

purpose, nor shall it include any amount that a broker or dealer has sold short to the issuer or to any affiliated purchaser of the issuer if the issuer or such affiliated purchaser knows or has reason to know that the sale was a short sale.

\* \* \* \*

(13) \* \* \*

(iv) Effected during the period from the time of public announcement (as defined in § 230.165(f) of this chapter) of a merger, acquisition, or similar transaction involving a recapitalization, until either the earlier of the completion of such transaction or the completion of the vote by target shareholders or, in the case of an acquisition or other covered transaction by a special purpose acquisition company (“SPAC”), the earlier of the completion of such transaction or the completion of the votes by the target and SPAC shareholders. This exclusion does *not* apply to Rule 10b–18 purchases:

\* \* \* \*

(14) *Rule 10b–18 VWAP purchase* means a purchase effected at the volume-weighted average price (“VWAP”) by or on behalf of an issuer or an affiliated purchaser of the issuer that meets the conditions of paragraphs (b)(1), (b)(2), and (b)(4) of this section and the following criteria:

(i) The purchase is for a security that qualifies as an “actively-traded security” (as defined in § 242.101(c)(1) of this chapter);

(ii) The purchase is entered into or matched before the opening of the regular trading session;

(iii) The execution price of the VWAP purchase is determined based on all regular way trades effected in accordance with the conditions of paragraphs (b)(2) and (b)(3) of this section that are reported in the consolidated system during the primary trading session for the security;

(iv) The purchase does not exceed 10% of the security’s relevant average daily trading volume;

(v) The purchase is not effected for the purpose of creating actual, or apparent, active trading in or otherwise affecting the price of any security;

(vi) The VWAP assigned to the purchase is calculated by:

(A) Calculating the values for every regular way trade reported in the consolidated system during the regular trading session, except as provided in paragraph (a)(14)(iii) of this section, by multiplying each such price by the total number of shares traded at that price;

(B) Compiling an aggregate sum of all values; and

(C) Dividing the aggregate sum by the total number of trade reported shares for

that day in the security that represent regular way trades effected in accordance with the conditions of paragraphs (b)(2) and (b)(3) of this section that are reported in the consolidated system during the primary trading session for the security; and

(vii) The purchase is reported using a special VWAP trade modifier.

(b) \* \* \*

(2) \* \* \*

(i) The opening regular way purchase reported in the consolidated system, the opening regular way purchase in the principal market for the security, and the opening regular way purchase in the market where the purchase is effected;

\* \* \* \*

(3) \* \* \*

(i) Does not exceed the highest independent bid or the last independent transaction price, whichever is higher, quoted or reported in the consolidated system at the time the Rule 10b–18 purchase is effected; *Provided, however,* that Rule 10b–18 VWAP purchases, as defined in paragraph (a)(14) of this section, shall be deemed to satisfy paragraph (b)(3)(i) of this section;

\* \* \* \*

(d) *Other purchases.* (1) No presumption shall arise that an issuer or an affiliated purchaser has violated the anti-manipulation provisions of section 9(a)(2) or 10(b) of the Act (15 U.S.C. 78j(a)(2) or 78j(b)), or § 240.10b–5, if the Rule 10b–18 purchases of such issuer or affiliated purchaser do not meet the conditions specified in paragraph (b) or (c) of this section; and

(2) A Rule 10b–18 purchase of an issuer or affiliated purchaser that meets the conditions specified in paragraph (b) or (c) of this section at the time the purchase order is entered but does not meet the price condition specified in paragraph (b)(3)(i) of this section at the time the purchase is effected due to flickering quotes shall remove only such purchase, rather than all of the issuer’s other Rule 10b–18 purchases, from the safe harbor for that day.

Dated: January 25, 2010.

By the Commission.

**Elizabeth M. Murphy,**  
*Secretary.*

[FR Doc. 2010–1856 Filed 1–28–10; 8:45 am]

**BILLING CODE 8011–01–P**

## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

#### 29 CFR Part 1904

[Docket No. OSHA–2009–0044]

**RIN 1218–AC45**

### Occupational Injury and Illness Recording and Reporting Requirements

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

**ACTION:** Proposed rule; announcement of public meeting.

**SUMMARY:** OSHA is proposing to revise its Occupational Injury and Illness Recording and Reporting (Recordkeeping) regulation to restore a column to the OSHA 300 Log that employers would use to record work-related musculoskeletal disorders (MSD). The 2001 Recordkeeping final regulation included an MSD column, but the requirement was deleted before the regulation became effective. This proposed rule would require employers to place a check mark in the MSD column, instead of the column they currently mark, if a case is an MSD that meets the Recordkeeping regulation’s general recording requirements.

**DATES:** *Written comments:* Comments must be submitted (postmarked, sent, or received) by March 15, 2010.

*Public meeting:* OSHA will hold a public meeting on the proposed rule from 9 a.m. to 5 p.m. on March 9, 2010. If necessary, the meeting may be extended to subsequent days.

*Requests to speak at the public meeting and requests for special accommodation at the meeting:* You must submit requests to speak at the public meeting and requests for special accommodations to attend the meeting by February 16, 2010.

**ADDRESSES:** *Written comments and requests to speak at the public meeting:* You may submit comments and requests to speak, identified by docket number OSHA–2009–0044, or regulatory information number (RIN) 1218–AC45, by any of the following methods:

*Electronically:* You may submit comments, requests to speak, and attachments electronically at <http://www.regulations.gov>, which is the Federal eRulemaking Portal. Follow the instructions on-line for making electronic submissions;

*Fax:* If your submission, including attachments, does not exceed 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648; or

*Mail, hand delivery, express mail, messenger or courier service:* You must submit your comments, requests to speak, and attachments to the OSHA Docket Office, Docket Number OSHA-2009-0044, U.S. Department of Labor, Room N-2625, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693-2350 (OSHA's TTY number is (877) 889-5627). Deliveries (hand, express mail, messenger and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m.-4:45 p.m., e.t.

*Public meeting:* The public meeting will be held in C 5320, Room 6, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

*Requests for special accommodation:* Submit requests for special accommodations to attend the public meeting to Veneta Chatmon, OSHA, Office of Communications, Room N-3647, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693-1999; e-mail [Chatmon.veneta@dol.gov](mailto:Chatmon.veneta@dol.gov).

*Instructions for submitting comments, requests to speak, and requests for special accommodation:* All submissions must include the docket number (Docket No. OSHA-2009-0044) or the RIN number (RIN 1218-AC45) for this rulemaking. Because of security-related procedures, submission by regular mail may result in significant delay. Please contact the OSHA Docket Office for information about security procedures for making submissions by hand delivery, express delivery, and messenger or courier service.

All comments and requests to speak, including any personal information you provide, are placed in the public docket without change and may be made available online at <http://www.regulations.gov>. Therefore, OSHA cautions you about submitting personal information such as social security numbers and birthdates. For further information on submitting comments and requests to speak, plus additional information on the rulemaking process, see the "Public Participation" heading in the **SUPPLEMENTARY INFORMATION** section of this notice.

**Docket:** To read or download submissions in response to this **Federal Register** notice, go to docket number OSHA-2009-0044, at <http://regulations.gov>. All submissions are listed in the <http://regulations.gov> index, however, some information (e.g., copyrighted material) is not publicly available to read or download through that Web page. All submissions, including copyrighted material, are

available for inspection and copying at the OSHA Docket Office.

Electronic copies of this **Federal Register** document are available at <http://www.regulations.gov>. This document, as well as news releases and other relevant information, is available at OSHA's Web page at <http://www.osha.gov>.

**FOR FURTHER INFORMATION CONTACT:** For press inquiries: Jennifer Ashley, OSHA, Office of Communications, Room N-3647, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693-1999.

*For general and technical information on the proposed rule:* Jim Maddux, Acting Deputy Director, OSHA Directorate of Standards and Guidance, Room N-3718, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693-1950.

*For the public meeting:* Veneta Chatmon, OSHA, Office of Communications, Room N-3647, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693-1999.

**SUPPLEMENTARY INFORMATION:** OSHA is proposing to revise its Recordkeeping regulation (29 CFR part 1904) to restore a column to the OSHA 300 Log that employers would use to record work-related musculoskeletal disorders (MSD). The 2001 Recordkeeping final regulation included an MSD column, but the requirement was deleted before it became effective (66 FR 5916, 6129 (1/19/2001)). The proposed rule would require employers to place a check mark in the MSD column, instead of the column they mark now, if the case is an MSD and meets the general recording requirements of the Recordkeeping rule. The rule also proposes, for this recordkeeping purpose only, a definition of MSD that is identical to the one contained in the 2001 final Recordkeeping rule. In addition, OSHA proposes an entry for the total number of MSDs on the OSHA 300A form, the form that employers use to annually summarize their work-related injuries and illnesses (see 29 CFR 1904.32).

In 2003 OSHA deleted the MSD provisions (column and definition) from the 2001 Recordkeeping rule (68 FR 38601). However, after further consideration and analysis, the Agency believes that information generated from the MSD column will improve the accuracy and completeness of national occupational injury and illness statistics; will provide valuable and industry specific information to assist OSHA in effectively targeting its inspection, outreach, guidance and

enforcement efforts to address workplace MSDs; and will provide useful establishment-level information that will help both employers and employees readily identify the incidence of MSDs.

OSHA stresses that the purpose of this rulemaking is solely to improve data gathering regarding work-related MSDs. The proposed rule does not require employers to take any action other than to check the MSD column on the OSHA 300 log if a work-related MSD case occurs that meets the general recording requirements of the Recordkeeping regulation. Unlike OSHA standards, the proposed rule does not require employers to implement controls to prevent and control employee exposure to an identified occupational hazard.

