those citations—make clear that OSHA took this approach for many years. See *Martin v. OSHRC*, 499 U.S. 144, 157 (1991) (OSHA citations embody the Secretary's interpretation of regulations). See discussion in Section I.C, Background, above. Throughout this preamble, exhibit numbers are referred to in the form Ex. XXXX, where XXXX reflects the last four digits of the full document number (OSHA–2015–006–XXXX).

*Volks II*—reversing the Commission. *AKM LLC v. Sec’y of Labor*, 675 F.3d 752 (D.C. Cir. 2012) (*Volks II*). The majority opinion in *Volks II*, without discussion of Commission precedent to the contrary, held that the OSH Act does not provide authority for the Secretary to impose a continuing recordkeeping obligation on employers, explaining that “the . . . language in [the OSH Act] . . . which deals with record-keeping is not authorization for OSHA to cite the employer for a record-making violation more than six months after the recording failure.” *Id.* at 758; *see also id.* at 756–57. The majority stated that OSHA must cite an employer for failing to record an injury or illness within six months of the first day on which the regulations require the recording; a citation issued later than that, according to the *Volks II* majority, is barred by the OSH Act’s statute of limitations. *Id.* at 753–59.

In a separate opinion concurring in the judgment in *Volks II*, Judge Garland disagreed with the majority’s conclusion that the OSH Act did not permit continuing record-making obligations. Judge Garland agreed with the Secretary that the OSH Act does allow for continuing violations of recordkeeping requirements. He concluded, however, that the specific language in the recordkeeping regulations reviewed by the panel did not implement this statutory authority and did not create continuing recordkeeping obligations. *Id.* at 759–64. Under the analysis in Judge Garland’s concurring opinion, OSHA in fact has statutory authority to create a continuing obligation for employers to make and maintain accurate records of work-related illnesses and injuries, and can revise its recordkeeping regulations to more clearly implement that statutory authority.

Thus, because of the *Volks II* decision, OSHA has decided to clarify employers’ obligations under its recordkeeping regulations and to elaborate on its understanding of the statutory basis for those obligations. OSHA disagrees with the legal holding in the majority opinion in *Volks II*, but agrees with Judge Garland that, while the OSH Act gives the Secretary authority to impose continuing recordkeeping obligations, the text of the recordkeeping regulations did not make clear OSHA’s longstanding intention to fully implement that authority. Therefore, OSHA is changing its recordkeeping regulations to clarify that the duty to make and maintain an accurate record of a work-related illness or injury is an ongoing obligation that continues until the required record is made or until the

end of the record-retention-and-access period prescribed by the regulations. To that end, OSHA is revising the titles of some sections and subparts in part 1904 and changing the text of some of the recordkeeping requirements. OSHA describes the changes in **SUPPLEMENTARY INFORMATION**, Section III, later in this preamble.

#### *E. Events Preceding This Final Rule*

On July 29, 2015, OSHA issued a proposed rule entitled “Clarification of Employer’s Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness.” 80 FR 45116. Before issuing the proposal, OSHA consulted with the Advisory Committee on Construction Safety and Health (ACCSH). OSHA provided ACCSH with a summary and explanation of the proposal and a statement regarding the need for the proposed revisions to 29 CFR part 1904. On December 4, 2014, ACCSH voted to recommend that OSHA proceed with the proposal.<sup>3</sup>

OSHA provided 60 days for public comment and eventually extended the comment period for an additional 30 days. 80 FR 57765. OSHA received a total of 30 comments. The comments are addressed elsewhere in this preamble.

## II. Legal Authority

### *A. Overview*

As explained previously, in **SUPPLEMENTARY INFORMATION**, Section I.A, the OSH Act authorizes the Secretary of Labor to issue “standards” and other “regulations.” *See, e.g.*, 29 U.S.C. 655, 657. An occupational safety and health standard, issued pursuant to section 6 of the Act, prescribes measures to be taken to remedy an identified occupational hazard. Other regulations, issued pursuant to general rulemaking authority found, *inter alia*, in section 8 of the Act, establish enforcement or detection procedures designed to further the goals of the Act generally. 29 U.S.C. 657(c); *Workplace Health and Safety Council v. Reich*, 56 F.3d 1465, 1468 (D.C. Cir. 1995). This final rule amends OSHA’s recordkeeping regulations issued pursuant to authority expressly granted by sections 8 and 24 of the Act. 29 U.S.C. 657, 673. It simply clarifies existing duties under part 1904, and does not impose any new substantive recordkeeping requirements.

Many commenters suggested that OSHA does not have legal authority to

promulgate this rule. Exs. 0003, 0008, 0009, 0010, 0011, 0012, 0013, 0014, 0016, 0017, 0020, 0021, 0023, 0026. OSHA disagrees. As recognized by Judge Garland in his concurring opinion in *Volks II*, and explained in more detail in **SUPPLEMENTARY INFORMATION**, Section II.B, later in this preamble, the OSH Act plainly authorizes this regulatory action. Numerous provisions of the OSH Act both underscore Congress’ acknowledgement that accurate injury and illness records are a critical component of the national occupational safety and health program and give the Secretary broad authority to enact recordkeeping regulations that create a continuing obligation for employers to make and maintain accurate records of work-related illnesses and injuries. Section 2(b)(12) of the Act states that one of the purposes of the OSH Act is to assure, so far as possible, safe and healthful working conditions by providing for appropriate reporting procedures that will help achieve the objectives of the Act and “accurately describe” the nature of the occupational safety and health problem. *See* 29 U.S.C. 651(b)(12). Section 8(c)(1) requires each employer to “make, keep and preserve” and to “make available” to the Secretary such records prescribed by regulation as necessary or appropriate for the enforcement of the Act or for developing information regarding the causes and prevention of occupational accidents and illnesses. *See* 29 U.S.C. 657(c)(1). Section 8(c)(2) requires the Secretary to prescribe regulations requiring employers to “maintain accurate records” of, and to make periodic reports on, work-related deaths, injuries and illnesses. *See* 29 U.S.C. 657(c)(2). Section 8(g)(2) of the Act generally empowers the Secretary to prescribe such rules and regulations as he may deem necessary to carry out his responsibilities under the Act. *See* 29 U.S.C. 657(g)(2). Section 24(a) requires the Secretary to develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics and to compile accurate statistics on work injuries and illnesses. *See* 29 U.S.C. 673(a). And Section 24(e) provides that on the basis of the records made and kept pursuant to section 8(c) of the Act, employers must file such reports with the Secretary as the Secretary prescribes by regulation as necessary to carry out his functions under the Act. *See* 29 U.S.C. 673(e).

<sup>3</sup> The National Federation of Independent Businesses has requested that the transcript of ACCSH’s meeting be added to the docket of this rulemaking. Ex. 0014. The transcript can now be found at Ex. 0030.

*B. The OSH Act Authorizes the Secretary To Impose a Continuing Obligation on Employers To Make and Maintain Accurate Records of Work-Related Injuries and Illnesses, and Incomplete or Otherwise Inaccurate Records Create Ongoing, Citable Conditions*

1. Section 8(c) of the Act Governs Employers' Recordkeeping Obligations, and That Provision Authorizes the Imposition of Continuing Obligations on Employers To Make and Maintain Accurate Records of Work-Related Illnesses and Injuries

"Whether [an] . . . obligation is continuing is a question of statutory construction." *Earle*, 707 F.3d at 307. The express language of the OSH Act readily supports a continuing violation theory in recordkeeping cases. And section 8(c) grants the Secretary broad authority to impose requirements he considers "necessary or appropriate," including recordkeeping regulations that provide that an employer's duty to make records of injuries and illnesses is an ongoing obligation. 29 U.S.C. 657(c).

Section 8(c)(2) requires the Secretary to prescribe regulations requiring employers to "maintain accurate records" of work-related deaths, injuries and illnesses. See 29 U.S.C. 657(c)(2) (emphasis added). And section 8(c)(1) requires employers to "make, keep and preserve" and to "make available" records that the Secretary identifies as necessary or appropriate for the enforcement of the Act or for developing information regarding the causes and prevention of occupational accidents and illnesses. See 29 U.S.C. 657(c)(1) (emphasis added). The language Congress used in these provisions therefore authorizes the Secretary to require employers to have on hand and to make available records that accurately reflect *all* of the recordable injuries and illnesses that occurred during the designated time period. Moreover, this statutory language is inconsistent with any suggestion that Congress intended the duty to record an injury or illness to be a discrete obligation that expires if the employer fails to comply on the first day the Secretary's regulations require recording.

This is because the words "accurate" and "maintain" in section 8(c)(2) of the Act connote a continued course of conduct that includes an ongoing obligation to create records. The word "maintain" means to "[c]ause or enable (a condition or state of affairs) to continue," an example being when one works to ensure that something stays "in good condition or in working order

by checking or repairing it regularly." [http://www.oxforddictionaries.com/us/definition/american\\_english/maintain?searchDictCode=all](http://www.oxforddictionaries.com/us/definition/american_english/maintain?searchDictCode=all). Therefore, "maintain" plainly implies an ongoing action. See, e.g., *Carey v. Shiley, Inc.*, 32 F.Supp.2d 1093, 1103 (S.D. Iowa 1998) ("continuing duty to maintain records for" the Food and Drug Administration). And "accurate" means "conforming exactly to truth," and is synonymous with "exact." <http://www.merriam-webster.com/dictionary/accurate>. See also, e.g., *Huntington Sec. Corp. v. Busey*, 112 F.2d 368, 370 (6th Cir. 1940) (noting that the term "accurately" . . . in its ordinary use[ ] means precisely, exactly correctly, without error or defect"). Therefore, the OSH Act's direction to enact regulations requiring employers to "maintain accurate [injury and illness] records" is a mandate for the Secretary to impose an ongoing or continuing duty on employers to have true or exact documentation of recordable incidents. An employer cannot be said to have (or to be keeping or maintaining) accurate (or true or exact) records of injuries and illnesses for a particular calendar year if there are recordable injuries or illnesses that occurred during that year that are missing from those records. Put simply, the Secretary cannot fulfill the statutory obligation of ensuring that employers "maintain accurate records" without imposing on employers an ongoing duty to create records for injuries and illnesses in the first place; a duty to maintain accurate records inherently implies an ongoing obligation to create the records that must be maintained.

The Fourth Circuit recognized as much in *Sierra Club v. Simkins Industries*, 847 F.2d 1109, 1115 (4th Cir. 1988), a Clean Water Act case, when it refused to allow a company to defend against its failure to file and retain water sampling records on the ground that it never collected the data it needed to create the records in the first place. The court ruled that an ongoing duty to maintain records implies a corresponding, and continuing, duty to have those records, explaining that it would not allow the company "to escape liability . . . by failing at the outset to sample and to create and retain the necessary . . . records." *Id.* See also, e.g., *Big Bear Super Mkt. No. 3 v. INS*, 913 F.2d 754, 757 (9th Cir. 1990) (per curiam) (statutory and regulatory scheme described by the court as requiring companies to "maintain" documents is interpreted to impose a "continuing duty" on those companies "to prepare and make" the documents in the first instance); *Park v. Comm'r of*

*Internal Revenue*, 136 T.C. 569, 574 (U.S. Tax Ct. 2011) (noting that a party that did not create required records thereby failed to "keep" those records), *rev'd and remanded on other grounds*, 722 F.3d 384 (D.C. Cir. 2013).

The "make, keep, and preserve" and "make available" language in section 8(c)(1) similarly envisions a continuing duty to record and provides additional support for the Secretary's interpretation of the "maintain accurate records" language in section 8(c)(2). "Keep" is a synonym for "maintain," <http://thesaurus.com/browse/maintain>, and both words imply a continued course of conduct, as does "preserve."<sup>4</sup> See, e.g., *Powerstein v. Comm'r of Internal Revenue*, T.C. Memo 2011-271, 2011 WL 5572600, at \*13 (U.S. Tax Ct. Nov. 16, 2011) (interpreting statutory and regulatory requirements to "keep" tax records to mean that taxpayers must "maintain" such records); *Freedman v. Comm'r of Internal Revenue*, T.C. Memo 2010-155, 2010 WL 2942167, at \*1 (U.S. Tax Ct. July 21, 2010) (same).