## I. Background

### Regulatory History

On January 19, 2001, OSHA published the revised Recordkeeping rule, which took effect on January 1, 2002 (66 FR 5916). The rule contained a section, which never became effective (Section 1904.12), that would have required that any MSD meeting the regulation's general recording criteria be recorded on the OSHA 300 Log by checking the MSD column. Section 1904.12(b)(1) of the Recordkeeping rule defined MSDs as "disorders of the muscles, nerves, tendons, ligaments, joints, cartilage and spinal discs, except those caused by slips, trips, falls, motor vehicle accidents or other similar accidents" (66 FR 6129). Section 1904.12(b)(2) clarified that an MSD, like any other injury or illness, was recordable if it "is work-related, and is a new case, and meets one or more of the general recording criteria" in §§ 1904.5, 1904.6 and 1904.7 (66 FR 6129-6130).

Prior to revision of the Recordkeeping regulation in 2001, OSHA's injury and illness recording form (the OSHA 200 Log) did not contain an MSD column. Instead, the OSHA 200 Log had a column for "repeated trauma" cases. Repeated trauma included some, but not all, MSDs (e.g., it excluded back MSDs) and included some non-MSD cases, such as occupational hearing loss. In the preamble to the 2001 Recordkeeping rule, the Agency concluded, after extensive consultation with the Bureau of Labor Statistics (BLS) and the National Institute for Occupational Safety and Health (NIOSH), that adding an MSD column to the new OSHA 300 Log was "essential to obtain an accurate picture of the MSD problem in the United States" (66 FR 6030). OSHA also noted that, in the past, determining the

number of MSD cases had been complicated. It required close cooperation between OSHA and BLS, since MSDs were not recorded in a single column. It also required special computer analyses to calculate MSD numbers. OSHA said that adding an MSD column to the 300 Log not only would permit “more complete and accurate reporting of these disorders” in the national statistics, but also “provide a useful analytical tool at the establishment level” (66 FR 6030). In addition, OSHA said that capturing all recordable MSDs in a “single entry” would “allow employers, employees, authorized representatives, and government representatives to determine, at a glance, what the incidence of these disorders in the establishment is” (66 FR 6030).

On October 12, 2001, after providing notice and seeking comment (66 FR 35113 (7/3/2001)), OSHA delayed the effective date of § 1904.12 of the Recordkeeping rule (66 FR 52031). At that time, the Agency was reconsidering the MSD column requirement and MSD definition in light of the Secretary of Labor’s decision to develop a comprehensive plan to address ergonomic hazards (66 FR 52032). On April 5, 2002, OSHA announced the plan, which included a combination of industry-targeted guidelines, enforcement measures, workplace outreach, and a National Advisory Committee on Ergonomics (see OSHA’s Web page at <http://www.osha.gov>; 68 FR 38601, 38602). On December 17, 2002, following notice and comment (67 FR 44121 (7/1/2002)), OSHA again delayed the effective date of § 1904.12, explaining that the Agency had not yet decided on the correct approach for dealing with the MSD definition in the Recordkeeping regulation (67 FR 77165, 77166).

On June 30, 2003, OSHA deleted § 1904.12 from the Recordkeeping rule, after determining that the MSD column was not necessary or supported by the record (68 FR 38601, 38605). OSHA explained that it was not persuaded that the MSD column would provide the type of detailed information that would make it a useful tool for addressing MSDs at the establishment level; materially improve national statistics on MSDs; or help to ensure effective enforcement of section 5(a)(1) (the General Duty Clause) of the Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 651, 656). The Agency said that the existing MSD data published by BLS were adequate to provide information for OSHA and the public. The Agency did note, however, that the addition of columns might be

warranted if a type of injury or illness was misrepresented in the BLS data for cases resulting in days away from work (68 FR at 38605). Based on this, OSHA concluded there was a need to create a separate column for occupational hearing loss. OSHA reasoned that, since many hearing loss cases do not result in days away from work, the BLS statistics on those cases “represented only a minor fraction” of the total occupational hearing loss that workers experienced (68 FR at 38605). The column for hearing loss was added to the log in 2003 (67 FR at 44037).

#### *Consultation With ACCSH and HHS*

As required by the Contract Work Hours and Safety Standards Act (Construction Safety Act) (40 U.S.C. 3704) and OSHA regulations (29 CFR 1911.10(a) and 1912.3(a)), OSHA has consulted with the Advisory Committee on Construction Safety and Health (ACCSH) about this proposal. OSHA provided ACCSH with the materials necessary to deliberate about the proposed rule and, in December 2009, OSHA met with ACCSH to discuss the rulemaking, answer their questions, and receive the committee’s comments and recommendations.

On December 11, 2009, ACCSH unanimously recommended that OSHA add an MSD column to the OSHA 300 and 300A recordkeeping forms. The committee also unanimously recommended that OSHA highlight the “do not include” language in the proposed MSD definition that is intended to make clear that MSDs do not include disorders caused by slips, trips, falls, motor vehicle accidents, or other similar accidents; and, to the extent possible, include additional common examples of MSDs. OSHA is requesting comment on the definition of MSD in this rulemaking, including identification of any additional examples of common MSDs that would make clear the MSDs that are to be recorded. OSHA has modified the proposed regulatory text to highlight the “DO NOT include” language by using all capital letters. Other highlighting techniques, such as italics, bold, or underline are reserved by the **Federal Register** for other purposes, and cannot be used for emphasis. OSHA asks for comments on alternative methods the Agency could use to make clear that MSDs do not include disorders caused by slips, trips, falls, motor vehicle accidents, or other similar accidents.

OSHA has also consulted with the Department of Health and Human Services (HHS), as required by Section 8(c) of the OSH Act (29 U.S.C. 657).

#### *BLS Statistical Program*

BLS is the Federal agency responsible for producing national occupational injury and illness statistics. BLS produces information on two basic categories of non-fatal occupational injuries and illnesses: (1) all injuries and illnesses combined, and (2) injuries and illnesses that result in days away from work.

For all occupational injuries and illnesses combined, BLS publishes aggregate and industry totals for the number and rates of injuries and illnesses. BLS breaks down the aggregate and industry injury and illness totals into cases that result in lost-work days and those that do not result in lost-workdays. For occupational illnesses (skin diseases or disorders, respiratory conditions, poisonings, hearing loss, and all other illnesses), BLS also publishes the totals from the illness columns on the OSHA 300 Log (BLS, “Workplace Injuries and Illnesses in 2007,” available on the BLS Web page at <http://www.bls.gov>). BLS makes the detailed and aggregate results available for both research and for public information.

BLS only publishes detailed information about injuries and illnesses that result in days away from work. The detailed information on injuries and illnesses resulting in days away from work, called case characteristics, is derived from a survey BLS conducts to elicit information from employers about the specific characteristics of these cases. Case characteristics include the employee’s age, sex, occupation, and length of service; the employer’s industry classification; the part of the body affected; the source of injury (e.g., bodily motion or position, machinery, fire); and the causal event or exposure (e.g., overexertion, repetitive motion, fall).

To produce information on MSDs that resulted in days away from work, BLS uses information from its survey about the nature of the injury or illness and the event or exposure leading to the injury or illness. Cases that BLS reports as MSDs include those in which the nature of the injury is a sprain, strain, tear, soreness, hernia, carpal tunnel syndrome or other similar type of injury to the soft tissue structures, and in which the causal event is bodily movement, such as bending, climbing, reaching, twisting, overexertion, or repetition (BLS, “Lost-Worktime Injuries and Illnesses: Characteristics and Resulting Time Away From Work, 2007,” available on the BLS Web page at <http://www.bls.gov>).

## II. Legal Authority

The OSH Act authorizes the Secretary to issue two types of occupational safety and health rules: *standards* and *regulations*. The OSH Act defines “occupational safety and health standard,” which is authorized by section 6 of the OSH Act (29 U.S.C. 655), as a rule that “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” (29 U.S.C. 652(8)). Standards specify remedial measures to be taken to prevent and control employee exposure to identified occupational hazards (*Louisiana Chemical Ass’n v. Bingham*, 657 F.2d 777, 781 (5th Cir. 1981); *United Steelworkers of America v. Reich*, 763 F.2d 728, 735 (3d Cir. 1985) (court held Hazard Communication rule was a standard because it aimed to ameliorate the significant risk of inadequate communication about hazardous chemicals)).

Regulations, by contrast, are the means to effectuate other statutory purposes, including the collection and dissemination of records of occupational injuries and illnesses. Courts of appeals have held that OSHA recordkeeping rules are regulations and not standards (*Louisiana Chemical Ass’n*, 657 F.2d at 782–785 (Access to Employee Exposure and Medical Records); *Workplace Health & Safety Council v. Reich*, 56 F.3d 1465, 1467–1469 (D.C. Cir. 1995) (Reporting of Fatality or Multiple Hospitalization Incidents)). These courts applied a functional test to differentiate between standards and regulations: standards aim toward correction of identified hazards, while regulations serve general enforcement and detection purposes (*Workplace Health & Safety Council*, 56 F.3d at 1468).

OSHA is issuing this proposed revision of the Recordkeeping regulation pursuant to authority expressly granted by sections 8 and 24 of the OSH Act (29 U.S.C. 657, 673). Section 8(c)(1) requires each employer to “make, keep and preserve, and make available to the Secretary [of Labor] or the Secretary of Health and Human Services, such records regarding his activities relating to this Act as the Secretary, in cooperation with the Secretary of Health and Human Services, may prescribe by regulation as necessary or appropriate for the enforcement of this Act or for developing information regarding the causes and prevention of occupational accidents and illnesses.” Section 8(c)(2) directs the Secretary to prescribe

regulations “requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job” (29 U.S.C. 657(c)(2)). Section 8(g)(2) of the OSH Act broadly empowers the Secretary to “prescribe such rules and regulations as [s]he may deem necessary to carry out [her] responsibilities under the Act” (29 U.S.C. 657(g)(2)).

Section 24 of the OSH Act contains a similar grant of authority. It requires the Secretary to “develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics” and “compile accurate statistics on work injuries and illnesses which shall include all disabling, serious, or significant injuries and illnesses, whether or not involving loss of time from work, other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job” (29 U.S.C. 673(a)). Section 24 also requires employers to “file such reports [of work injuries and illnesses] with the Secretary” as she may prescribe by regulation (29 U.S.C. 673(e)).

In addition, the Secretary’s responsibilities under the OSH Act are defined largely by its enumerated purposes, which include “[p]roviding appropriate reporting procedures that will help achieve the objectives of this Act and accurately describe the nature of the occupational safety and health problem” (29 U.S.C. 651(b)(12)).

Where an agency is authorized to prescribe regulations necessary to implement a statutory provision or purpose, a regulation promulgated under such authority is valid “so long as it is reasonably related to the enabling legislation.” *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973). See also *Louisiana Chemical Assn. v. Bingham*, 550 F. Supp. 1136, 1138–1140 (W.D. La. 1982), aff’d, 731 F.2d 280 (5th Cir. 1984) (records access rule is directly related to the goals stated in the OSH Act and supported by the language of section 8). The proposed MSD requirements are reasonably related to the purposes of the OSH Act and serve administrative functions necessary to carry out the purposes of sections 8 and 24 of the OSH Act. As discussed below, the proposed rule will improve the completeness and quality of national occupational injuries and

illnesses statistics. It will ensure that OSHA has more complete information to help the agency effectively target its inspection, guidance, outreach, and enforcement efforts to address MSDs. Finally, the proposal will provide easily identifiable information at the establishment level that will be useful for both employers and employees.

## III. Summary and Explanation of Proposed Rule

### *MSD Column*

OSHA proposes to restore on the OSHA 300 Log the MSD column that the Agency included in the 2001 final Recordkeeping rule. After further consideration and analysis, OSHA believes that the MSD column would provide valuable information for maintaining complete and accurate national occupational injury and illness statistics; assist OSHA in targeting its inspection, outreach, guidance, and enforcement efforts to address MSDs; and provide easily identifiable information at the establishment level that will be useful for both employers and employees.

Having data from the MSD column would improve national statistics on MSDs in several ways. It would allow BLS to collect and annually report the total number and rate of MSDs, both nationally and in specific industries, not just the figures for cases that result in days away from work (as is currently reported). Currently, this basic information is unavailable. Having the total number of MSDs would provide BLS with more complete data for analyzing the magnitude of the MSD problem and trends over time in the country as a whole, as well as in specific industries. Having more complete MSD data would assist OSHA, and other safety and health policy makers, in understanding MSDs and making informed decisions on policies concerning workplace MSDs.

Prior to the 2001 Recordkeeping rule, the OSHA 200 Log did not contain an MSD column, but it did have a “repeated trauma” column. However, the column did not include all MSDs (i.e., it excluded back MSDs) and included some non-MSDs (i.e., occupational hearing loss). As a result, the column did not provide accurate information on MSDs. The MSD column that OSHA proposes would correct that problem. The proposed MSD definition, which is identical to the definition in the 2001 final Recordkeeping rule, covers all MSDs, including back cases. The proposed definition does not cover hearing loss cases, which already have a separate column on the OSHA 300

Log. OSHA believes that information from the MSD column would help to ensure that national statistics more accurately reflect the full extent of MSD problems in U.S. workplaces.

In its 2003 notice rescinding the MSD column, the agency stated that information from the column would be of little statistical value because it would be general for all MSDs and would lack the detailed breakdown of case characteristics that is available for days away from work cases (68 FR 38605). After careful reconsideration, OSHA believes that this conclusion substantially understated the usefulness of the MSD column information. As noted above, the column would enable the agency and the public to learn, for the first time, the total number of MSDs both nationally and by industry sector. Moreover, the MSD category is no broader than the other illness categories that are included as columns on the OSHA 300 Log, and the information from those columns has proved useful. Like MSDs, each of these columns combines a class or range of illnesses or disorders into a single category. For example, respiratory illness includes a broad range of illnesses differing in etiology and severity. OSHA believes that information from the MSD column would be at least as useful as the valuable data generated from the other illness columns already present on the Log (i.e., skin disorders, respiratory conditions, poisonings, and hearing loss).

Furthermore, OSHA believes that, compared to MSDs, each of these other categories individually account for a smaller fraction of the total number of occupational illnesses. In 2007, for instance, skin disorders, the category with the highest number of cases (35,000), accounted for 17% of all illnesses while poisonings, the category with the fewest cases (3,400), accounted for less than 2% (BLS, "Workplace Injuries and Illnesses in 2007"). The hearing loss column, which OSHA added in 2001, accounted for 11% of all illnesses. The number of skin disorders, respiratory conditions, poisonings and hearing loss cases combined was 78,400 in 2007, which was only 38% of all occupational illnesses and less than 2% of the total number of occupational injuries and illnesses (4,002,700) that year.

MSDs, on the other hand, accounted for significantly more occupational illnesses than the combined total for the specific illnesses currently listed on the OSHA 300 Log. Looking only at MSDs that resulted in days away from work, BLS reported 335,390 MSDs, which accounted for 29% of the 1,158,870

injuries and illnesses with days away from work (BLS, "Lost-Worktime Injuries and Illnesses: Characteristics and Resulting Time Away From Work, 2007") and 8.4% of all occupational injuries and illnesses combined. Clearly the total of all MSDs (i.e., cases with and without days away from work) would account for a significantly greater portion of all occupational injuries and illnesses. OSHA believes it is reasonable and appropriate to have a column on the log for the type of case that accounts for such a significant portion of all occupational illnesses.

Further, OSHA believes that having both types of data, the overall number and rate of MSDs by industry, combined with the existing detailed demographic and case characteristic data on cases with days away from work, will provide a strong statistical tool for researchers. Having both types of data available may allow researchers to make new inferences about MSDs that have previously not been possible.

OSHA also believes that restoring the MSD column on the 300 Log would help to eliminate some of the uncertainties in existing national occupational illness statistics. In 2007, the "all other illnesses" column on the OSHA 300 Log accounted for 62% of all occupational illnesses (BLS, "Workplace Injuries and Illnesses in 2007"). OSHA believes that MSDs account for a large portion of "all other illnesses." In 2000, the last year the OSHA 200 Log contained a repeated trauma column, repeated trauma was the dominant illness reported, accounting for 67% of all illnesses (BLS, "Workplace Injuries and Illnesses in 2000," available on the BLS Webpage at <http://www.bls.gov>). Even if hearing loss cases were removed, repeated trauma still would have accounted for the majority of all occupational illnesses reported that year. OSHA believes that having the MSD column not only would help to eliminate some of the uncertainties concerning occupational illnesses in the national statistics, but would also provide better information on the nature of the large proportion of illnesses currently reported in the "all other illnesses" column.

In addition to its statistical value, the MSD column would provide valuable information to assist OSHA's inspection, outreach, guidance, and enforcement efforts. Each year, OSHA collects summary data from OSHA 300 Logs from approximately 80,000 establishments and uses them to schedule targeted inspections in high hazard industries. The summary data are comprised of the totals for each column on the OSHA 300 Log. These data include totals for the number of

injuries and illnesses, cases with days away from work, cases involving restricted work or job transfer, and cases of each specific illness listed on the log. However, the summary data do not include any data specifically on MSDs. Restoring the MSD column on the OSHA 300 Log would provide the Agency with such data.

Data from the MSD column would also allow OSHA to better target its future outreach and guidance efforts and to more accurately measure the effectiveness of its ongoing efforts. OSHA currently uses information about MSDs that resulted in days away from work to estimate whether its programs have been effective in reducing the severity of MSDs. Data from an MSD column, however, would allow the agency to better measure whether those programs have been effective in reducing MSDs, including those that did not result in days away from work. For example, if the MSD column had been on the OSHA 300 Log when OSHA issued guidelines for nursing homes, poultry processing, grocery stores, and shipyards, the information from that column would have provided baseline and post-intervention data to allow OSHA to more effectively measure the success of those guidelines in reducing MSDs. Such data could also be used in developing inspection programs aimed at identifying and reducing MSD hazards.

Data from the column also would be useful at the establishment level. Having an MSD column would provide information that both employers and employees could quickly and easily identify at a glance. Although OSHA noted in 2003 that employers can identify MSDs without the aid of a specific column (68 FR 38604), OSHA believes that having readily available MSD information in a single column will save employers and employees time in identifying and tracking the incidence of MSDs at the establishment. In the absence of the column, a person interested in MSD incidence must study every entry on the log to determine which cases are MSDs. Having the person responsible for the log identify a case as an MSD up front, at the time it is recorded, will be far easier and faster than studying every entry to identify which ones are MSDs. Employers would be able to use MSD column data in connection with their efforts to determine whether their workplace programs are effective in reducing MSDs. Having the column would also make it easier for employees to remain informed about MSD hazards associated with their jobs. Being able to easily access data on MSDs in the workplace

will give employees the type of information that will help them to actively participate in their own protection.

OSHA is also reconsidering restoring the MSD column in light of recent information that indicates employers are recording fewer and fewer cases as days away from work cases. This increases the importance of understanding what is happening with the other kinds of cases, which are not reflected in the BLS detailed case characteristics analyses. Recently, concerns have been raised about accuracy of workplace injury and illness records. In 2008, the U.S. House of Representatives Committee on Education and Labor held a hearing to examine the extent of this problem and its causes. In June 2008, the Committee Staff Majority published a report titled "Hidden Tragedy: Underreporting of Workplace Injuries and Illnesses" (Ex. A). The report identified ergonomics injuries as one type of case that has been "significantly underreported" (Ex. A, p. 10). The report discussed a series of articles in the *Charlotte Observer* about MSDs at poultry plants in North and South Carolina (Ex. B, Hall, Alexander & Ordonez, "The Cruelest Cuts: The Human Cost of Bringing Poultry to Your Table, *Charlotte Observer*, February 10, 2008). The *Charlotte Observer* reported that one South Carolina plant had not reported any MSDs during a four-year period, even though 12 employees who worked at the plant during that time said they suffered pain brought on by MSDs, and two said they had carpal tunnel surgery paid for by the company. The *Charlotte Observer* reported that the plant avoided having to record these injuries as days away from work cases by bringing injured employees back to the factory within hours of surgery. Similarly, OSHA has received information about MSD cases in which employers have scheduled employees for surgery on Friday afternoons and brought them back on Monday using restricted work. Those cases would not be recorded as resulting in days away from work, so they would not be included in the BLS detailed case characteristics analysis.