The fact that Congress included the word "make" in a phrase with two other terms that both call for a continuing action suggests that "make" was also intended to signify a continuing course of conduct in the recordkeeping context. The most reasonable reading of section 8(c)(1), particularly in light of the "maintain accurate records" language in section 8(c)(2), is that the phrase "make, keep, and preserve" authorizes one continuous recordkeeping requirement that includes both the creation and the keeping of records. See, e.g., *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) (noting a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"). The related authorization to the Secretary to prescribe such recordkeeping regulations as he considers "necessary or appropriate" further emphasizes the breadth of the Secretary's discretion in implementing the statute.

Thus, the Secretary does not believe that section 8(c) authorizes two and only two discrete duties: A duty to create a record that can arise at only one moment in time, and a duty to preserve

<sup>4</sup> The legislative history of the OSH Act shows that Congress used "keep" and "maintain" synonymously. In a Senate Report, Congress described section 8(c)(2)—which talks about "maintaining" records—as "requiring employers to keep records of all work-related injuries and diseases." S. Rep. No. 91-1282, at 31 (1970), reprinted in Subcomm. on Labor of the Comm. on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970, at 171 (1971) (emphasis added).

that record if it should be created. Such a view would be inconsistent with the most relevant provision of the Act, section 8(c)(2), which is the provision that specifically addresses the Secretary's authority to prescribe regulations for injury and illness recordkeeping, *i.e.*, to prescribe regulations that require employers to "maintain accurate records" of workplace illnesses and injuries. Nothing about the Congressional direction to "maintain accurate records" is naturally read as creating two entirely discrete obligations, or as conveying Congressional intent to limit the duty to make a required record to a single point in time. Records that omit work-related injuries and illnesses are not accurate, and no purpose is served by maintaining inaccurate records. Instead, Congress intended employers, employees, and the Secretary to have access to accurate information about injuries and illnesses occurring in workplaces.

The requirement in section 8(c)(1) that employers "make available" such records as the Secretary prescribes regarding injuries and illnesses further illustrates that section 9(c)'s statute of limitations does not limit the Secretary to acquiring only six months of accurate injury and illness data. A regulation requiring employers, if requested, to make available accurate records showing injuries and illnesses that have occurred within the past few years is on its face well within the OSH Act's grant of authority. Nothing in the statutory language suggests that the Secretary can only require employers to provide information regarding work-related injuries and illnesses that have occurred within the past six months. Such a limitation would cripple OSHA's ability to gather complete information and to improve understanding of safety and health issues, contrary to Congressional intent. Furthermore, the duty to make accurate multi-year records available upon request arises when the request is made, and the statute of limitations therefore does not begin to run until the request is made and the employer fails to comply.

It therefore follows that section 8(c) of the Act authorizes the Secretary to enact regulations that impose a continuing obligation on employers to make and maintain accurate records of work-related illnesses and injuries. Not only are such recordkeeping regulations expressly called for by the language of section 8(c), but they are also consistent with Congressional intent and the purpose of the OSH Act. The Supreme Court recognizes a "familiar canon of statutory construction that remedial

legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). And reading the statute in light of its protective purposes further supports the Secretary's interpretation that the Act calls for treating the duty to record injuries and illnesses as a continuing obligation. *See, e.g., United States v. Advance Mach. Co.*, 547 F. Supp. 1085, 1090–91 (D. Minn. 1982) (requirement in Consumer Product Safety Act to "immediately inform" the government of product defects is read as creating a continuing obligation to report because any other reading would frustrate the statute's goal of protecting the public from hazards).

The legislative history of the OSH Act also demonstrates that Congress wanted employers to have accurate injury and illness records both for the purpose of making workplaces safer and healthier and for the purpose of allowing the federal government to study the nation's occupational safety and health problems. As the House Committee on Education and Labor noted, before passage of the OSH Act it was impossible to know the extent of national occupational safety and health issues due to variability in state reporting measures; thus, Congress viewed it as an "evident Federal responsibility" to provide for "[a]ccurate, uniform reporting standards." H.R. Rep. No. 91–1291, at 15 (1970), *reprinted in* Subcomm. on Labor of the Comm. on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970, at 845 (1971). *See also* 29 U.S.C. 673(a) ("The Secretary shall compile accurate statistics on work injuries and illnesses . . ."); *Sec'y of Labor v. Gen. Motors Corp.*, 8 BNA OSHC 2036, 2039 (Rev. Comm'n 1980) ("Examination of the legislative history of [sections 8(c)(1) and 8(c)(2)] . . . shows a clear congressional intent that th[e] reporting requirement be interpreted broadly in order to develop information for future scientific use.').

Some commenters, including the Coalition for Workplace Safety and the American Health Care Association, stated a concern that interpreting section 8(c) to authorize continuing violations means that OSHA is claiming unfettered discretion to essentially eliminate any statute of limitations for recordkeeping violations. Exs. 0011, 0013, 0020. OSHA disagrees. OSHA's interpretation does not mean that the Secretary's authority is unconstrained. Under section 8(c)(1), the records the Secretary requires must be "necessary or appropriate" to enforcement of the Act or to gathering information regarding

the causes or prevention of occupational accidents or illnesses. 29 U.S.C. 657(c)(1). Under section 8(d), the Secretary must obtain information with a minimum burden on employers, especially small businesses, and reduce unnecessary duplication to the maximum extent feasible. 29 U.S.C. 657(d). Moreover, under the Paperwork Reduction Act, the Secretary and the Office of Management and Budget must determine that a recordkeeping requirement will have practical utility and will not be unduly burdensome. 44 U.S.C. 3506(c)(3).

## 2. The OSH Act's Statute of Limitations Does Not Define OSHA Violations or Address When Violations Occur, Nor Does the Language in Section 9(c) Preclude Continuing Recordkeeping Violations

As explained previously, it is section 8(c) of the OSH Act that authorizes the Secretary to establish the nature and scope of employers' recordkeeping obligations. The OSH Act's statute of limitations in section 9(c) deals only with the question of *when* OSHA can cite a violation; it says nothing about what *constitutes* a violation, or when a violation *occurs*. A violation is a breach of a duty, and the question of what duties the Secretary may prescribe must logically be dealt with prior to addressing the statute of limitations. Section 9(c) cannot be read as prohibiting the Secretary from imposing continuing recordkeeping obligations on employers covered by the OSH Act when the text and legislative history of the Act show that section 8(c) authorizes the Secretary to create such obligations. Thus, the OSH Act's statute of limitations simply sets the period within which legal action must be taken *after* the obligation ceases or the employer comes into compliance. *See, e.g., Inst. For Wildlife Prot. v. United States Fish & Wildlife Serv.*, No. 07–CV–358–PK, 2007 WL 4117978, at \*6 (D. Or. Nov. 16, 2007) (declining to apply applicable statute of limitations to "nullify . . . [the government's] ongoing duty to designate critical habitat" for an endangered species "and . . . insulate the agency from challenges to any continued inaction").

Moreover, "statutes of limitation in the civil context are to be strictly construed in favor of the Government against repose," *Interamericas*, 111 F.3d at 382 (citing *Badaracco v. Comm'r of Internal Revenue*, 464 U.S. 386 (1984) and *E.I. Dupont De Nemours & Co. v. Davis*, 264 U.S. 456 (1924)), and nothing in section 9(c) precludes continuing violations in recordkeeping cases. To the contrary, the language in section 9(c)

is very general, providing only that “[n]o citation may be issued . . . after the expiration of six months following the occurrence of any violation.” 29 U.S.C. 658(c). The “occurrence” of something is not necessarily a discrete event; it can encompass actions or events that continue over time. For example, one dictionary defines “occurrence” as “the existence or presence of something.” <http://dictionary.cambridge.org/dictionary/american-english/occurrence> 2. See also, e.g., *PECO Energy Co. v. Boden*, 64 F.3d 852, 856–57 (3d Cir. 1995) (scheme of repeated thefts over the span of six years constituted a single “occurrence” such that only one insurance deductible applied to the resulting loss). Similarly, the term “occurrence of any violation” in section 9(c) does not mean that an OSHA violation is necessarily a discrete event that takes place at one, and only one, point in time.

Had Congress wanted the statute of limitations to run from the time a violation first occurred, it could have used language so stating. Indeed, Congress has used language more readily susceptible to that interpretation in other statutes. See, e.g., the Multiemployer Pension Plans Amendments Act, 29 U.S.C. 1451(f)(1) (statute of limitations runs from “the date on which the cause of action arose”); the Federal Employers’ Liability Act, 45 U.S.C. 56 (statute of limitations runs from “the day the cause of action accrued”); the general statute of limitations governing civil actions against the United States, 28 U.S.C. 2401(a) (claims barred unless “filed within six years after the right of action first accrues”).

This new rule is intended to clarify that if an employer fails to record an injury or illness within seven days, the obligation to record continues on past the seventh day, such that each successive day where the injury or illness remains unrecorded constitutes a continuing “occurrence” of the ongoing violation. If the employer records the injury on the twentieth, thirtieth, or some later day, the violation ceases to occur at that point, and any citation would need to be issued within six months of the cessation of the violation. This position is entirely consistent with section 9(c). Neither OSHA nor the Commission nor any court has ever treated section 9(c) as precluding all continuing violations. Indeed, continuing violations are common in the OSHA context, with the Commission taking the position that violations of OSHA requirements, including recordkeeping violations, generally continue as long as employees

are exposed to the non-complying conditions. See, e.g., *Sec’y of Labor v. Arcadian Corp.*, 20 BNA OSHC 2001 (Rev. Comm’n 2004) (violation of the OSH Act’s general duty clause stemming from the unsafe operation of a urea reactor); *Johnson Controls*, 15 BNA OSHC 2132 (recordkeeping); *Sec’y of Labor v. Safeway Store No. 914*, 16 BNA OSHC 1504 (Rev. Comm’n 1993) (hazard communication program and material safety data sheets); *Sec’y of Labor v. Yelvington Welding Serv.*, 6 BNA OSHC 2013 (Rev. Comm’n 1978) (fatality reporting); *Cent. of Georgia R.R.*, 5 BNA OSHC 1209 (housekeeping).<sup>5</sup> Indeed, the *Volks II* panel also acknowledged that the duties to preserve records, to train employees, and to correct unsafe machines may continue. 675 F.3d at 756, 758. The OSH Act simply would not achieve Congress’ fundamental objectives if basic employer obligations were not continuing.

These cases reflect fundamental OSH Act principles. Safety and health standards are rules that require, *inter alia*, “conditions.” 29 U.S.C. 652(8). The absence of a required condition violates the standard. It does not matter when the absence first arose or how long it has persisted. If a condition is required and is not present (e.g., a machine is not guarded or a hazardous materials container is not labeled), a violation occurs and a citation requiring abatement may be issued within six months of the observed noncompliance. This construction follows from the language of the Act and is essential to the Secretary’s ability to enforce compliance. Accordingly, continuing obligations and violations are a regular occurrence under the OSH Act. Nothing in section 9(c), which applies equally to standards and regulations such as recordkeeping requirements, bars them.

In addition, continuing violations have been found to exist under other laws with statutes of limitations that contain language similar to that in section 9(c) of the OSH Act. For example, in *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002), the Supreme Court addressed the statute of limitations in Title VII of the Civil Rights Act of 1964, which precludes the filing of claims a certain number of days after the alleged unlawful employment practice

“occurred.” See 42 U.S.C. 2000e–5(e)(1). The Court concluded that the statute authorized application of a continuing violations doctrine in hostile work environment cases, holding that in such cases, an unlawful employment action can “occur” over a series of days or even years. *Morgan*, 536 U.S. at 116–20. Similarly, in *Havens Realty Corporation v. Coleman*, 455 U.S. 363 (1982), the Supreme Court found continuing violations of the Fair Housing Act, which at the time required the commencement of civil actions within 180 days “after the alleged discriminatory housing practice occurred.” And in *Postow*, 627 F.2d 1370, the D.C. Circuit found a continuing violation of the Truth-in-Lending Act, which, at 15 U.S.C. 1640(e), provides that actions must be brought within one year from the date of the “occurrence” of the violation. The language of section 9(c) of the OSH Act is at least equally receptive to continuing violations, since it allows citation within six months of “the occurrence of any violation.” “Occurrence” of “any” violation is open-ended language that does not suggest that a violation can exist at only one moment in time.