OSHA believes that these types of changes in employer practices for medically managing MSDs may be resulting in underrepresentation in BLS statistics for cases with days away from work. OSHA is concerned that employers are increasingly using restricted work, job transfers and medical treatment or surgeries without lost work time to bring employees back to work more quickly and to avoid recording MSDs as cases with days away from work. Employer use of

restricted work and job transfer has grown significantly during the past decade. In 1997, for instance, occupational injuries and illnesses involving restricted work or job transfer accounted for 36% of all cases (BLS, "Lost-Worktime Injuries and Illnesses: Characteristics and Resulting Time Away From Work, 1997," available on the BLS Web page at <http://www.bls.gov>). In 2007, they accounted for 43% of all injuries and illnesses (BLS, "Lost-Worktime Injuries and Illnesses: Characteristics and Resulting Time Away From Work, 2007").

OSHA believes that MSD data may be particularly affected by these changes in employer practices, since many MSDs may not fully incapacitate workers and may still enable them to perform alternative work duties during the recovery period. As the number of MSD cases being shifted from days away from work to restricted work continues to grow, there will be fewer and fewer MSDs represented in BLS detailed statistics on cases with days away from work. The MSD column would ensure that serious MSDs are included in the BLS statistics, regardless of employer practices.

The House Committee on Education and Labor Majority Staff Report also found that OSHA's withdrawal of the MSD column provision may have contributed to the underreporting of these incidents (Ex. A, p. 13). When OSHA removed the MSD column provision in 2003, some employers were confused about whether they were required to record MSD cases. Since 2003, OSHA has received numerous calls from employers asking whether MSDs are considered recordable injuries and illnesses. Although the Agency has been clear in all of its communications and outreach activities that, even without an MSD column, MSDs must be recorded on the OSHA 300 Log just as any other injury or illness, some confusion remains. Including a specific reference in the regulation making it clear that employers are required to record MSDs, combined with the specific MSD column, should provide clarity and help to finally resolve this confusion.

OSHA requests comment on the proposal to put back the MSD column on the OSHA 300 Log, including comment on the following:

- What are current employer practices regarding recording, tracking, and analysis of MSDs in workplaces?
- How do employers, employees, researchers and others use MSD data that are recorded on the OSHA 300 Log?

- Should OSHA put the MSD column back on the OSHA 300 Log? Please explain.

- Will the MSD column make it easier to analyze MSDs? Please explain.
- If OSHA restores the MSD column, how will your industry and establishment use the additional information?

- To what extent are employers using restricted work and job transfer instead of time away from work for managing MSDs? How are these changes affecting the reporting of MSDs?

- Will the MSD column result in additional costs to employers? If so, what are the costs? Will easier analysis of MSDs offset some of these costs? Please explain.

#### *MSD Definition*

Proposed section 1904.12(b)(1) defines MSDs as "disorders of the muscles, nerves, tendons, ligaments, joints, cartilage and spinal discs." The proposal clarifies that MSDs "do not include disorders caused by slips, trips, falls, motor vehicle accidents, or other similar accidents." In addition, it gives examples of MSDs, including "Carpal tunnel syndrome, Rotator cuff syndrome, De Quervain's disease, Trigger finger, Tarsal tunnel syndrome, Sciatica, Epicondylitis, Tendinitis, Raynaud's phenomenon, Carpet layers knee, Herniated spinal disc, and Low back pain." The proposed definition is identical to the one OSHA included in the 2001 final Recordkeeping rule, which never became effective.

MSDs have been studied for many years. During that time different terms have been used to describe these disorders, including cumulative trauma disorders, repetitive motion injuries, repetitive strain injuries, occupational overuse syndrome, occupational cervicobrachial disease, occupational overexertion syndrome, and ergonomic injuries. In recent years, MSD has become one of the most frequently used terms.

Different definitions for MSDs have been used for different purposes and by different organizations (Exs. C). Despite the differences, these definitions all share a common goal: to aggregate into one category a class of injuries and illnesses that have certain connections or commonalities. These definitions also have some common approaches. Like OSHA's proposed definition, most definitions use a general description, usually of the parts of the body MSDs generally affect. For instance, NIOSH has defined an MSD as a condition or "disorder that involves the muscles, nerves, tendons, ligaments, joints, cartilage, or spinal discs" (NIOSH,

"Proceedings of a Meeting to Explore the use of Ergonomics Interventions for the Mechanical and Electrical Trades," 2002; NIOSH "Elements of Ergonomics Programs: A Primer Based on Evaluations of Musculoskeletal Disorders," 1997 DHHS (NIOSH) Publication No. 97-117. Both documents are available on the NIOSH Web page at <http://www.cdc.gov>.

Many definitions using a general description also contain examples of specific types of MSDs to help illustrate the types of disorders the definition is intended to cover. OSHA's proposed definition uses this approach, as does the American National Standard A10.40, 2007, Reduction of Musculoskeletal Problems in Construction, which defines "musculoskeletal problems" as:

[I]njuries to the muscle, tendon, sheath, nerve, bursa, blood vessel, bone, joint, or ligament and musculoskeletal pain or swelling, and also where there may not be any obvious evidence of injury, and where occupational exposure is clearly identified. The injuries include, but are not limited to:

- Muscular
- Carpal Tunnel Syndrome
- Thoracic Outlet
- Tenosynovitis
- Myalgia
- Double Crush Syndrome
- Connective Tissue
- Bursitis
- Spasms
- Sciatica
- Disc Damage
- Neurological
- Vascular
- Tendonitis
- Back

A number of MSD definitions include causal risk factors, events or sources of exposure to clarify the types of disorders the definition covers. For example, the U.S. Navy definition of MSDs includes risk factors such as force, repetition, awkward or static postures, vibration, and contact stress (resulting from occasional, repeated or continuous contact between sensitive body tissues and a hard or sharp object) (Ex. C, OPNAVINST 5100.23G, December 30, 2005).

To clarify the scope, some definitions exclude disorders that may result from other causes, exposures, or events. The MSD definition in "NIOSH Elements of Ergonomics Programs" excludes disorders that are "the result of any instantaneous or acute event (such as a slip, trip, or fall)." *The Occupational Ergonomics Handbook* also used this approach (Waldemar Karwowski & William S. Marras, eds., *The Occupational Ergonomics Handbook: Fundamentals and Assessment Tools*

*for Occupational Ergonomics, Second Edition*, 1999).

The BLS detailed definition of MSDs, which has been used for over 10 years, utilizes a combination of all these approaches:

Musculoskeletal Disorders (MSDs) include cases where the nature of the injury is sprains; strains; tears; back pain; hurt back; soreness; pain; hurt; except the back; carpal tunnel syndrome; hernia; or musculoskeletal system and connective tissue diseases and disorders, when the event or exposure leading to the injury or illness is bodily reaction/bending, climbing, crawling, reaching, twisting, overexertion, or repetition. Cases of Raynaud's phenomenon, tarsal tunnel syndrome, and herniated spinal discs are not included, although they may be considered MSDs, the survey classifies these injuries and illnesses in categories that also include non-MSD cases (See the BLS Webpage at <http://www.bls.gov/iif/oshdef.htm>).

Because there currently is not an MSD column on the OSHA 300 Log, BLS must obtain statistics on the number of MSDs resulting in days away from work by aggregating cases that fall under certain nature of injury/illness and event or exposure codes used to classify cases. As the BLS definition notes, having to aggregate cases and classification codes to obtain the number of MSDs with days away from work has the unavoidable result of omitting some disorders (e.g., Raynaud's phenomenon, tarsal tunnel syndrome, herniated spinal discs) that could otherwise be classified as MSDs.

Like BLS, the proposed MSD definition incorporates a combination of approaches. The proposed definition is essentially identical to the summary description of MSDs that BLS uses in its news releases reporting annual case characteristics data (see e.g., BLS, "Lost-Worktime Injuries and Illnesses: Characteristics and Resulting Time Away From Work, 2007"), except that the proposed definition also includes a list of examples of disorders, and the proposed list includes Raynaud's phenomenon, tarsal tunnel syndrome, and herniated spinal discs. OSHA believes that the proposed definition provides clarity without imposing too much complexity. OSHA notes that the Agency is proposing this MSD definition for recordkeeping purposes only, and that there may be other definitions that are useful for other purposes.

OSHA requests comment on the proposed definition of MSD, including comment on the following:

- What MSD definitions are employers using currently and for what purposes?

- Should the definition include examples of MSDs? Should the examples be expanded to include hand arm vibration syndrome, Guyon's canal syndrome, radial tunnel syndrome, or hypothenar hammer syndrome. Should the definition include other examples?

- Are there any MSDs that the proposed definition should exclude? If so, which ones and why?

- Should the MSD definition include language on exposure or causal risk factors? Please explain.

- Are there other definitions of MSD that would be more effective for recordkeeping purposes? If so, please provide them and explain why.

#### *MSD Recording Criteria*

Proposed section 1904.12(b)(2) identifies which injuries and illnesses must be identified as MSDs on the OSHA 300 Log. MSDs that meet the general criteria for recordability (i.e., a work-related new case resulting in medical treatment, job transfer or restriction, or days away from work) are already required to be recorded on the log. The proposed section, like the 2001 Recordkeeping rule, specifies that "there are no special criteria" for determining which MSDs to record. Employers would continue to use the same process to decide whether an MSD must be recorded, as they are required to do for any other injury or illness under the Recordkeeping regulation. Under the proposal, employers would simply be required to identify which of those injuries and illnesses are MSDs by checking the MSD column on the log instead of the column they currently mark.

The proposed section also guides employers to the appropriate sections of the Recordkeeping regulation that discuss how to determine whether an MSD is work-related, is a new case and not a recurrence, and meets the general recording criteria (i.e., days away from work, restricted work or transfer to another job, or medical treatment beyond first aid). The proposed section is identical to the section OSHA included in the 2001 final Recordkeeping rule.

OSHA request comments on the proposed section.

#### *Subjective Symptoms*

Section 1904.12(b)(3) of the proposed rule specifies that the symptoms of an MSD are to be treated in exactly the same manner as symptoms for any other injury or illness. That is, an employer must record a case as an MSD if (1) The employee experiences "pain, tingling, burning, numbness or any other subjective symptom of an MSD;" (2) the

symptoms are work-related; (3) new; and (4) meet the general recording criteria in the Recordkeeping regulation (e.g., restricted work, job transfer, days away from work, medical treatment beyond first aid). As with any injury or illness, an MSD case would be recordable only if it meets all of these requirements. OSHA included this provision in section 1904.12 of the 2001 Recordkeeping rule (66 FR 6130), but, as discussed, that section was deleted in 2003. OSHA is including the proposed provision to eliminate any potential for confusion about when and what MSDs are recordable and to carry out the basic principle that, for recordkeeping purposes, MSDs should not be treated differently from other occupational injuries and illnesses.

The Recordkeeping regulation in section 1904.46 defines “injury or illness” as “an abnormal condition or disorder.” As explained in the preamble to the rule, this definition includes pain and other subjective symptoms. “Pain and other symptoms that are wholly subjective are also considered an abnormal condition or disorder. There is no need for the abnormal condition to include objective signs to be considered an injury or illness.” (66 FR 6080). Although the definition is broad, and is intentionally so, it captures “only those changes that reflect an adverse change in the employee’s condition that is of some significance, i.e., that reach the level of abnormal condition or disorder” (66 FR 6080). OSHA pointed out that including pain and other symptoms in the definition of injury or illness is appropriate because their occurrence is only the starting point of the inquiry into whether the case is a recordable injury or illness. Unless the pain or other symptoms are also work-related, new, and reach the level of seriousness in the Recordkeeping regulation’s general recording criteria, the employer does not have to record it (66 FR 6080). This definition applies to all injuries and illnesses, regardless of whether they are MSDs or any other kind of condition.

In its 2001 preamble discussion of section 1904.12, the agency elaborated on the reasons for including pain and similar symptoms within the definition of an “injury or illness.” First, OSHA explained that “symptoms such as pain are one of the primary ways that injuries and illnesses manifest themselves,” regardless of the type of injury or illness (66 FR 6020). Second, symptoms such as pain, burning, and numbness also “generally indicat[e] the existence of some underlying physiological condition” (e.g., inflammation, spinal disc damage) that warrants further

investigation by the employer to determine whether there is a work connection (66 FR 6020). Third, OSHA pointed out that the *International Classification of Diseases, Clinical Modification* (ICM-CM), the official system of assigning codes to diagnoses to diseases, injuries, and illnesses, lists several MSDs that consist only of pain (66 FR 6020). When health care professionals diagnose these disorders, they do so on the basis of employee-reported pain, evaluating and confirming them by physical examination (66 FR 6020). Therefore, OSHA concluded that pain and other subjective symptoms, of and by themselves, may indicate an injury or illness (66 FR 6020). The agency stressed that MSDs should not be treated differently from any other kind of case (66 FR 6021). When the agency revoked section 1904.12 in 2003, it noted that it was not changing which injuries and illnesses were required to be recorded, but was only deleting the requirement to identify cases as MSDs (68 FR 38606). Thus, this discussion has remained an authoritative guide to the current rule’s definition of injury and illness.

To eliminate any potential for confusion, OSHA also intends to remove language from the Recordkeeping Compliance Directive that says that “minor musculoskeletal discomfort” is not recordable under § 1904.7(b)(4) as a restricted work case “if a health care professional determines that the employee is fully able to perform all of his or her routine job functions, and the employer assigns a work restriction for the purpose of preventing a more serious injury” (CPL 02-00-135, Chapter 2, Section I(F)). This language was first introduced into OSHA’s initial Recordkeeping Compliance Directive as a result of a settlement agreement between OSHA and the National Association of Manufacturers (66 FR 66943 (12/27/2001)). OSHA agreed to include the language in its initial Compliance Directive but the agreement did not change the language of the Recordkeeping regulation itself. The agreement also stipulated that nothing in it affected the Agency’s right to modify or interpret its Recordkeeping regulations in the future (66 FR 66943-44).

OSHA intends to remove the language in the Compliance Directive because of concerns that it creates confusion about recording MSDs. First, OSHA is concerned that employers may misinterpret “minor musculoskeletal discomfort” to include MSD pain and other subjective symptoms that are truly

indicative of injury or illness under the Recordkeeping regulation’s definition of “injury or illness.” This confusion could result in the underreporting of work-related MSDs.

Second, OSHA finds that the language in the Compliance Directive also creates confusion about recordability of MSDs involving work restriction or job transfer. OSHA is concerned that employers who assign job transfers or work restrictions to prevent an injury from worsening may misinterpret the Compliance Directive language and not record the case. Again, this could result in the underreporting of work-related MSDs.

In addition, OSHA believes that the language in the Compliance Directive is not necessary because § 1904.4 of the Recordkeeping regulation clearly and fully specifies when cases involving work restrictions and transfers must be recorded. The decision tree accompanying that provision clearly delineates the decisionmaking process the employer must use to determine whether the case is recordable. The decision tree specifies that the first decision the employer must make is whether the case is an injury or illness within the meaning of the Recordkeeping regulation. If it is not, the case does not meet the very first requirement for recording, therefore, any work restriction or job transfer the employer assigns or voluntarily implements at this point (i.e., before the employee has an injury or illness) does not turn the case into a recordable one. On the other hand, if the employer determines that the employee’s injury or illness, including an MSD, meets the definition of “injury or illness” and the next two inquiries indicate that the case is work-related and new, then the job transfer or work restriction that results from the injury or illness MSD is recordable regardless of its purpose (i.e., to prevent the injury or illness from getting worse or to allow the employee to recover from the injury or illness or both). OSHA believes that by following the decision tree in § 1904.4, employers will be able to accurately determine whether an injury or illness, including an MSD, must be recorded.

The agency underscored this point in the preamble discussion of job transfer in the 2001 rule. The agency rejected suggestions to add an exception to recordability for voluntary or preventive job transfers. The agency explained that this concept is not relevant to the recordkeeping rule:

Transfers or restrictions taken before the employee has experienced an injury or illness do not meet the first recording requirement of the recordkeeping rule, i.e.

that a work-related injury or illness must have occurred for recording to be considered at all. \* \* \* However, transfers or restrictions whose purpose is to allow an employee to recover from an injury or illness as well as to keep the injury or illness from becoming worse are recordable because they involve restriction or work transfer caused by injury or illness. All restricted work cases and job transfer cases that result from an injury or illness that is work-related are recordable on the employer's Log" (66 FR 5981).

OSHA requests comment on proposed section 1904.12(b)(3).

#### *Startup Date*

Proposed § 1904.12(b)(4) explains that employers would be required to start using the MSD column of the OSHA 300 Log on January 1, 2011. Changes in recording procedures are implemented on January 1 of each year to ensure that occupational injury and illness data for that year reflect the same process and criteria. The January 1 effective date also reflects the annual summary requirements of section 1904.32.

Choosing any other date would complicate the annual summary, result in errors, and affect the statistics and programs that rely on the records. The 2001 Recordkeeping rule also became effective on January 1. In the preamble to the 2001 Recordkeeping rule, OSHA agreed with commenters that beginning a new requirement on any other date but January 1 would create "an insurmountable number of problems" (66 FR 6071). For example, if the startup date occurred during the middle of a year, it would necessitate that employers go back through their OSHA 300 Log and update it to reflect the change in the columns on the log.

#### *Former Privacy Provisions*

In § 1904.29 of the 2001 Recordkeeping rule, OSHA clarified that certain sensitive occupational injuries and illnesses were to be considered privacy concern cases (§ 1904.29(b)(7)), and set forth specific requirements for protecting the identity of injured or ill workers (§ 1904.29(b)(9) and (10)). The MSD provisions in the 2001 rule clarified that MSDs were not to be considered privacy concern cases (§ 1904.29(b)(7)(vi)).

At this time OSHA is not proposing to add a provision specifying that MSDs are not considered privacy concern cases. The privacy concern provisions have been in place since 2002, and the Agency is not aware of any difficulty with MSD cases being entered as privacy concern cases. However, if comments on the proposed rule support including language concerning MSDs and privacy concern cases, the Agency

will consider adding such language to the final rule. OSHA requests comment on the issue of privacy concern cases, including comment on the following:

- Currently, are employers having any difficulty determining whether an MSD is a privacy concern case? If so, how should OSHA clarify this issue in the final rule?
- Should OSHA include language in the final rule clarifying that MSDs are not to be considered privacy concern cases? If so, please explain why.

#### **IV. Preliminary Economic Analysis and Regulatory Flexibility Act Certification**

This proposed rule is not a "significant regulatory action" within the context of Executive Order 12866<sup>1</sup> or the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1532(a)), or a "major rule" under the Congressional Review Act (5 U.S.C. 801 *et seq.*).<sup>2</sup> The rulemaking imposes far less than \$100 million in annual costs on the economy, and does not meet any of the other criteria specified for a significant regulatory action or major rule in the Executive Order, UMRA and the Congressional Review Act.

This section addresses the potential costs of the proposed rule. OSHA notes that this proposal would merely restore the Recordkeeping rule as issued in 2001 (i.e., before the deletion of the MSD column). All findings related to the economic impact of the 2001 rule, such as the determinations that the regulation (including the MSD column requirement) was economically feasible

<sup>1</sup> "Significant regulatory action" means any regulatory action that is likely to result in a regulation that may:

(1) Have an annual effect on the economy of \$100 or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order (E.O. 12866 Section 3(f)).