Notably, even the *Volks II* majority appeared to recognize that the word “occurrence” does not necessarily have a single fixed meaning, stating that “[o]f course, where . . . a company continues to subject its employees to unsafe machines . . . or continues to send its employees into dangerous situations without appropriate training . . . OSHA may be able to toll the statute of limitations on a continuing violations theory since the dangers created by the violations persist.” 675 F.3d at 758. The court also acknowledged that a violation of the record-retention requirement—through the loss or destruction of a previously-created record—is a violation that continues from the time of the loss or destruction until the conclusion of the five-year retention period. *Id.* at 756; see *id.* at 763 (concurring opinion).

Moreover, continuing violations have been found even under statutes of limitations that contain language that is arguably *less* receptive to continuing violations than section 9(c); courts implicitly recognize that the underlying legal requirement, not the statute of limitations, determines whether there is a continuing legal obligation. For example, courts have found continuing violations of various laws that are governed by the general five-year statute of limitations for criminal cases in 18 U.S.C. 3282(a), which requires initiation of an action “within five years . . . after

<sup>5</sup> The American Petroleum Institute stated that the OSH Act limits continuing obligations only to “physical hazards.” Ex. 0020. This assertion finds no basis in the statute or case law. In any event, access to accurate injury and illness records helps employers and employees address and avoid physical hazards. See Section II.B.3. Legal Authority.

. . . [the] offense shall have been committed.” See, e.g., *United States v. Bell*, 598 F.3d 366, 368–69 (7th Cir. 2010) (continuing violation of child support payment requirements), *overruled on other grounds*, *United States v. Vizcarra*, 668 F.3d 516 (7th Cir. 2012); *Edelkind*, 525 F.3d 388 (same); *United States v. Are*, 498 F.3d 460 (7th Cir. 2007) (crime of being found in the United States after deportation is a continuing violation).

The D.C. Circuit has suggested that suits alleging a continuing failure to act are permissible even under the general statute of limitations governing civil actions against the United States (28 U.S.C. 2401(a)), which provides that claims are barred unless “filed within six years after the right of action first accrues.” *Wilderness Soc’y v. Norton*, 434 F.3d 584 (D.C. Cir. 2006). In *Wilderness Society*, the court intimated, but did not decide, that an agency’s failure to act in accordance with a statutory deadline for action was a continuing violation, such that a lawsuit to compel agency action would not be time-barred just because it was filed more than six years after the agency first missed the statutory deadline. The court explained that because the suit “‘does not complain about what the agency has done but rather about what the agency has yet to do,’” it likely would not be time-barred. *Id.* at 589 (quoting *In re United Mine Workers of America Int’l Union*, 190 F.3d 545, 549 (D.C. Cir. 1999)). See also, e.g., *Padres Hacia Una Vida Mejor v. Jackson*, No. 1:11–CV–1094 AWI DLB, 2012 WL 1158753 (E.D. Cal. April 6, 2012) (28 U.S.C. 2401(a) did not bar a claim based on EPA’s ongoing failure to act on complaints of discrimination within regulatory deadlines). And the Fifth Circuit found continuing violations of the Bank Holding Company Act in a case governed by the general statute of limitations in 28 U.S.C. 2462, which requires actions to enforce civil fines, penalties, or forfeitures to be “commenced within five years from the date when the claim first accrued.” *Interamericas*, 111 F.3d 376. See also, e.g., *Newell Recycling Co. v. EPA*, 231 F.3d 204 (5th Cir. 2000) (finding a continuing violation of disposal requirements for polychlorinated biphenyls under the Toxic Substances Control Act in a case involving the general statute of limitations at 28 U.S.C. 2462); *Advance Mach Co.*, 547 F.Supp. at 1085 (finding a continuing violation of the Consumer Product Safety Act in a case governed by 28 U.S.C. 2462); cf. *Capital Tel. Co v. FCC*, 777 F.2d 868, 871 (2d Cir. 1985) (per

curiam) (deferring to FCC determination that company’s “actions constituted a ‘continuing violation’” despite an applicable statute of limitations (47 U.S.C. 415(b)) requiring the filing of complaints “within two years from the time the cause of action accrues”).

Finally, concerns about stale claims have little bearing on OSHA recordkeeping cases. OSHA recognizes that statutes of limitations are designed to “keep stale claims out of the courts.” *Havens Realty*, 455 U.S. at 380. They protect parties from having to defend against stale claims and ensure that courts are not faced with “adjudicat[ing] claims that because of their staleness may be impossible to resolve with even minimum accuracy.” *Stephan v. Goldinger*, 325 F.3d 874, 876 (7th Cir. 2003). Claims generally are considered stale when so much time has passed that relevant evidence has been lost and witnesses are no longer available or do not have reliable memories of the relevant occurrence. *Id.* But “[w]here the challenged violation is a continuing one, the staleness concern disappears.” *Havens Realty*, 455 U.S. at 380. And nothing about continuing violations in the context of OSHA recordkeeping violations undermines this general principle.

The American Petroleum Institute cited an example of a case where the employer’s recordkeeper had passed away by the time of the hearing. Ex. 0020. However, reliance on witness recollection is often not necessary in recordkeeping cases because one can ordinarily ascertain whether an injury or illness occurred, and what treatment was necessary, by looking at medical reports, workers’ compensation documents, and other relevant records, even if the affected employee or other witnesses are no longer available. In fact, OSHA’s Recordkeeping Policies and Procedure Manual, CPL 02–00–135 (Dec. 30, 2004), directs compliance officers to review medical records to determine whether an employer has failed to enter recordable injuries and illnesses on the OSHA forms. And with respect to whether the employer recorded the injury or illness, the only evidence the parties and the court will need are the employer’s OSHA Log and Incident Report Forms, which existing regulations require employers to maintain for five years. Furthermore—and contrary to the comment by the American Petroleum Institute that staleness concerns primarily hurt employers (Ex. 0020)—OSHA ultimately bears the burden of proving that a recordable injury or illness occurred and the employer did not record it. Therefore, the absence of documents

and witnesses generally will be more prejudicial to OSHA’s case than to the employer’s defense. See *Secretary v. Home Depot #6512*, 22 BNA OSHC 1863 (Rev. Comm’n 2009) (vacating citation for failure to report employee fatality because Secretary did not provide sufficient evidence to establish fatality was work-related). And any limited staleness concerns that exist are outweighed by the fact that ongoing recordkeeping requirements are essential to fulfilling the purposes of the OSH Act. See generally *Connecticut Light & Power Co. v. Sec’y of Labor*, 85 F.3d 89, 96 (2d Cir. 1996) (“Consideration of limitations periods requires a fair and reasonable weighing of the conflicting concerns of the remedial intent of the [statute] . . . and the desire to keep stale claims out of the courts.”).

Moreover, under this final rule, an employer’s obligation is the same as under the current rule: To record injuries and illnesses within seven days and maintain the records for five years. The new rule simply clarifies that an employer cannot avoid the five-year maintenance requirement by failing to make the record in the initial seven days; rather, the obligation to make the record continues throughout the five-year maintenance period even if the employer fails to meet its initial obligation. Therefore, employers who record injuries and illnesses promptly, as paragraph 1904.29(b)(3) requires, will not face staleness concerns.

### 3. Incomplete or Otherwise Inaccurate Records of Work-Related Illnesses and Injuries Create an Ongoing Condition Detrimental to Full Enforcement of the Act

OSHA records “are a cornerstone of the Act and play a crucial role in providing the information necessary to make workplaces safer and healthier.” *Gen. Motors Corp.*, 8 BNA OSHC at 2041. As explained previously, in **SUPPLEMENTARY INFORMATION**, Section I.B, employers must give employees (as well as OSHA and BLS) access to injury and illness records. OSHA injury and illness records are designed to be used by employers, employees, the public health community, and the government to learn about the injuries and illnesses that are occurring in American workplaces. See “Improve Tracking of Injuries and Illnesses,” 81 FR 29623 (May 12, 2016). Accurate OSHA injury and illness 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. (See **SUPPLEMENTARY INFORMATION**, Section I.B, earlier in this preamble, for a full discussion of the purposes served by OSHA injury and illness records.) Thus, Congress viewed accurate records as necessary for the enforcement of the Act. 29 U.S.C. 657(c). Inaccurate or incomplete injury and illness records will leave all of the relevant parties underinformed, and thereby create an ongoing hazardous condition detrimental to full enforcement of the Act. The Commission has recognized as much. See, e.g., *Gen. Dynamics*, 15 BNA OSHC at 2131 n. 17 (recordkeeping regulations “clearly are safety- and health-related”); *Johnson Controls*, 15 BNA OSHC at 2135–36 (“[A] failure to record an occupational injury or illness . . . does not differ in substance from any other condition that must be abated pursuant to . . . occupational safety and health standards . . .”).

Nor is there any meaningful distinction to be drawn between cases involving inadequate training or unsafe machines (which may also be seen as involving repeated affirmative acts, for example, sending untrained employees to work in hazardous conditions) and recordkeeping cases (involving failures to create and maintain accurate records of workplace illnesses and injuries). The lack of access—by employers, employees and OSHA—to accurate records is as much an ongoing non-complying condition under the Act as is an untrained employee or an unguarded machine. Whether the condition was created by an act of omission or of commission, the condition is one that continues to violate the Act until it is abated.

Moreover, under the system Congress established in the OSH Act, any distinction that can be drawn between action and inaction lacks legal significance. As the Commission recognizes, “unlike other federal statutes in which an overt act is needed to show any violation, the OSH Act penalizes both overt acts and failures to act in the face of an ongoing, affirmative duty to perform prescribed obligations.” *Volks I*, 23 BNA OSHC at 1417 n.3 (emphasis in original). See also, e.g., *Gen. Dynamics*, 15 BNA OSHC at 2130 (“[T]he Act penalizes the occurrence of noncomplying conditions which are accessible to employees and of which the employer knew or reasonably could have known. That is the only ‘act’ that the Secretary must show to prove a violation.”). That is why it is still a citable violation if an employer has left a hazardous machine unguarded for years—even though the employer has

not done anything to the machine since first removing the guard. That is why it is a violation if an employer fails to label containers of hazardous chemicals or have safety data sheets on hand, regardless of how long the inaction persists or when it first occurred. And courts regularly find that a failure to act in accordance with an ongoing legal obligation constitutes a continuing violation. Such cases have included a lender’s failure to make required disclosures to a borrower (*Postow*, 627 F.2d 1370), a sex offender’s failure to register with authorities (*George*, 625 F.3d 1124), a parent’s failure to pay child support (*Edelkind*, 525 F.3d 388), an agency’s failure to comply with statutory mandates and deadlines (*Wilderness Soc’y*, 434 F.3d 584), a company’s failure to create and maintain water sampling records (*Sierra Club*, 847 F.2d 1109), and a failure on the part of the government to act on complaints of discrimination (*Padres Hacia Una Vida Mejor*, 2012 WL 1158753).