<sup>2</sup> A "major rule" means any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in:

(A) An annual effect on the economy of \$100 million or more;

(B) A major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or

(C) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises or compete with foreign-based enterprises in domestic and export markets (5 U.S.C. 804(2)).

and had no significant impact on small entities, were established at that time and need not be revisited here.

Therefore, the potential costs associated with this proposal are limited to the time for affected employers to familiarize themselves with the MSD column reporting procedures and the time to mark MSDs on the OSHA 300 Log. As noted in the Summary and Explanation, this rule involves no change in when and under what circumstances MSDs are recordable injuries or illnesses. Since employers will use the general recording criteria in the existing Recordkeeping rule for recording MSDs, there are no costs to either employees or employers with respect to becoming familiar with recordability criteria.

#### *Familiarization With Reporting Procedures*

The Agency expects the largest time required to comply with the proposed rule will be related to familiarization with the MSD column reporting procedure. At the time of the 2001 recordkeeping rulemaking, the Agency estimated that it would take 20 minutes for the average affected employer to familiarize themselves with all of the new recordkeeping requirements and procedures (66 FR 6092).<sup>3</sup> That estimate included time for learning the procedures for recording MSDs. When the Agency subsequently removed the MSD-column requirement in 2003, the Agency did not provide a quantitative estimate of time or cost savings (68 FR 3860). OSHA believes that the proposed MSD reporting requirement would require a fraction of the time that the Agency estimated for employers to familiarize themselves with all of the provisions in the 2001 Recordkeeping rule, including the MSD column. As such, OSHA preliminarily estimates that it would take affected employers five minutes to familiarize themselves with the proposed MSD reporting procedures.

The proposed rule affects all firms within OSHA jurisdiction that have 10 or more employees at some time in the year, except for those low hazard industries that are not required to routinely prepare an OSHA Form 300 and 301. In 2008, OSHA put out an Information Collection Request (ICR),

<sup>3</sup> The 20-minute estimate for familiarization was for employers who were already required to keep OSHA injury and illness records. OSHA estimated that familiarization would take longer for employers who were required to keep injury and illness records for the first time. Since 2001, all affected employers have been keeping OSHA 300 Logs and OSHA assumes they are familiar with the recordkeeping procedures.

which calculated that the Recordkeeping rule affects 1,542,000 establishments (Recordkeeping ICR Supplemental Statement (SS) 1218–1706 (1–17–08)). Multiplying the estimate of the total number of affected facilities by the estimated time (five minutes) to familiarize the record keeper with the proposed MSD recording requirement, the proposed regulation would require 129,000 hours in the first year it takes effect.

OSHA believes the occupational category most likely to prepare OSHA injury and illness records is a Human Resource, Training, and Labor Relations Specialist, not elsewhere classified (Human Resources Specialist). The BLS Occupational Employment Survey (OES) indicated that in May 2008, Human Resources Specialists earned a mean hourly wage of \$28 (BLS OES, 2009). In June 2009, the BLS National Compensation Survey indicated a mean fringe benefit factor of 1.43 for civilian workers in general. This would indicate an hourly compensation of \$40.04 for Human Resources Specialists. Using this estimate of the cost of labor, the cost of initial familiarization with the proposed MSD recording requirement annualized over 10 years at a discount rate of 7 percent would be \$735,000 per year for all affected establishments combined.

#### *Recording MSDs*

The Agency believes that there will be some small incremental cost above what firms currently incur for recordkeeping to decide whether specific cases are MSDs and mark them on the MSD column. Given the recordkeeping guidance OSHA provides, as well as information already recorded on the OSHA Form 301 and workers' compensation reports, the Agency believes that the incremental time to decide and record cases in the MSD column will be minimal. The Agency also believes that, in the large majority of cases, it will be obvious whether a case is an MSD. Therefore, the Agency estimates it will take employers approximately one minute per case to record it in the MSD column.

The Agency is aware that some establishments use computer software to track worker injuries, although the Agency does not have information on employer patterns of use. Currently, commercially available recordkeeping software comes in various forms. While the software would presumably reduce the amount of time required for recordkeeping, employers may incur some costs to slightly modify the software to provide an extra column on the OSHA Form 300. More sophisticated

software, such as software that uses questions and decision logic to aid the employer in filling out the OSHA Form 300, may necessitate slightly more modification.

OSHA is considering developing software for free public distribution to assist employers, particularly smaller employers, with recordkeeping. The Agency requests comment on the use of computer software for recordkeeping, particularly among small businesses. For example, OSHA requests comment on whether computer software reduces employer recordkeeping burdens and, if so, in what ways or by how much. OSHA also requests comment about whether the proposed change in the Recordkeeping rule might affect current recordkeeping software and, if so, in what ways.

BLS reported that in 2007 there were 335,390 MSD cases that involved days away from work (DAFW). While we do not currently know how many non-days-away-from-work (non-DAFW) cases are MSDs, in 2007 BLS estimated there were 4,002,700 total workplace injuries and illnesses, of which 1,158,870 were days-away-from-work cases. If it is assumed that the pattern of DAFW MSDs and non-DAFW MSDs mirrors that of DAFW and non-DAFW injuries and illnesses as a whole, it would suggest the total number of MSDs would be approximately 3.45 times (4.0 divided by 1.159) the number of DAFW MSDs reported in 2007. The number of non-DAFW MSDs implied by this calculation would be 2.45 (3.45 – 1) times greater than the DAFW MSDs reported in 2007.

As discussed in Section III of this notice, the Agency anticipates that the number of non-DAFW MSDs, relative to the DAFW MSD count, may be higher than implied by taking a simple division of the total number of injuries and illnesses by the number of all DAFW cases. To ensure that the costs of the proposed rule are not underestimated, the Agency is estimating that the ratio of non-DAFW MSDs to DAFW MSDs is 50 percent higher than for the ratio for injuries and illnesses as a whole. This results in a ratio of 3.68 non-DAFW MSDs for each DAFW MSD. Using this ratio, the total estimated number of non-DAFW MSDs is estimated to be 1,233 million. Combined with the 335,390 DAFW MSDs reported in 2007, OSHA estimates that a total of 1.568 million recordable MSDs are occurring annually.

While the Agency estimates that 1.568 million MSDs occur annually, not all of these cases would occur in establishments that are required to maintain OSHA 300 Logs. Some cases

occur in establishments with fewer than 10 employees, and others occur in low hazard, "partially exempt" industries in the trade and service industries. Based on the pattern of injuries and illnesses generally, only approximately 80 percent of the cases annually are actually recorded (2008 ICR, SS 1218–1706 (1–17–08)).<sup>4</sup> Therefore, the Agency estimates approximately 1.254 million MSDs (80% of 1.568 million MSDs) would be recorded annually. At the same time, the Agency also recognizes that there will be some cases, perhaps 20 percent more than the total, that might require consideration as possible MSDs, but which employers would ultimately determine not to be MSDs, leaving 1.505 million MSDs (1.254 times 1.2) that employers would be required to record. At one minute of recording time per case, and using the hourly rate of \$40.04, the actual data entry would cost \$1,004 million annually for all affected establishments combined. This cost estimate assumes that no establishments are currently making any determinations as to whether a case is an MSD for other reasons. The addition of the MSD entry on the OSHA 300A summary form is expected to impose no new costs, as the summary totals will simply be tallied in the MSD column instead of the injury and all other illness columns. The annualized cost of both initial familiarization and annual MSD recording costs combined would be \$1,739 million per year for all affected establishments combined.

OSHA welcomes comment on all aspects of these cost estimates.

#### *Economic Impacts*

The economic impact on any affected establishment would obviously be quite small. As mentioned, 1.505 million recordable MSD cases are expected to occur annually among the 1.542 million affected establishments, which averages to approximately one case per establishment per year. This suggests that the average establishment would require an extra 6 minutes (5 minutes to familiarize and 1 minute to record an MSD) in the first year and 1 minute to record MSDs in subsequent years. The resulting costs for the typical affected establishment would be \$4.00 in the first year, and 67 cents in future years. In smaller establishments with fewer injuries, the cost would be even lower. Costs on this order should not pose an economic difficulty for any firm.

OSHA's guideline for determining whether a regulation has a significant

<sup>4</sup> The estimate of 80% of cases was based on an estimate of 3.365 million recorded cases out of a total of 4.214 million cases in 2005.

impact on a substantial number of small firms is whether the costs of the regulation exceed one percent of revenues or 5 percent of profits. Costs of \$4.00 in the first year and lower thereafter will never represent more than 1 percent of revenues or 5 percent of profits for a substantial number of small firms. Even if considerably more MSDs occurred in an establishment in a given year, it still would be very unlikely that the costs would pose any economic difficulty. Accordingly, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605), OSHA certifies that the proposed rule will not have a significant impact on a substantial number of small entities.

#### V. Environmental Impact Assessment

In accordance with the requirements of the National Environmental Policy Act (NEPA) (42 U.S.C. 4231 *et seq.*), Council on Environmental Quality NEPA regulations (40 CFR part 1500 *et seq.*), and the Department of Labor NEPA regulations (29 CFR Part 11), the Assistant Secretary has determined that this proposed rule will not have a significant impact on the external environment.

#### VI. OMB Review Under the Paperwork Reduction Act of 1995

The proposed regulation contains revised collections of information requirements (paperwork) that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (“PRA–95”), 44 U.S.C. 3501 *et seq.*, and OMB’s regulations at 5 CFR part 1320. The PRA–95 defines a “collection of information” as “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 are promulgated under 29 CFR part 1904, and consist of the OSHA Form 300, the Log of Work-Related Injuries and Illnesses; the OSHA Form 300A, Summary of Work-Related Injuries and Illnesses; and the OSHA Form 301, and the Injury and Illness Incident Report. These forms are contained in the Information Collection Request (ICR) (paperwork package) titled, 29 CFR Part 1904 Recordkeeping and Reporting Occupational Injuries and Illnesses (“Recordkeeping”), and are approved by OMB under OMB control number 1218–0176, (expiration date 03/31/2011). OSHA is proposing to revise its Occupational Injury and Illness Recording and Reporting (Recordkeeping) regulation to add a musculoskeletal disorder (MSD) column

to the OSHA 300 Log that employers use to record work-related injuries and illnesses. This proposed rule would require employers to place a check in the MSD column if a case is an MSD and meets the Recordkeeping regulation’s general recording requirements.