Incomplete and inaccurate OSHA records therefore result in an *ongoing non-complying condition*—namely employers, employees, and the government being denied access to information necessary to full enforcement of the Act. This non-complying condition continues every day that the records are inaccurate.<sup>6</sup>

Additionally, the legislative history of the Act reflects Congress’ concern about harm resulting to employees in workplaces with incomplete records of occupational injuries and illnesses. Most notably, a report of the Senate Committee on Labor and Public Welfare stated that “[f]ull and accurate information is a fundamental precondition for meaningful administration of an occupational safety and health program.” S. Rep. No. 91–1282, at 16 (1970), *reprinted in* Subcomm. on Labor of the Comm. on Labor and Public Welfare, Legislative

<sup>6</sup> For this reason, *Gabelli v. SEC*, 133 S.Ct. 1316 (2013), cited by Nabors Drilling USA and the National Association of Manufacturers, is inapposite. Exs. 0010, 0026. *Gabelli* deals with the discovery rule, which pertains to whether a claim’s accrual date should be extended until the plaintiff learns of the unlawful conduct. The discovery rule is not needed where, as here, the unlawful conduct is ongoing. In *Gabelli*, which involved a civil enforcement action under the Investment Advisers Act, the Supreme Court held that the five-year statute of limitations in 28 U.S.C. 2462 ran from the date a fraud was complete, not from the date the government discovered the fraud. *Gabelli* does not stand for the proposition that the language in 28 U.S.C. 2462 precludes application of a continuing violation theory. Indeed, in *Gabelli* the government agreed that the alleged illegal activity ended more than five years prior to the filing of the complaint, so there was no issue about the duration of the violative conduct.

History of the Occupational Safety and Health Act of 1970, at 156 (1971) (emphasis added). Additionally, a report from the House of Representatives shows that Congress recognized “comprehensive [injury and illness] reporting” as playing a key role in “effective safety programs.” H.R. Rep. No. 91–1291, at 15 (1970), *reprinted in* Subcomm. on Labor of the Comm. on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970, at 845 (1971).

Some commenters, including Nabors Drilling USA and the North American Insulation Manufacturers’ Association, expressed the opinion that this rule will do nothing to improve safety and health. Exs. 0010, 0016, 0017, 0019, 0026. For the reasons already stated, OSHA disagrees, and evidence submitted by other commenters supports OSHA’s conclusion. For example, North America’s Building Trades Unions commented that records of workplace injuries and illnesses are valuable to help identify hazards and correct problems in the workplace, both immediately and over time, and that this information is of particular value in the construction industry where workers change jobsites often. Ex. 0025. The United Steelworkers (USW) provided an example of a company safety committee noticing that the employer was not accurately recording hand lacerations caused by certain equipment; later, an employee using the same equipment suffered an amputation. Ex. 0028. Properly maintained records could have helped alert the employer to the hazardous machine before the amputation occurred. The USW also provided several examples of workplace hazards that emerge as trends over time, including occupational hearing loss, exposure to hazardous chemicals, and musculoskeletal disorders. Injury and illness records are an important tool in the identification of these types of hazards. Ex. 0028.

Additionally, as noted by commenter ORCHSE Strategies, LLC, although most employers are diligent about recording injuries and illnesses as required, some are not.<sup>7</sup> Ex. 0015. OSHA’s ability to enforce the recordkeeping regulations is an important tool to ensure that accurate information about workplace safety is

<sup>7</sup> The USW suggested that OSHA incorporate into this rule a prohibition on employer practices that discourage reporting of injuries and illnesses. Ex. 0028. Such a prohibition would be beyond the scope of this rulemaking, which is limited to clarifying existing obligations. However, such practices are addressed in OSHA’s recent rulemaking, “Improve Tracking of Injuries and Illnesses,” 81 FR 29623 (May 12, 2016).

available and that conscientious employers are not placed at a disadvantage by employers who intentionally underreport and thus appear safer than they actually are. Ex. 0015; see Ex. 0024. Although OSHA's recordkeeping rules have always required employers to maintain records for five years, they did not previously expressly state that an employer cannot skirt this requirement by ignoring its obligation to record an injury or illness when first learning of it. This final rule clarifies the recordkeeping requirements and enables OSHA to ensure that employers make and keep an accurate, five-year record of workplace injuries and illnesses. Indeed, without this clarification, as the AFL-CIO noted, the rule would not achieve Congress' intent that the Secretary collect accurate data about workplace safety. Ex. 0024.

#### 4. OSHA Is Acting Within Its Regulatory Authority, and Consistently With the General Case Law, in Issuing This Clarifying Rule

Several commenters expressed the view that the *Volks II* majority opinion prohibits the Secretary from imposing a continuing obligation on employers to record, and maintain records of, injuries and illnesses, with a few commenters stating that OSHA is improperly attempting to "overturn" the *Volks II* decision. Exs. 0003, 0008, 0009, 0010, 0011, 0012, 0013, 0014, 0016, 0017, 0020, 0021, 0023, 0026. OSHA disagrees. For the reasons described below, OSHA does not believe it is improper to respond to the *Volks II* decision by clarifying the regulations before there is any additional litigation over OSHA's statutory authority to establish continuing recordkeeping obligations.

Given that OSHA agrees with Judge Garland that the regulations as previously written did not clearly convey the intended continuing obligation, it would have been fruitless for OSHA to seek further appellate review of the *Volks II* decision, as some commenters suggested. See Exs. 0017, 0020, 0021. The executive branch of the federal government may elect not to appeal an adverse decision from the judiciary for a number of reasons unrelated to its views about the merits of the ruling, and, as the Supreme Court recognizes, the government's decision to forgo appeal in a particular case should not foreclose future review of relevant issues in other appropriate judicial forums. See *United States v. Mendoza*, 464 U.S. 154, 160-61 (1984) (declining to apply non-mutual collateral estoppel against the federal government in part because doing so "would force the . . .

[government] to abandon prudential concerns and to appeal every adverse decision in order to avoid foreclosing further review"). Thus, OSHA has acted reasonably in deciding to clarify its regulations before there is any additional litigation over the issues of statutory interpretation addressed in *Volks II*.

OSHA acknowledges that this clarification of its recordkeeping regulations to address the textual deficiencies identified by Judge Garland leaves unsettled the issue of OSHA's statutory authority to regulate in this manner. (Two of three judges on the *Volks II* panel found that the OSH Act did not permit OSHA to issue continuing recordkeeping regulations; however, Judge Garland disagreed with the majority's holding on this point.) When OSHA implements this rule, that issue will likely be the subject of future litigation in various federal courts, and potentially in the Supreme Court. Courts generally recognize the value of allowing the law to develop through litigation in multiple forums. See, e.g., *Mendoza*, 464 U.S. at 160 (noting "benefit . . . from permitting several courts of appeals to explore a difficult question before this Court grants certiorari"); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("It often will be preferable to allow several courts to pass on a given class claim in order to gain the benefit of adjudication by different courts in different factual contexts."). See also *Holland v. Nat'l Mining Ass'n*, 309 F.3d 909, 815 (D.C. Cir. 2002) ("Allowing one circuit's statutory interpretation to foreclose . . . review of the question in another circuit would squelch the circuit disagreements that can lead to Supreme Court review.").

OSHA has issued rules with a similar clarifying purpose following adverse court decisions before. For example, after the Fifth Circuit held that OSHA's respirator standard and the training provisions in the asbestos standard did not permit citing an employer for each individual employee who was not provided the required respirator or training, OSHA issued a final rule "to make it unmistakably clear that each covered employee is required to receive PPE and training, and that each instance when an employee subject to a PPE or training requirement does not receive the required PPE or training may be considered a separate violation subject to a separate penalty." 73 FR 75568-01, 75569 (Dec. 12, 2008); see *Chao v. OSHRC and Erik K. Ho*, 401 F.3d 355 (5th Cir. 2005). See also 72 FR 64342-01, 64342-43 (Nov. 15, 2007) (final rule clarifying employers' responsibility to pay for PPE, issued in response to

Commission decision vacating citation for employer's failure to pay).<sup>8</sup>

OSHA also disagrees with the commenters, including the Coalition for Workplace Safety and the National Association of Home Builders, who suggested that a Supreme Court case, *National Cable and Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005) ("*Brand X*"), precludes the Secretary from promulgating this final rule. Exs. 0011, 0013, 0017, 0020. In holding that the Ninth Circuit should have deferred to the FCC's interpretation of a statutory term instead of following the contrary interpretation the court had adopted in an earlier case, *Brand X* stated that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference *only* if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." 545 U.S. at 982 (emphasis added). *Brand X* does not control here, however, because *Volks II* did not clearly hold that the OSH Act unambiguously forecloses continuing recordkeeping violations. Indeed, the court expressly acknowledged that the loss or destruction of a record previously made constitutes a continuing violation of the requirement to retain records for five years. 675 F.3d at 756; see *id.* at 763 (concurring opinion). Moreover, although parts of the majority opinion suggest that the "clear" language in the OSH Act's statute of limitations precludes continuing record-making violations (because the majority said that the word "occurrence" requires a discrete action to have taken place within the six-month limitations period, 675 F.3d at 755-56), the court nevertheless acknowledged ambiguity in the meaning of "occurrence" when it agreed that training and machine guarding violations can continue, not because a discrete action occurs within the six-month window, but because "the dangers created by th[ose] violations persist." *Id.* at 758.<sup>9</sup> Notably, nothing in

<sup>8</sup> Nor is it uncommon for federal agencies to engage in nonacquiescence when faced with what they believe are erroneous court decisions. See, e.g., Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679 (1989).

<sup>9</sup> The Coalition for Workplace Safety also stated that the cases *Local Lodge No. 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411 (1960) and *Ledbetter v. Goodyear*, 550 U.S. 618 (2007) prohibit this final rule. Ex. 0013. However, these cases do not control this rule because they involve causes of action that the Court found to accrue at one discrete moment

the OSH Act's statute of limitations distinguishes between standards (such as machine guarding requirements) and regulations (such as recordkeeping requirements). Finally, the fact that Judge Garland disagreed with the majority about what the statute says lends further support to OSHA's view that *Volks II* should not be read as holding that the OSH Act unambiguously forecloses this regulatory action.

As touched upon previously in this preamble, OSHA further believes that general case law on continuing violations clearly supports a continuing violation theory for OSHA recordkeeping violations. The *Volks II* majority stated that recordkeeping violations are not "the sort of conduct we generally view as giving rise to a continuing violation[.]" *i.e.*, the kind of violation "whose 'character as a violation . . . [does] not become clear until . . . repeated during the limitations period . . . because it is . . . [the] cumulative impact . . . that reveals . . . illegality.'" *Volks II*, 675 F.3d at 757 (quoting *Taylor v. FDIC*, 132 F.3d 753, 765 (D.C. Cir. 1997)). While the "cumulative impact" theory is one way to establish a continuing violation (see, e.g., *Morgan*, 536 U.S. 101 (hostile environment claims under Title VII)), established precedent recognizes a second type of continuing violation—a violation that continues to occur on a day-by-day (or act-by-act) basis and whose illegality was clear from the beginning. See, e.g., *Edelkind*, 525 F.3d 388 (failure to pay child support is a continuing offense); *Sierra Club*, 847 F.2d 1109 (finding continuing violations of the Clean Water Act where the company failed to comply with permit requirements for reporting and record retention); *Postow*, 627 F.2d 1370 (violation of Truth-in-Lending Act's disclosure requirements is a continuing violation). This is the type of continuing violation relevant here because all OSHA violations—including recordkeeping violations—"continue" only insofar as non-compliant conditions exist.

The D.C. Circuit explicitly recognized the existence of these two types of continuing violation cases in *Earle*, 707 F.3d 299, 1307—a post-*Volks II* case that made no reference to the *Volks II* majority opinion, but cited, with approval, Judge Garland's concurring

in time—the illegal execution of a collective bargaining agreement and a particular instance of sex discrimination, respectively. In contrast, a failure to maintain an accurate record of workplace injuries and illnesses is a continuing violation that reoccurs each day it persists.

opinion.<sup>10</sup> In *Earle*, the court, quoting Judge Garland, explained that where a statute "imposes a continuing obligation to act, a party can continue to violate it until that obligation is satisfied and the statute of limitations will not begin to run until it does.'" *Id.* at 307. And "[w]hether the obligation is continuing is a question of statutory construction." *Earle*, 707 F.3d at 307. The court explained that *Postow* had found a continuing violation of the Truth-in-Lending Act because the "goals of the Act" required construing the obligation to be continuing. *Id.* So too, the goals of the OSH Act require construing the recordkeeping obligation to be continuing. The purpose of recording injuries is to allow the recorded information to be used thereafter, throughout the retention and access period. Accurate and complete OSHA records enable employers, employees, and the government to understand the hazards present in the workplace so that corrective measures can be taken. Inaccurate and incomplete records, by contrast, are likely to be misleading.