OSHA has submitted a revised Recordkeeping ICR to OMB for review (44 U.S.C. 3507(d)). OSHA solicits comments on the collection of information requirements and the estimated burden hours associated with these collections, including comments on the following:

- Whether the proposed collection of information requirements 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 information collection requirements, including the validity of the methodology and assumptions used;
- Ways to enhance the quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply, for example, by using automated or other technological techniques for collecting and transmitting information.

The title of the ICR, summary of the paperwork requirements, description of the need, respondent description, estimated recordkeeping burden, and the proposed frequency of the information collection requirements are described below.

*Title:* 29 CFR Part 1904

Recordkeeping and Reporting

Occupational Injuries and Illnesses.

*OMB Control Number:* 1218–0176.

*Summary:* Proposed section 1904.12(b)(2) identifies which injuries and illnesses must be identified as MSDs on the OSHA 300 Log. MSDs that meet the general criteria for recordability (i.e., a work-related new case resulting in medical treatment, job transfer or restriction, or days away from work) are already required to be recorded on the log. The proposed section explains that employers would continue to use the same process to decide whether an MSD must be recorded as they are required to do for any other injury or illness under the Recordkeeping regulation. Under the proposal, however, employers would be required to identify which of those injuries and illnesses are MSDs by checking the MSD column on the log. Section 1904.12(b)(3) of the proposed rule specifies that an employer must record a case as an MSD if (1) The employee experiences “pain, tingling, burning, numbness or any other

subjective symptom of an MSD;” (2) the symptoms are work-related; (3) new; and (4) meet the general recording criteria in the Recordkeeping regulation (e.g., restricted work, job transfer, days away from work, medical treatment beyond first aid). A case would be recordable only if it meets all of these requirements.

*Description of Need:* OSHA believes that an MSD column would provide valuable information for maintaining complete and accurate national occupational injury and illness statistics; assist OSHA in targeting its inspection, outreach, guidance, and enforcement efforts to address MSDs; and provide easily identifiable information at the establishment level that will be useful for both employers and employees.

Adding an MSD column to the OSHA 300 Log would improve national statistics on MSDs in several ways. It would allow BLS to collect and annually report the total number and rates of MSDs, both nationally and in specific industries, not just the figures for cases that result in days away from work. Currently, this basic information is unavailable. Having the total number of MSDs would provide BLS with more complete data for analyzing the magnitude of the MSD problem and trends over time in the country as a whole as well as in specific industries. Having more complete MSD data would assist OSHA, and other safety and health policy makers in understanding MSDs and making informed decisions on policies concerning workplace MSDs.

*Affected Public:* Business or other for-profit. The proposed rule affects all firms within OSHA jurisdiction that have 10 or more employees at some time in the year, except for those low hazard industries that are not required to routinely prepare an OSHA Form 300 and 301.

*Number of Respondents:* 1,541,900 employers.

*Frequency:* On occasion.

*Average Time per Response:* Five minutes for employers to familiarize themselves with the proposed MSD reporting procedure; and approximately one minute per MSD to record it in the MSD column. The addition of the MSD entry on the OSHA 300A summary form is expected to impose no new paperwork burden, as the summary totals will simply be tallied in the MSD column instead of the injury and all other illness columns.

*Estimated Total Burden Hours:* 127,978 hours for employers to become familiar with the MSD reporting procedure; and, 25,585 hours for

employers to mark 1,505,000 MSDs in the MSD column.

*Estimated Costs (Capital Operation and Maintenance): \$0.*

**Submitting comments.** Members of the public who wish to comment on the paperwork requirements in this proposal may send their written comments to the Office of Information and Regulatory Affairs, Attn: OSHA Desk Officer (RIN 1218-AC45), Office of Management and Budget, Room 10235, 725 17th Street, NW., Washington, DC 20503. The Agency encourages commenters to also submit their comments on these paperwork requirements to the rulemaking docket (Docket Number OSHA-2009-0044), along with their comments on other parts of the proposed rule. For instructions on submitting these comments to the rulemaking docket, see the sections of this **Federal Register** notice titled **DATES** and **ADDRESSES**. Comments submitted in response to this notice are public records; therefore, OSHA cautions commenters about submitting personal information such as Social Security numbers and date of birth.

**Docket and inquiries.** To access the docket to read or download comments and other materials related to this paperwork determination, including the complete ICR (containing the Supporting Statement with attachments describing the paperwork determinations in detail), use the procedures described under the section of this notice titled **ADDRESSES**. You also may obtain an electronic copy of the complete ICR by visiting the Web page at <http://www.reginfo.gov/public/do/PRAIMain>, scroll under “Currently Under Review” to “Department of Labor (DOL)” to view all of the DOL’s ICRs, including those ICRs submitted for proposed rulemakings. To make inquiries, or to request other information, contact Mr. Todd Owen, Directorate of Standards and Guidance, OSHA, Room N-3609, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693-2222.

The Department notes that a Federal agency cannot conduct or sponsor a collection of information unless it is approved by OMB under the PRA and displays a currently valid OMB control number, and the public is not required to respond to a collection of information unless it displays a currently valid OMB control number. Also, notwithstanding any other provisions of law, no person 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.

## VII. Unfunded Mandates

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*), as well as Executive Order 12875, this proposed rule does not include any Federal mandate that may result in increased expenditures by State, local, and tribal governments, or increased expenditures by the private sector of more than \$100 million.

## VIII. Federalism

The proposed rule has been reviewed in accordance with Executive Order 13132 (52 FR 41685), regarding Federalism. Because this rulemaking involves a “regulation” issued under Sections 8 and 24 of the OSH Act, and is not an “occupational safety and health standard” issued under Section 6 of the OSH Act, the rule will not preempt State law (29 U.S.C. 667(a)). The effect of the proposed rule on States is discussed in section IX. State Plan States.

## IX. State Plan States

If the proposed rule is issued in final form, the 27 States and territories with their own OSHA-approved occupational safety and health plans must adopt an identical regulation within six months of the publication date. These states and territories 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, Virgin Islands, Washington, and Wyoming. Connecticut, Illinois, New Jersey, and New York have OSHA approved State Plans that apply to state and local government employees only.

Consistent with Section 18 of the OSH Act (29 U.S.C. 667) and the requirements of 29 CFR 1904.41 and 1952.4, State-Plan States must promulgate occupational injury and illness recording and reporting requirements that are the same as the Federal requirements for determining which injuries and illnesses will be entered into the records and how they are entered. All other injury and illness recording and reporting requirements that are promulgated by State-Plan States may be more stringent than, or supplemental to, the Federal requirements, but, because of the unique nature of the national recordkeeping program, States must consult with OSHA and obtain approval of such additional or more stringent reporting and recording requirements to ensure

that they will not interfere with uniform reporting objectives.

Because this proposed rule determines how MSD injuries and illnesses are entered onto the OSHA 300 Log, the State-Plan State requirements must be the same as the Federal OSHA requirements to ensure the consistency of the occupational injury and illness information across the States.

## X. Public Participation

This rulemaking is governed by the notice and comments requirements in the Administrative Procedures Act (APA) (5 U.S.C. 553) rather than section 6 of the OSH Act (29 U.S.C. 655) and 29 CFR part 1911, which only apply to “promulgating, modifying or revoking occupational safety and health standards” (29 CFR part 1911). For example, section 6(b)(3) of the OSH Act and 29 CFR 1911.11 state that the requirement to hold an informal public hearing on a proposed rule only applies to rulemakings on occupational safety and health standards, not to those dealing with regulations.

Section 553(b)(1) of the APA requires the agency to specify the type of rule involved, the time during which the agency will receive comments on the proposal, and the instructions regarding the procedures for submitting comments. The APA does not specify a minimum period for submitting comments. In accordance with the goals of E.O. 12866, OSHA is providing 60 days for public comment (E.O. 12866 § 6(a)(1)).

### Public Submissions

OSHA invites comment on all aspects of the proposed rule. Interested persons must submit comments by March 15, 2010. The Agency will carefully review and evaluate all comments, information, and data, as well as all other information in the rulemaking record, to determine how to proceed.

You may submit comments in response to this document, requests to speak at the public meeting, and requests for special accommodation to attend the meeting (1) electronically at <http://www.regulations.gov>, which is the Federal eRulemaking Portal; (2) by facsimile (FAX); or (3) by hard copy. All submissions must identify the Agency name and the OSHA docket number (Docket No. OSHA-2009-0044) or RIN number (RIN No. 1218-AC45) for this rulemaking. You may supplement electronic submissions by uploading document files electronically. If, instead, you wish to mail additional materials in reference to an electronic or fax submission, you must submit them to the OSHA Docket Office (see

**ADDRESSES** section). The additional materials must clearly identify your electronic comments by name, date, and docket number, so OSHA can attach them to your comments.

Because of security-related procedures, the use of regular mail may cause a significant delay in the receipt of submissions. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger or courier service, please contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627).

#### Access to Docket

Comments in response to this **Federal Register** notice, requests to speak, and submissions at the public meeting are posted without change at <http://www.regulations.gov>, the Federal eRulemaking portal. Therefore, OSHA cautions individuals about submitting personal information such as social security numbers and birthdates. Exhibits referenced in this **Federal Register** document are posted at <http://www.regulations.gov>. Although submissions are listed in the <http://www.regulations.gov> indexes, some information (e.g., copyrighted material) is not publicly available to read or download through that Web page. All comments, requests to speak, materials presented at the public meeting, and exhibits, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using <http://www.regulations.gov> to submit comments and access dockets is available on the Webpage. Contact the OSHA Docket Office for information about materials not available through the Web page and for assistance in using the internet to locate docket submissions.