The Secretary recognizes that one court has said that: "The Supreme Court has made clear . . . that the application of the continuing violations doctrine should be the exception, rather than the rule." *Cherosky v. Henderson*, 330 F.3d 1243, 1248 (9th Cir. 2003) (not referring to any specific decision) (quoted in *Volks II*, 675 F.3d at 757). Even so, the Secretary believes that the language and purposes of the OSH Act make it clear that the duty to maintain and make available records is a continuing obligation for all the reasons set forth previously.<sup>11</sup>

<sup>10</sup> It is also noteworthy that *Earle* was written by Judge Henderson, who was part of the *Volks II* majority.

<sup>11</sup> In *Toussie v. United States*, 397 U.S. 112 (1970), the Supreme Court stated that "the doctrine of continuing offenses should be applied in only limited circumstances since . . . 'the tension between the purpose of a statute of limitations and the continuing offense doctrine is apparent.'" *Id.* at 115 (citations omitted). But *Toussie* was a criminal case subject to the general principle that "criminal limitations statutes are 'to be liberally interpreted in favor of repose.'" *Id.* (emphasis added and citations omitted). See also *Diamond v. United States*, 427 F.2d 1246, 1247 (Ct. Cl. 1970) (per curiam) ("[T]he considerations moving the Court to decide [in *Toussie*] that the offense was not a continuing one were entwined with the criminal aspects of the matter, and the holding was limited to criminal statutes of limitations."). In contrast, as noted previously, in Legal Authority, Section II.B.2, OSHA civil enforcement cases are subject to the opposing principle that "statutes of limitation in the civil context are to be strictly construed in favor of the Government against repose." *Interamericas*, 111 F.3d at 382.

### III. Summary and Explanation of the Final Rule

OSHA is amending its recordkeeping regulations, 29 CFR part 1904, 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 records for the year in which an injury or illness became recordable, and it does not expire if the employer fails to create a record when first required to do so.

The continuing obligation to make and maintain accurate records of work-related illnesses and injuries is in accord with longstanding OSHA policy. Thus, this final rule does not impose new or additional obligations on employers covered by part 1904. Employers will not be required to make records of any injuries or illnesses for which records are not currently required; nor are the recording requirements themselves changing. Because the rule imposes no new burdens or obligations and changes no law, it is simply a clarification, not a substantive change (as a few commenters contended; see Exs. 0012, 0014, 0020). As discussed at length previously, the amendments are meant simply to clarify employers' obligations in the wake of the *Volks II* decision. The amendments consist of revisions to various sections of the regulatory text as well as changes to the titles of some sections and subparts. (Titles are useful for clarity but do not change the legal meaning of the text itself. See *Penn. Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998); *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189–90 (1991)).

As discussed in more detail later in this preamble, the amendments 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 record retention-and-access period if employers do not create the record when first required to do so. During that period, employers must update the Log by adding cases not previously recorded and by noting changes to previously recorded cases. (2) *OSHA 301 Incident Report*. Employers must prepare a Form 301 Incident Report for each recordable illness or injury. This obligation continues throughout the five-year retention-and-access period if employers do not prepare the report when first required to do so. Unlike with the Log, employers are not required to update the Incident Report

to show changes to the case that occur after the form is initially prepared. (3) *Year-end records review; preparation certification; and posting of the Form 300A annual summary.* These ancillary tasks are intended to be performed at particular times during each year. They are not continuing obligations.

Many commenters expressed concern that this rule increases recordkeeping obligations and thus will require employers to devote additional time and resources to recordkeeping. Exs. 0008, 0010, 0012, 0013, 0014, 0020, 0021, 0026, 0027. For example, Nabors Drilling USA commented that the new rule will force it “to hire one or more individuals whose sole job will be to police our volumes of OSHA 300, 300A, and 301 logs for accuracy one-hundred percent of the time,” and the National Federation of Independent Businesses stated its belief that the rule imposes on employers “a duty of daily reconsideration” of each “decision to not record or to not fully record an injury.” Exs. 0010, 0014. This concern is misplaced. An employer’s obligation remains the same as it was before: To record workplace injuries and illnesses within seven days and to maintain the record for five years. There is no new requirement to review or reassess existing records over the course of the maintenance period (and, correspondingly, there are no additional costs involved). The new rule simply makes clear that if an employer fails to record an injury or illness within seven days, it is not relieved of the requirement to make and keep an accurate record of all recordable injuries and illnesses for the duration of five years. As explained above in Section I.C, this has long been OSHA’s position. In response to the observation in *Volks II* that a record cannot be maintained if it was never made, 657 F.3d at 756, the new rule is meant to explain that the obligations to make and maintain records go hand-in-hand. An employer cannot skirt the requirement to maintain accurate injury and illness records by failing to make the records in the first place.

The commenters’ concern about needing to regularly reassess recordkeeping determinations applies to only one type of recordkeeping violation—the type in which a well-intentioned employer simply makes a mistake and fails to record a recordable case (e.g., due to administrative oversight or because of an erroneous belief that the case is not recordable). The commenters’ concern has no relevance to cases in which employers simply decide not to record cases they know to be recordable or in which

employers have known, pervasive shortcomings in their recordkeeping policies and systems. See Ex. 0019 (comment from American Society of Safety Engineers). While inadvertent mistakes are always a possibility with respect to any regulatory obligation—whether discrete or continuing—OSHA generally focuses its recordkeeping enforcement resources on systematic recording failures, not on one-time errors made in good-faith attempts at compliance.<sup>12</sup> See, e.g., *Secretary v. Pepperidge Farm, Inc.*, 17 BNA OSHC 1993 (Rev. Comm’n 1997) (affirming 176 willful recordkeeping violations where employer failed to train responsible employee on how to complete OSHA forms and failed to record dozens of injuries of a type that affected workers at “an extraordinarily high rate”). And while employers are responsible for complying with the requirement to accurately record workplace injuries and illnesses and to maintain accurate records for five years, there is no separate requirement for daily (or regular) reconsideration of decisions not to record. Thus, even though OSHA may cite an employer for failing to record a recordable case, OSHA would have no basis for separately citing an employer for failing to reconsider prior recordkeeping determinations.

#### A. Description of Revisions

##### 1. Section 1904.0—Purpose

OSHA received no comments on the proposed changes to § 1904.0 and has adopted the provision as proposed. OSHA has revised 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. The revised language reflects the longstanding requirement for employers to provide their injury and illness records to certain government representatives and to employees and former employees and their representatives. The additions to the regulatory text include language reiterating that recordkeeping requirements are important in helping OSHA achieve its mission of providing safe and healthful working conditions for the nation’s workers. OSHA also

<sup>12</sup> OSHA notes, however, that an employer may be cited for an OSH Act violation as long as it has knowledge that the cited condition exists, whether or not the employer also has particular knowledge that the cited condition violates the Act. See, e.g., *Secretary v. Shaw Constr., Inc.*, 6 BNA OSHC 1341 (Rev. Comm’n 1978) (finding employer in violation of trenching standard where employer knew trench was not sloped, even though employer was unsure which OSHA standard applied to the trench). Recordkeeping violations are no different from other OSH Act violations in this respect.

added a new sentence at the end of this section to explain that 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. This concept is not new, as the requirement for employers to maintain accurate records is derived directly from the OSH Act, 29 U.S.C. 657(c)(2).

##### 2. Subpart C—Making and Maintaining Accurate Records, Recordkeeping Forms, and Recording Criteria

OSHA proposed to amend the title of this Subpart to better reflect the content of revised §§ 1904.4 and 1904.29, which address employers’ duties to make and maintain accurate records, as well as recordkeeping forms and criteria. OSHA received no comments on this proposed change and has adopted the change as proposed.

##### 3. Paragraph (a) of § 1904.4—Basic Requirement

OSHA received no comments on the proposed changes to § 1904.4(a) and has adopted the changes as proposed. OSHA has revised this paragraph to reiterate the requirement that employers make and maintain accurate records of every injury and illness that meets the recording criteria in paragraphs (a)(1) through (3) of § 1904.4. The prior version of paragraph (a), which required employers to “record” injuries and illnesses, was less explicit in expressing OSHA’s intent that employers both create and keep accurate records. The revised language confirms that an employer’s duty includes both creating and preserving accurate records of recordable injuries and illnesses. To be accurate, these records must be correct and complete. The revised language also reflects more closely the language of the OSH Act at 29 U.S.C. 657(c)(1) and (2). OSHA did not propose to change, and is not changing, the recording criteria in paragraphs (a)(1) through (3) of existing § 1904.4.

##### 4. Note to Paragraph (a) of § 1904.4

OSHA proposed to add a note to § 1904.4(a) to clarify the Secretary’s longstanding position that the duty to make and maintain accurate injury and illness records continues throughout the entire record-retention period set out in § 1904.33(a). This retention period runs for five years from the end of the calendar year that the records cover. An employer who fails to create a required record during the seven-day grace period provided for in § 1904.29(b)(3) must still create the record so long as the retention period has not elapsed.

Given this ongoing duty, OSHA may issue recordkeeping citations to employers that have incomplete or otherwise inaccurate records at any point during the retention period, and, under the six-month statute of limitations set out in 29 U.S.C. 658(c), for up to six months thereafter.

OSHA received a number of comments about its proposal to specify that the recordkeeping duty is a continuing one. These comments are addressed in Section II.B, Legal Authority, above. For the reasons stated there, OSHA has adopted the changes as proposed.

5. Paragraph (b)(3) of § 1904.29—How quickly must each injury or illness be recorded?

OSHA proposed to revise paragraph (b)(3) of § 1904.29. The paragraph, as proposed and adopted in this final rule, states OSHA'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 receives information that the injury or illness occurred. OSHA is making minor wording changes to the first sentence of paragraph (b)(3), and the remainder of paragraph (b)(3), as proposed and adopted, is designed to make clear that employers who fail to record as required within seven days are not then relieved of the obligation to record. Thus, the obligation to record continues until the five-year retention period in § 1904.33(a) has ended.

North America's Building Trades Unions suggested that OSHA's use of the word "deadline" to refer to the end of the seven-day reporting period might cause confusion about whether the obligation continues after the "deadline" is missed. Ex. 0025. OSHA agrees and is removing this word in the final rule. OSHA has always interpreted the seven-day recording period as a grace period when an employer can gather information on an injury or illness without fear of being cited by OSHA for a failure to record. Similarly, OSHA has always interpreted the obligation to record as continuing throughout the record retention period. The amendments to this paragraph simply clarify OSHA's long-held positions.

Other comments disagreeing with OSHA's proposal to specify that the recordkeeping duty is a continuing one are addressed in Section II.B, Legal Authority, above. For the reasons stated there, OSHA has adopted the remainder of the provision as proposed.

6. Section 1904.32—Year-End Review and Annual Summary

OSHA proposed 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. OSHA received no comments on this proposed change and has adopted the change as proposed.

7. Paragraph (a) of § 1904.32—Basic Requirement

OSHA received no comments on the proposed changes to § 1904.32(a) and has adopted the changes as proposed. OSHA has revised 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 each and every recordable injury and illness is recorded on the Log, and that each entry is accurate. 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.

OSHA has added a new paragraph (paragraph (a)(2)) to § 1904.32. This paragraph provides that after reviewing and verifying the Log entries under § 1904.32(a)(1), employers must verify that all entries on the Log are accurately recorded on OSHA 301 Incident Reports. Paragraph (a)(2) clarifies that if an employer discovers, during the § 1904.32(a)(1) review, that an injury or illness was initially left off of the OSHA 300 Log, the employer must both add it to the log and create an accurate Incident Report for that injury or illness.

OSHA is moving the language from paragraph (a)(2) in § 1904.32 to paragraph (a)(3) in the same section. OSHA is adding a clause to that paragraph to explain that the annual summary should be created only after an employer verifies the accuracy of the Log. This language is for clarification purposes only and does not add any new compliance requirements. OSHA is also renumbering paragraphs (a)(3) and (4) of § 1904.32 as paragraphs (a)(4) and (5), respectively. OSHA did not propose to make, and is not making, any substantive changes to these provisions.

The specific tasks required of employers under § 1904.32(a)—to conduct a year-end review of the Log, and to prepare, certify, and post the annual summary—are in addition to the duties described elsewhere in part 1904, and do not supersede or modify them. These other duties include the fundamental continuing obligation for employers to ensure that Logs are accurate and complete and that all recordable cases are included on them. The specific steps required under

§ 1904.32(a) are supplementary tasks designed to help ensure that employers are maintaining accurate records. These supplementary tasks are to be performed at specified times (at the end of each calendar year, and from February 1 to April 30 for posting). Failure to perform one of these supplementary tasks by the required date or during the required time period is a violation of § 1904.32 that may be cited during the following six months. *See Volks II*, 675 F.3d at 761–62 (concurring opinion).

8. Paragraph (b)(1) of § 1904.32—How extensively do I have to review the OSHA 300 Log at the end of the year?

OSHA received no comments on the proposed changes to paragraph (b)(1) of § 1904.32 has adopted the changes as proposed. OSHA is amending paragraph (b)(1) of § 1904.32 to reflect the revisions to § 1904.32(a)(1). The changes to paragraph (b)(1) 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. In addition, OSHA is making one minor, non-substantive change to the heading of paragraph (b)(1).

9. Section 1904.33—Retention and Maintenance of Accurate Records

OSHA proposed to update the title of this section to more accurately reflect the obligations described in § 1904.33. OSHA received no comments on this proposed change and has adopted the change as proposed.

10. 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 proposed 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. OSHA also proposed to amend the text of paragraph (b)(1) of § 1904.33 to provide an introduction to the paragraphs that follow.

OSHA proposed to add paragraphs (b)(1)(i) through (iii) to § 1904.33 to provide further guidance to employers on the duties to update Log entries and Incident Reports. Proposed paragraph (b)(1)(i) was designed to clarify 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. There must also be an associated Incident Report for each illness and

injury recorded on the Log. As the proposed language made explicit, these duties continue until the five-year retention period ends; thus, an employer may be required to make an entry on the OSHA Log or fill out an Incident Report for an illness or injury that occurred several years ago, if the employer either just learned of the incident or failed initially to record as required upon learning of the incident.

Proposed paragraph (b)(1)(ii) addressed changes that must be made to OSHA Logs throughout the retention period. As emphasized throughout this rule, employers' OSHA 300 Logs must be accurate. This means that if an employer discovers that any aspect of a previously-recorded case (such as the classification, description, or outcome of the case) has changed, or that a case was recorded incorrectly at the outset, the employer must amend the entry to reflect the new or corrected information.

Proposed paragraph (b)(1)(iii) reiterated the requirement in paragraph (b)(1)(i) that there must be an Incident Report for each and every recordable injury and illness. The primary purpose of proposed paragraph (b)(1)(iii) was to explain that employers are not required to update or correct existing Incident Reports during the retention period. This principle was previously stated in § 1904.33(b)(3).

OSHA received a number of comments questioning its assertion that the proposed changes to paragraph (b)(1) of § 1904.33 would not require anything new of employers. These comments are addressed below and in Section II.B, Legal Authority, above. The proposed language was intended not to change, but rather to state more clearly, what was already required under the recordkeeping rules. The prior recordkeeping rules provided that during the five-year retention period, the employer must update the Logs to include newly discovered recordable injuries and illnesses and to show changes that occurred in previously recorded cases. They did not explicitly state the employer's continuing duty to record cases it initially failed to record as required. Judge Garland's concurring opinion in *Volks II* concluded that the regulation was not worded explicitly enough to create a continuing obligation to record all such cases, as compared with newly discovered cases. *Volks II*, 675 F.3d at 760–61.

At the time OSHA amended the recordkeeping rules in 2001, it was well-established law in the Commission that employers had a continuing duty to record these previously unrecorded injuries and illnesses on their Logs. See *Gen. Dynamics*, 15 BNA OSHC 2122;

*Johnson Controls*, 15 BNA OSHC 2132. Nothing in the 2001 rulemaking suggested that OSHA had any intention of changing this fundamental requirement. The 2001 recordkeeping regulations required employers to promptly record cases on the 300 Log, and, throughout the five-year retention period, to add to the Log newly discovered cases even if they occurred some time ago. These rules did not assume noncompliance; in other words, the rules did not explicitly state what an employer must do if it failed to record a case that was recordable. But by stating in the 2001 regulations that newly discovered cases should be recorded, the Secretary did not intend to signify that other cases the employer had learned about need not be recorded.

The 2001 regulations also stated that employers were *not* required to “update” Form 301 Incident Reports. In *Volks II*, Judge Garland read this to mean that employers do not have to create a form at all, once the initial seven-day recording period is over. See *Volks II*, 675 F.3d at 760–61 (concurring opinion). That was not the Secretary's intention. The intent was to distinguish between the Log, which employers must update to reflect new and changed information, and the 301 Form, which employers do not need to update. (The Secretary explained that although updating the Log would provide useful, accurate information, updating Incident Reports would not enhance the information in the employer's records sufficiently to warrant the additional burden that would be associated with such a requirement. See 66 FR at 6050, January 19, 2001.) That OSHA did not require employers to update Incident Reports did not mean employers were not required to create the forms in the first place. The language in the final rule clarifies this.

For the reasons stated above and in Section II.B, Legal Authority, OSHA has adopted the proposed revisions to § 1904.33(b)(1) without change.

11. 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 proposed minor changes to paragraph (b)(2) of § 1904.33. These proposed changes were not substantive. The recordkeeping rules do not require employers to update or make changes to annual summaries during the five-year retention period. OSHA received no comments on the proposed changes to § 1904.33(b)(2) and has adopted the changes as proposed.

12. Paragraph (b)(3) of § 1904.33

OSHA proposed to delete paragraph (b)(3) from § 1904.33 and move it, in slightly modified form, to paragraph (b)(1)(iii) in § 1904.33. OSHA received no comments on this proposed change to the regulatory text and has adopted the change as proposed.

13. Section 1904.34—Change in Business Ownership

Commenter Nabors Drilling USA observed that the language in the proposed rule might create confusion about the obligations of a new owner regarding the accuracy of the previous owner's injury logs. Ex. 0010. To eliminate any potential confusion, OSHA is adding a sentence at the end of § 1904.34 to clarify that when a business changes ownership, the new owner is not responsible for recording work-related injuries and illnesses that occurred before the change in ownership.

14. 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 § 1904.35 addresses employee access to records created under part 1904. OSHA proposed only one minor change to this paragraph—the addition of the word “accurate” to describe the records to which employees, former employees, and their representatives must be given access. Accurate records are described in § 1904.0. OSHA received no comments on this proposed change to the regulatory text and has adopted the change as proposed.

15. 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?

In paragraph (b)(2)(iii) of § 1904.35, OSHA proposed to add the term “accurate” to describe the OSHA 300 Logs to which employees, former employees, and their representatives must be given access. Accurate records are described in § 1904.0. Records are required so they can be used, and records must be accurate if they are to serve this purpose. The duty to provide an accurate record upon request arises when the request is made, not before, so the six-month statute of limitations does not begin to run until the request is made.

Nabors Drilling USA asked whether the change to § 1904.35 creates a private right of action by employees, former employees, and their representatives to pursue claims over recordkeeping. Ex. 0010. It does not. OSHA received no

other comments on the proposed change to § 1904.35 and has adopted the change as proposed.

#### 16. Subpart E—Reporting Accurate Fatality, Injury, and Illness Information to the Government

OSHA proposed to revise the title of Subpart E to more precisely reflect the requirement in the Subpart that government representatives be given access to *accurate* fatality, injury, and illness information. OSHA received no comments on this proposed change and has adopted the change as proposed.

#### 17. Section 1904.40—Providing Accurate Records to Government Representatives

OSHA proposed to revise the title of § 1904.40 to reflect the changes to paragraph (a) of that section. OSHA received no comments on this proposed change and has adopted the change as proposed.

#### 18. Paragraph (a) of § 1904.40—Basic Requirement

OSHA proposed to add the term “accurate” to paragraph (a) of § 1904.40 to reflect OSHA’s longstanding expectation that employers provide government representatives with *accurate* records upon request. OSHA also proposed some non-substantive wording changes to this paragraph.

Nabors Drilling USA suggested that OSHA revisit the four-business-hour timeframe in which employers must provide requested records to government representatives. Ex. 0010. This suggestion is beyond the scope of this rulemaking because this final rule only clarifies, and does not change, existing obligations. OSHA received no other comments on its proposed changes to § 1904.40(a) and has adopted the changes as proposed.

### IV. State Plans

The 28 States and U.S. Territories with their own OSHA-approved occupational safety and health plans must adopt a rule comparable to the amendments that Federal OSHA is promulgating to 29 CFR part 1904 in this final rule. The States and U.S. Territories with OSHA-approved occupational safety and health plans covering private employers and State and local government employees are: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. In addition, six States and U.S. Territories have OSHA-approved

State plans that apply to State and local government employees only: Connecticut, Illinois, Maine, New Jersey, New York, and the Virgin Islands.

Under 29 CFR 1952.4(a), States with approved occupational safety and health plans under section 18 of the OSH Act (29 U.S.C. 667) must adopt recordkeeping and reporting regulations that are “substantially identical” to those set forth in 29 CFR part 1904. State plans’ recording and reporting requirements for determining which injuries and illnesses must be recorded, and how they will be recorded, must be the same as the Federal requirements. 29 CFR 1952.4(a). State plans may promulgate injury or illness recording and reporting requirements that are more stringent than, or supplemental to, 29 CFR part 1904, after consulting with, and obtaining approval from, Federal OSHA. *Id.*

State plans may not grant variances from injury and illness recording and reporting requirements for private sector employers; any such variances must be granted by Federal OSHA. 29 CFR 1952.4(b). And a State may grant such a variance for a State or local government entity only after obtaining Federal OSHA approval. *Id.*

### V. Final Economic Analysis

These revisions to OSHA’s recordkeeping rules do not constitute an economically significant regulatory action under Executive Order 12866. (See 58 FR 51735, September 30, 1993). Executive Order 12866 requires regulatory agencies to conduct an economic analysis for significant rules. A rule is economically significant under Executive Order 12866 if it will have an annual effect on the economy of \$100 million or more. This rule does not satisfy that criterion; as explained later in this preamble, neither the benefits nor the costs of the rule equal or exceed \$100 million. OSHA has also determined that this rule does not meet the definition of a major rule under the Congressional Review provisions of the Small Business Regulatory Enforcement Fairness Act (SBREFA). See 5 U.S.C. 804(2).<sup>13</sup>

<sup>13</sup> Nor does this rule present a “novel legal issue” rendering it a significant regulatory action, as the Coalition for Workplace Safety suggests. Ex. 0013. The commenter states that the final rule presents such a novel legal issue because OSHA is “us[ing] a rule to overturn a U.S. Court of Appeals decision.” As explained above in Legal Authority, Section II.B.4, OSHA does not agree with this characterization of the rulemaking. This rule is intended simply to clarify the meaning of the recordkeeping regulations following the *Volks II* decision, and the decision does not deprive OSHA of authority to promulgate this rule.

The Regulatory Flexibility Act of 1980, as amended by SBREFA in 1996, requires OSHA to determine whether its regulatory actions will have a significant impact on a substantial number of small entities. See 5 U.S.C. 601 *et seq.* OSHA’s analysis indicates that the final rule will not have such an impact.