Electronic copies of this **Federal Register** document are available at <http://www.regulations.gov>. This document, as well as news releases and other relevant information, also are available at OSHA's Web page at <http://www.osha.gov>. For specific information about OSHA's Recordkeeping rule, go the Recordkeeping page on OSHA's Web page.

#### Public Meeting

OSHA will hold a two-day public meeting on the proposed rule on March 9, 2010 at the U.S. Department of Labor in Washington, DC (see **ADDRESSES** section). If necessary, the meeting may be extended to subsequent days.

The purpose of the public meeting is to allow interested persons to provide

oral comments on the proposed rule, which is a limited rulemaking to revise one provision of the Recordkeeping regulation. Although OSHA is not required to hold a public meeting on proposed regulations, the Agency believes that the public meeting will help to facilitate the development of a clear and complete rulemaking record. Consistent with this purpose, OSHA has the discretion to limit the time of speakers whose presentation goes beyond the scope of the proposed regulation.

Individuals interested in speaking at the public meeting must submit their request by February 16, 2010. The request must provide the following information:

- Name, address, and telephone number of each individual who will speak at the public meeting;
- Name of organization or establishment each individual represents, if any;
- Occupational title and position of each person speaking at the meeting;
- Date on which each individual wishes to speak at the meeting;
- Approximate amount of time each individual wishes to speak;
- An outline of the statement each individual wishes to make at the meeting.

OSHA will review each request to speak and determine whether the information it contains warrants the amount of time the individual requested to speak. To ensure that each participant has an opportunity to speak, OSHA will generally limit the time allotted to each speaker to a maximum of 15 minutes. Therefore, OSHA urges speakers to submit written comments of their presentation and to summarize and clarify their written submissions during the meeting. OSHA may also limit the time to speak of any individual who fails to comply substantially with the procedures for submitting a request to speak.

At OSHA's discretion and as time permits, individuals who did not submit a request to speak may be allowed time to make a brief oral statement not exceeding five minutes at the end of the scheduled presentations.

OSHA will post the schedule of appearances for the public meeting as well as additional information about the meeting on the OSHA Web page at <http://www.osha.gov>. The meeting will be transcribed. The transcription and all materials submitted during the public meeting will be put in the public docket of this rulemaking.

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

Health statistics, Occupational safety and health, Recording and reporting of occupational injuries and illnesses, State plans.

#### Authority and Signature

This document was prepared under the direction of David Michaels, PhD, MPH, Assistant Secretary of Labor for Occupational Safety and Health. It is issued under Sections 8 and 24 of the Occupational Safety and Health Act (29 U.S.C. 657, 673), 5 U.S.C. 553, and Secretary of Labor's Order No. 5–2007 (72 FR 31160).

Signed at Washington, DC, this 27th day of January 2010.

**David Michaels,**

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

#### Proposed Rule

Part 1904 of Title 29 of the Code of Federal Regulations is hereby proposed to be amended as follows:

#### PART 1904—[AMENDED]

1. The authority citation for part 1904 is to be revised 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) and 5–2007 (72 FR 31160), and 5 U.S.C. 553.

2. A new § 1904.12 is to be added to read as follows:

#### § 1904.12 Recording criteria for cases involving work-related musculoskeletal disorders.

(a) *Basic requirement.* If any of your employees experiences a recordable work-related musculoskeletal disorder (MSD), you must record it on the OSHA 300 Log by checking the “musculoskeletal disorder” column.

(b) *Implementation—(1) What is a “musculoskeletal disorder” or MSD?* MSDs are disorders of the muscles, nerves, tendons, ligaments, joints, cartilage and spinal discs. MSDs DO NOT include disorders caused by slips, trips, falls, motor vehicle accidents, or other similar accidents. Examples of MSDs include: Carpal tunnel syndrome, Rotator cuff syndrome, De Quervain's disease, Trigger finger, Tarsal tunnel syndrome, Sciatica, Epicondylitis, Tendinitis, Raynaud's phenomenon, Carpet layers knee, Herniated spinal disc, and Low back pain.

(2) *How do I decide which MSDs to record?* There are no special criteria for determining which MSDs to record. An MSD case is recorded using the same process you would use for any other injury or illness. If an MSD disorder is work-related, is a new case, and meets

one or more of the general recording criteria, you must record the case as an MSD in the MSD column. The following table will guide you to the appropriate section of the rule for guidance on recording MSD cases.

(i) Determining if the MSD is work-related. See § 1904.5.

(ii) Determining if the MSD is a new case. See § 1904.6.

(iii) Determining if the MSD meets one or more of the general recording criteria:

(A) Days away from work. See § 1904.7(b)(3);

(B) Restricted work or transfer to another job. See § 1904.7(b)(4); or

(C) Medical treatment beyond first aid. See § 1904.7(b)(5).

(3) *If a work-related MSD case involves only subjective symptoms like pain or tingling, do I have to record it as an MSD?* The symptoms of an MSD are treated the same way as symptoms for any other injury or illness. You must record the case on the OSHA 300 Log as an MSD if:

(i) An employee has pain, tingling, burning, numbness or any other subjective symptom of an MSD;

(ii) The symptoms are work-related;

(iii) The MSD is a new case; and

(iv) The case meets one or more of the general recording criteria.

(4) *When do I have to start recording work-related MSDs on the MSD column?* You must begin recording work-related MSDs on the MSD column as of January 1, 2011.

[FR Doc. 2010-2010 Filed 1-28-10; 8:45 am]

**BILLING CODE 4510-26-P**

## POSTAL SERVICE

### 39 CFR Part 111

#### Express Mail Open and Distribute and Priority Mail Open and Distribute Changes and Updates

**AGENCY:** Postal Service™.

**ACTION:** Proposed rule.

**SUMMARY:** The Postal Service proposes to revise its standards to reflect changes and updates for Express Mail® Open and Distribute and Priority Mail® Open and Distribute to improve efficiencies in processing and to control costs.

**DATES:** Submit comments on or before March 1, 2010.

**ADDRESSES:** Mail or deliver written comments to the Manager, Mailing Standards, U.S. Postal Service, 475 L'Enfant Plaza, SW., Room 3436, Washington, DC 20260–3436. You may inspect and photocopy all written comments at USPS® Headquarters

Library, 475 L'Enfant Plaza, SW., 11th Floor N, Washington, DC, between 9 a.m. and 4 p.m., Monday through Friday. E-mail comments, containing the name and address of the commenter, may be sent to: *MailingStandards@usps.gov*, with a subject line of “Open and Distribute Comments.” Faxed comments are not accepted.

#### FOR FURTHER INFORMATION CONTACT:

Karen Key, 202–268–7492 or Garry Rodriguez, 202–268–7281.

**SUPPLEMENTARY INFORMATION:** The Open and Distribute feature of Express Mail and Priority Mail service allows customers to expedite the transportation of shipments of other classes of mail to destination facilities using Express Mail or Priority Mail service.

Currently, for customers using USPS-provided letter trays for Priority Mail Open and Distribute, the Postal Service provides the option to use sacks, USPS-supplied tray boxes, or Label 23, an adhesive label which must be affixed to the outside of the letter tray. Tray boxes were introduced April 6, 2009, to address Open and Distribute customers' concerns that a USPS-provided letter tray sleeve might not maintain the integrity of all mail inside a letter tray during processing. Customers now have the option to place their trays in either sacks or Open and Distribute tray boxes, which are more secure. The Open and Distribute tray boxes are provided free of charge by the Postal Service to all Open and Distribute customers and are available for both half-size and full-size trays. Customers using the customer-supplied containers must affix the appropriate USPS-supplied tag (e.g., Tag 161, Tag 190). Label 23 is no longer needed since the letter trays will be enclosed in sacks or tray boxes and the Postal Service proposes to discontinue its use.

The Postal Service also proposes to discontinue the optional use of facsimile Tag 190, *Priority Mail Open and Distribute—Destination Delivery Unit*. Customers will now be required to use the USPS-supplied Tag 190, which is pink and easy to identify. This change will help to ensure accurate and efficient processing of Open and Distribute containers.

When presenting a mailing, Open and Distribute customers have always been required to leave containers unsealed until the business mail entry verification and acceptance of the contents have been completed, provide PS Form 3152, *Confirmation Services Certification*, and not exceed the 70 pound weight limit per container. We

also propose to update the standards to reflect these requirements.

Although we are exempt from the notice and comment requirements of the Administrative Procedure Act [5 U.S.C. 553 (b), (c)], regarding proposed rulemaking by 39 U.S.C. 410(a), the Postal Service invites comments on the following proposed revision of the *Mailing Standards of the United States Postal Service*, Domestic Mail Manual, incorporated by reference in the *Code of Federal Regulations*. See 39 CFR part 111.

#### List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

Accordingly, the Postal Service proposes to amend 39 CFR part 111 as follows:

#### PART 111—[AMENDED]

1. The authority citation for 39 CFR part 111 continues to read as follows:

**Authority:** 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 414, 416, 3001–3011, 3201–3219, 3403–3406, 3621, 3622, 3626, 3632, 3633, and 5001.

2. Revise the following sections of *Mailing Standards of the United States Postal Service*, Domestic Mail Manual (DMM®) as follows:

\* \* \* \* \*

#### 700 Special Standards

\* \* \* \* \*

#### 705 Advanced Preparation and Special Postage Payment Systems

\* \* \* \* \*

#### 16.0 Express Mail Open and Distribute and Priority Mail Open and Distribute

##### 16.1 Prices and Fees

###### 16.1.1 Basis of Price

*[Add new second sentence to 16.1.1 to clarify the maximum weight as follows:]*

\* \* \* The maximum weight for each container is 70 pounds.\* \* \*

\* \* \* \* \*

###### 16.1.5 Payment Method

*[Revise the third sentence of 16.1.5 to eliminate Label 23 as follows:]*

\* \* \* Priority Mail postage must be affixed to or hand-stamped on green Tag 161, pink Tag 190, or to the Open and Distribute tray box, or be part of the address label.

\* \* \* \* \*