This final rule simply reiterates and clarifies employers’ existing obligations to record work-related injuries and illnesses. This rule does not require employers to make records of any injuries or illnesses for which records were not already required. Nor does the rule impose any new requirement that employers reconsider or reassess records once they have been made; employers remain subject to the existing requirement that they ensure the accuracy and completeness of their 300 Logs. OSHA estimated the costs of these requirements as part of the final recordkeeping rule issued in January of 2001, see 66 FR 6081–6120, January 19, 2001. The revisions contained in this final rule impose no new cost burden because they do not require employers to do anything new.

A number of commenters stated their belief that the final rule will impose additional costs because it requires employers to reassess, or “think about,” each record of a workplace injury or illness repeatedly over the course of five full years. Exs. 0008, 0010, 0012, 0013, 0020, 0021, 0026, 0027. The National Federation of Independent Businesses estimated, “conservatively,” that this rule will cost the economy \$1,933,710,222 over five years, assuming each employer has one “unrecorded or partially-recorded injury.”<sup>14</sup> Ex. 0014. This concern is misplaced. An employer’s obligations remain the same as they have always been under the recordkeeping rules: To record workplace injuries and illnesses within seven days of when it learns of them and to maintain the records for five years. The final rule does not contain any new requirement to review or reassess existing records over the course of the maintenance period (see Section III, SUMMARY AND EXPLANATION, above); it simply

<sup>14</sup> To arrive at this number, the commenter assumed that “daily reconsideration” would take one minute per day per unrecorded or partially recorded injury or illness, and then multiplied one minute per day by 365 days per year by five years (minus seven days for the regulatory grace period) by an estimated 1,365,985 covered businesses by \$46.72 per hour. Ex. 0014. In addition to assuming a requirement for daily reconsideration that the rule does not impose, this calculation does not account for the fact that concerns about reassessment will apply to only a subset of all recordkeeping cases. See discussion in Section III, SUMMARY AND EXPLANATION, above.

makes clear that if an employer fails to record an injury or illness within seven days of learning about it, it is not relieved of the requirement to have and keep an accurate record of all recordable injuries and illnesses for the duration of five years. Because the final rule imposes no new requirement for review of records, there are no additional costs involved for the time it would take to conduct such review. Moreover, there is no evidence in the record that employers have ever incurred meaningful costs (let alone costs on the level of those described by the National Federation of Independent Businesses) for regularly reassessing or “thinking about” their records—either in the many years before the *Volks II* decision when OSHA was enforcing recordkeeping requirements in a manner consistent with the clarification contained in this final rule, or after the decision, when it is undisputed that the Secretary may cite an employer for a failure-to-record at any time within the six-month period following a violation. Therefore, there is no reason to think employers will incur such costs now.

Even if these revisions to OSHA’s recordkeeping rules would result in some costs beyond those OSHA estimated in 2001, any such costs would be nominal. According to OSHA’s 2016 request to the Office of Management and Budget for an extension of the approval of the information collection requirements in the recordkeeping rules, an estimated 1.99 million injuries and illnesses must be recorded on OSHA logs each year. See [http://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201604-1218-002](http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201604-1218-002).<sup>15</sup> Although OSHA accounted for the costs associated with full recordkeeping compliance as part of the 2001 rulemaking, and finds that this rulemaking will impose no additional costs on employers, OSHA will assume, for the sake of this analysis, that this rule will lead to the recording of a small number of recordable cases (one percent of all recordable cases) that would not have been recorded previously. In other words, OSHA will calculate the costs that would be imposed even if an additional 19,900 injuries and illnesses will be recorded as a result of the final rule. (OSHA took the same approach in

its preliminary economic analysis, although there OSHA referred to this as an assumption involving a one-percent rate of noncompliance. OSHA believes the terminology it used in the proposal led to some confusion, so it has clarified its approach for purposes of this final rule.)<sup>16</sup> OSHA also will examine a sensitivity analysis of the results assuming that this rule will lead to the recording of an even larger number of cases (5 percent of recordable injuries and illnesses).

The National Association of Manufacturers questioned OSHA’s preliminary economic analysis, suggesting that OSHA’s one-percent and five-percent assumptions were too low. Ex. 0026. OSHA believes, however, that the true costs associated with this final rule are zero, and is using the one-percent and five-percent assumptions simply to demonstrate that even if this rule leads to the recording of some additional injuries and illnesses, any costs incurred by employers as a result will be minimal.

In 2014, 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 OSHA. 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 (September 18, 2014). And according to the 2016 Information Collection Request (ICR), the average hourly rate for an Occupational Health and Safety Specialist (Standard Occupational Classification code 29–9011) is estimated to be \$48.78 (which includes a 43% addition for benefits). See [http://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201604-1218-002](http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201604-1218-002). This means that the total estimated cost of preparing OSHA records is \$18.54 per injury or illness. The American Society of Safety Engineers and the National Association of Manufacturers questioned these estimates of time and cost as too low. Exs. 0019, 0026. OSHA stands by these estimates, however, as they have been developed carefully through multiple notice and comment

rulemakings and Paperwork Reduction Act notices. Those who believe OSHA underestimated these values are failing to recognize that not all costs of investigating an accident are attributable to OSHA’s recordkeeping requirements. Much of the same information has to be collected for workers’ compensation purposes. To avoid overlapping paperwork, OSHA allows, and many employers take advantage of, the option to use equivalent workers’ compensation forms in place of OSHA’s recordkeeping forms. See 29 CFR 1904.29(a), (b)(4).

Thus, if 19,900 cases will be recorded as a result of the final rule, the total cost associated with this regulatory action will be 19,900 times \$18.54, or approximately \$368,946 per year. And if OSHA makes the even more conservative assumption that 5 percent of 1.99 million injuries and illnesses (99,500) would be recorded as a result of the final rule, the total estimated cost of the rule, across all affected employers, would be under \$1.85 million per year. Even this hypothetical cost would only exist if employers are not currently complying fully with the existing rule, but increase their compliance as a result of this clarification.

Just as there are no (or minimal) new costs associated with this rule, the rule will result in no new economic benefits. OSHA believes the revisions to the recordkeeping rules are technologically feasible because they do not require employers to perform any actions that they were not already performing under existing requirements. And because the rule does not impose any significant new compliance costs, OSHA deems it economically feasible.

## VI. Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (as amended), OSHA examined the regulatory requirements of the final rule to determine if they would have a significant economic impact on a substantial number of small entities. As indicated in Section V, Final Economic Analysis, earlier in this preamble, the rule is expected to have no effect, or at most a nominal effect, on compliance costs and regulatory burden for employers, whether large or small. Accordingly, OSHA certifies that the rule will not have a significant economic impact on a substantial number of small entities.

## VII. Environmental Impact Assessment

OSHA has reviewed the final rule in accordance with the requirements of the National Environmental Policy Act

<sup>15</sup> The National Association of Manufacturers objected that BLS estimates of recordable injuries are larger than OSHA’s estimate of the total injuries that must be recorded. Ex. 0026. This is correct, but not all employers are required to record their injuries. See 29 CFR 1904.1, 2 (describing exemptions for employers with 10 or fewer employees and those in certain industries). OSHA only uses BLS recordable injury estimates for those industries required to record injuries.

<sup>16</sup> Nabors Drilling USA commented that if OSHA is correct that 99% of employers already fully comply with the recordkeeping requirements, this final rule serves no purpose. Ex. 0010. As explained above, however, OSHA is not suggesting that 99% of employers are in full compliance with OSHA recordkeeping requirements. In any event, unlike most OSHA rulemakings, this final rule is not intended to change employers’ behavior, but rather is designed to clarify OSHA’s requirements. Thus, the current rate of recordkeeping compliance is unrelated to the need for this final rule.



(NEPA) (42 U.S.C. 4321 *et seq.*), the regulations of the Council on Environmental Quality (40 CFR parts 1500 through 1508), and the Department of Labor's NEPA procedures (29 CFR part 11). OSHA finds that the revisions included in the rule will have no major negative impact on air, water, or soil quality, plant or animal life, the use of land or other aspects of the environment. And recordkeeping and reporting requirements normally qualify for categorical exclusion from NEPA requirements in any event. *See* 29 CFR 11.10(a).

### VIII. Federalism

OSHA reviewed this final rule in accordance with the most recent Executive Order on Federalism (Executive Order 13132, 64 FR 43255, August 10, 1999). This Executive Order requires that Federal agencies, to the extent possible, refrain from limiting State policy options, consult with States prior to taking any actions that would restrict State policy options, and take such actions only when clear constitutional authority exists and the problem is national in scope. Executive Order 13132 provides for preemption of State law only with the expressed consent of Congress. Any such preemption must be limited to the extent possible. Because this rulemaking action involves a regulation that is not an occupational safety and health standard under section 6 of the OSH Act, it does not preempt State law. *See* 29 U.S.C. 667(a). The effect of a final rule on states and territories with OSHA-approved occupational safety and health plans is discussed previously in Section IV, State Plans.

### IX. Unfunded Mandates

OSHA cannot enforce compliance with its regulations or standards on "any State or political subdivision of a State." 29 U.S.C. 652(5). Under voluntary agreement with OSHA, some States enforce compliance with their State standards on public sector entities, and these agreements specify that these State standards must be equivalent to OSHA standards. But the final rule does not involve any unfunded mandates being imposed on any State or local government entity. Moreover, as discussed previously, OSHA estimates that there are no, or minimal, compliance costs associated with the rule. Therefore, this rule will not impose a Federal mandate on the private sector in excess of \$100 million in expenditures in any one year. Thus, OSHA certifies that this final rule is not a significant regulatory action within the meaning of Section 202 of the

Unfunded Mandates Reform Act (2 U.S.C. 1532).

### X. Consultation and Coordination With Indian Tribal Governments

OSHA reviewed this rule in accordance with Executive Order 13175 (65 FR 67249, November 6, 2000) and determined that it does not have "tribal implications" as defined in that order. The rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.

### XI. Office of Management and Budget Review Under the Paperwork Reduction Act of 1995

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) and OMB regulations (5 CFR part 1320) require agencies to obtain approval from OMB before conducting any collection of information. The PRA defines a "collection of information" as "the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public of facts or opinions by or for an agency regardless of form or format" (44 U.S.C. 3502(3)(A)).

OSHA's existing recordkeeping forms consist of the OSHA 300 Log, the 300A Summary, and the 301 Incident Report. These forms are contained in the Information Collection Request (ICR) titled 29 CFR part 1904, Recording and Reporting Occupational Injuries and Illnesses, which OMB approved under OMB Control Number 1218-0176 (expiration date 01/31/2018).

In accordance with the PRA, OSHA solicited public comments on the July 29, 2015 proposed rule. The proposed rule also invited the public to submit comments to OMB and OSHA on the proposed collections of information with regard to the following:

- Whether the proposed collections of information are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and cost) of the collections of information, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the compliance burden on employers, for example, by using automated or other technological techniques for collecting and transmitting information.

Because the proposal simply reiterated and clarified employers' existing obligations to record and maintain work-related injuries and illnesses and did not add any new collection of information, the Agency maintained the existing burden hour and cost estimates in the Recording and Reporting Occupational Injuries and Illnesses Information Collection Request. The Department also submitted this ICR to OMB for review in accordance with 44 U.S.C. 3507(d) on July 29, 2015. On October 7, 2015, OMB withheld approval of the revised ICR and issued a Notice of Action (NOA) stating that prior to publication of the final rule, the agency should provide a summary of any comments related to the information collection and their response, including any changes made to the ICR as a result of comments. In addition, the agency must enter the correct burden estimates (*see* <http://www.reginfo.gov/public/do/DownloadNOA?requestID=266192>).

The final rule adds no new compliance obligations. The rule simply reiterates and clarifies employers' existing obligations to record work-related injuries and illnesses; it does not require employers to make records of any injuries or illnesses for which records were not already required. Nor does the rule impose any new requirement that employers reconsider or reassess records once they have been made; employers remain subject to the existing requirement that they ensure the accuracy and completeness of their 300 Logs. These revisions impose no new cost burden because they do not require employers to do anything new. The Department of Labor has submitted a final ICR to OMB maintaining the existing burden hours and cost estimates. A copy of this ICR is available at [http://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201610-1218-003](http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201610-1218-003). OSHA will publish a separate notice in the **Federal Register** that will announce OMB results of that review. OSHA notes that a Federal agency cannot conduct or sponsor a collection of information unless it is approved by OMB under the PRA, and the collection of information notice displays a currently valid OMB control number (44 U.S.C. 3507(a)(3)). Also, notwithstanding any other provision of law, no employer shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number (44 U.S.C. 3512).

OSHA received comments relating to the estimated time necessary to meet the paperwork requirements of the proposed changes published in the July

29, 2015 proposed rule. A number of commenters stated their belief that the rule will impose additional costs because it requires employers to reassess, or “think about,” each record of a workplace injury or illness repeatedly over the course of five full years. Ex. 0008, 0010, 0012, 0013, 0020, 0021, 0026, 0027. This concern is misplaced. An employer’s obligations remain the same as they are under the existing rule: To record workplace injuries and illnesses within seven days of when it learns of them and to maintain accurate records for five years. The final rule does not contain any new requirement to review or reassess existing records over the course of the maintenance period; it simply makes clear that if an employer fails to record an injury or illness within seven days of learning about it, it is not relieved of the requirement to have and keep an accurate record of all recordable injuries and illnesses for the duration of five years. Because the final rule imposes no new requirement for review of records, there are no additional costs involved for the time it would take to conduct such review.

OSHA estimates 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. The average hourly rate for an Occupational Health and Safety Specialist (Standard Occupational Classification code 29–9011) is estimated to be \$48.78 (which includes a 43% addition for benefits). This means that the total estimated cost of preparing OSHA records is \$18.54 per injury or illness. The American Society of Safety Engineers and the National Association of Manufacturers questioned these estimates of time and cost as too low. Exs. 0019, 0026. OSHA stands by these estimates, however, as they have been developed carefully through multiple notice and comment rulemakings and Paperwork Reduction Act notices. Not all costs of investigating an accident are attributable to OSHA’s recordkeeping requirements. Much of the same information has to be collected for workers’ compensation purposes. To avoid overlapping paperwork, OSHA allows, and many employers take advantage of, the option to use equivalent workers’ compensation forms in place of OSHA’s recordkeeping forms. See 29 CFR 1904.29(a), (b)(4).

As required by 5 CFR 1320.5(a)(1)(iv) and 1320.8(d)(2), the following paragraphs provide information about this ICR.

1. *Title*: 29 CFR part 1904 Recording and Reporting Occupational Injuries and Illnesses.

2. *Number of respondents*: Approximately 640,000 employers with 1,300,000 establishments are regularly required to maintain the forms.

3. *Frequency of responses*: Annually.

4. *Number of responses*: Approximately 1.99 million injury and illness cases are recorded on the OSHA forms.

5. *Average time per response*: Time required completing and maintaining an entry (other than a needlestick) on the OSHA Form 300 ranges from 5 minutes to 30 minutes and averages 14 minutes. Time required completing an entry on the OSHA 301 averages 22 minutes. OSHA estimates 40% of recordable cases are recorded on form 301.

6. *Estimated total burden hours*: The final rule adds no new compliance obligations and does not require employers to make records of any injuries or illnesses for which records are not currently required to be made. The current total burden hours for the recordkeeping (part 1904) ICR are 2,525,458.

7. *Estimated costs (capital-operation and maintenance)*: There are no capital costs for the proposed information collection.

#### List of Subjects in 29 CFR Part 1904

Health statistics, Occupational safety and health, Safety, Reporting and recordkeeping requirements, State plans.

#### Authority and Signature

This document was prepared under the direction of David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor. It is issued pursuant to 29 U.S.C. 657, 673; 5 U.S.C. 553; and Secretary of Labor’s Order No. 1–2012 (77 FR 3912, January 25, 2012).

#### David Michaels,

*Assistant Secretary of Labor for Occupational Safety and Health.*

Accordingly, the Occupational Safety and Health Administration amends part 1904 of title 29 of the Code of Federal Regulations as follows:

### PART 1904—RECORDING AND REPORTING OCCUPATIONAL INJURIES AND ILLNESSES

■ 1. Revise the authority citation for part 1904 to read as follows:

**Authority**: 29 U.S.C. 657, 658, 660, 666, 669, 673, Secretary of Labor’s Order No. 3–2000 (65 FR 50017), or 1–2012 (77 FR 3912), and 5 U.S.C. 553.

■ 2. Revise § 1904.0 to read as follows:

#### § 1904.0 Purpose.

The purpose of this rule (part 1904) is to require employers to make and maintain accurate records of and report work-related fatalities, injuries, and illnesses, and to make such records available to the Government and to employees and their representatives so that they can be used to secure safe and healthful working conditions. For purposes of this part, accurate records are records of each and every recordable injury and illness that are made and maintained in accordance with the requirements of this part.

**Note to § 1904.0**: Recording or reporting a work-related injury, illness, or fatality does not mean that the employer or employee was at fault, that an OSHA rule has been violated, or that the employee is eligible for workers’ compensation or other benefits.

#### Subpart C—Making and Maintaining Accurate Records, Recordkeeping Forms, and Recording Criteria

■ 3. Revise the heading of subpart C to read as set forth above.

■ 4. In § 1904.4, revise paragraph (a) introductory text and add a note to § 1904.4(a) to read as follows:

#### § 1904.4 Recording criteria.

(a) *Basic requirement*. Each employer required by this part to keep records of fatalities, injuries, and illnesses must, in accordance with the requirements of this part, make and maintain an accurate record of each and every fatality, injury, and illness that:

\* \* \* \* \*

**Note to § 1904.4(a)**: This obligation to make and maintain an accurate record of each and every recordable fatality, injury, and illness continues throughout the entire record retention period described in § 1904.33.

\* \* \* \* \*

■ 5. Revise § 1904.29(b)(3) to read as follows:

#### § 1904.29 Forms.

\* \* \* \* \*

(b) \* \* \*

(3) *How quickly must each injury or illness be recorded?* You must enter each and every recordable injury or illness on the OSHA 300 Log and on a 301 Incident Report within seven (7) calendar days of receiving information that the recordable injury or illness occurred. A failure to record within seven days does not extinguish your continuing obligation to make a record of the injury or illness and to maintain accurate records of all recordable injuries and illnesses in accordance

with the requirements of this part. This obligation continues throughout the entire record retention period described in § 1904.33. See §§ 1904.4(a); 1904.32(a)(1); 1904.33(b)(1); and 1904.40(a).

\* \* \* \* \*

■ 6. Revise the heading and paragraphs (a) and (b)(1) of § 1904.32 to read as follows:

**§ 1904.32 Year-end review and annual summary.**

(a) *Basic requirement.* At the end of each calendar year, you must:

(1) Review that year's OSHA 300 Log to verify that it contains accurate entries for all recordable injuries and illnesses that occurred during the year, and make any additions or corrections necessary to ensure its accuracy;

(2) Verify that each injury and illness recorded on the 300 Log, including any injuries and illnesses added to the Log following your year-end review pursuant to paragraph (a)(1) of this section, is accurately recorded on a corresponding 301 Incident Report form;

(3) After you have verified the accuracy of the Log, create an annual summary of injuries and illnesses recorded on the Log;

(4) Certify the summary; and

(5) Post the summary.

(b) \* \* \*

(1) *How extensively do I have to review the OSHA 300 Log at the end of the year?* You must review the Log and its entries as extensively as necessary to verify that all recordable injuries and illnesses that occurred during the year are entered and that the Log and its entries are accurate.

\* \* \* \* \*

■ 7. Revise the heading and paragraph (b) of § 1904.33 to read as follows:

**§ 1904.33 Retention and maintenance of accurate records.**

\* \* \* \* \*

(b) *Implementation—(1) Other than the obligation identified in § 1904.32, do I have further recording duties with respect to the OSHA 300 Logs and 301 Incident Reports during the five-year retention period?* You must make the following additions and corrections to the OSHA Log and Incident Reports during the five-year retention period:

(i) The OSHA Logs must contain entries for all recordable injuries and illnesses that occurred during the calendar year to which each Log relates. In addition, each and every recordable injury and illness must be recorded on an Incident Report. This means that if a recordable case occurred and you

failed to record it on the Log for the year in which the injury or illness occurred, and/or on an Incident Report, you are under a continuing obligation to record the case on the Log and/or Incident Report during the five-year retention period for that Log and/or Incident Report;

(ii) You must also make any additions and corrections to the OSHA Log that are necessary to accurately reflect any changes that have occurred with respect to previously recorded injuries and illnesses. Thus, if the classification, description, or outcome of a previously recorded case changes, you must remove or line out the original entry and enter the new information; and

(iii) You must have an Incident Report for each and every recordable injury and illness; however, you are not required to make additions or corrections to Incident Reports during the five-year retention period.

(2) *Do I have to make additions or corrections to the annual summary during the five-year retention period?* You are not required to make additions or corrections to the annual summaries during the five-year retention period.

■ 8. Revise § 1904.34 to read as follows:

**§ 1904.34 Change in business ownership.**

If your business changes ownership, you are responsible for recording and reporting work-related injuries and illnesses only for that period of the year during which you owned the establishment. You must transfer the Part 1904 records to the new owner. The new owner must save all records of the establishment kept by the prior owner, as required by § 1904.33, but need not update or correct the records of the prior owner. The new owner is not responsible for recording and reporting work-related injuries and illnesses that occurred before the new owner took ownership of the establishment.

■ 9. Revise paragraphs (b)(2) introductory text and (b)(2)(iii) of § 1904.35 to read as follows:

**§ 1904.35 Employee involvement.**

\* \* \* \* \*

(b) \* \* \*

(2) *Do I have to give my employees and their representatives access to the OSHA injury and illness records?* Yes, your employees, former employees, their personal representatives, and their authorized employee representatives have the right to access accurate OSHA injury and illness records, with some limitations, as discussed below.

\* \* \* \* \*

(iii) *If an employee or representative asks for access to the OSHA 300 Log,*

*when do I have to provide it?* When an employee, former employee, personal representative, or authorized employee representative asks for copies of your current or stored OSHA 300 Log(s) for an establishment the employee or former employee has worked in, you must give the requester a copy of the relevant and accurate OSHA 300 Log(s) by the end of the next business day.

\* \* \* \* \*

**Subpart E—Reporting Accurate Fatality, Injury, and Illness Information to the Government**

■ 10. Revise the heading of subpart E to read as set forth above.

■ 11. Revise the heading and paragraph (a) of § 1904.40 to read as follows:

**§ 1904.40 Providing accurate records to government representatives.**

(a) *Basic requirement.* When an authorized government representative requests the records you keep under part 1904, you must provide accurate records, or copies thereof, within four (4) business hours of the request.

\* \* \* \* \*

[FR Doc. 2016–30410 Filed 12–16–16; 8:45 am]

BILLING CODE 4510–26–P

**DEPARTMENT OF HOMELAND SECURITY**

**Coast Guard**

**33 CFR Part 117**

[Docket No. USCG–2016–1029]

**Drawbridge Operation Regulation; Northeast Cape Fear River, Wilmington, NC**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of deviation from drawbridge regulation; modification.

**SUMMARY:** The Coast Guard has modified a temporary deviation from the operating schedule that governs the CSX Hilton Railroad Bridge across the Northeast Cape Fear River, mile 1.5, at Wilmington, NC. This modified deviation is necessary to manually operate the bridge and perform emergency bridge repairs. This modified deviation allows the bridge to remain in the closed-to-navigation position.

**DATES:** This modified deviation is effective without actual notice from December 19, 2016 through 6 p.m. on December 30, 2016. For the purposes of enforcement, actual notice will be used from December 9, 2016 at 6 p.m., until December 19, 2016.