



ORCHSE Strategies, LLC
2100 M Street, NW, Suite 170-357
Washington, DC 20037
+ 1 202-888-7100
orcstaff@orchse.com
www.orchse.com

October 27, 2015

OSHA Docket Office
Docket No. OSHA-2015-0006
U.S. Department of Labor
Room N-2695
200 Constitution Avenue. NW
Washington, DC 20210

Via Electronic Submission: <http://www.regulations.gov>

Re: Clarification of Employer's
Continuing Obligation to Make and
Maintain an Accurate Record of Each
Recordable Injury and Illness (80 Fed.
Reg. 45116, July 29, 2015)

Dear Sir/Madam:

ORCHSE Strategies, LLC (ORCHSE) welcomes this opportunity to comment on the Occupational Safety and Health Administration's (OSHA) Notice of Proposed Rulemaking (NPRM), Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness (80 Fed. Reg. 45116, July 29, 2015).

ORCHSE Strategies (formerly known as ORC Worldwide and more recently as Mercer HSE Networks) is an international occupational safety, health, and environmental consulting firm that has for more than 40 years specialized in providing a wide array of services to American businesses. Currently, more than 120 large (mostly Fortune 500) companies in diverse industries are members of one or more of ORCHSE's Occupational Safety and Health networks. The focus of these groups is to promote effective occupational safety and health programs and practices in business, to facilitate constructive communications between business and government agencies responsible for establishing national occupational safety and health policy, and to advocate responsible business positions to regulators. The activities of ORCHSE's Occupational Safety and Health networks are based on the premise that providing safe and healthful working conditions is of mutual importance to employers, employees and government agencies.

It should be noted that companies that are members of ORCHSE's Occupational Safety and Health networks may have provided substantial information, opinion, and advice to

ORCHSE in the development of its comments. However, the following comments are solely those of ORCHSE and may differ from the views and comments of individual member companies.

When it comes to worker safety and health our membership includes some of the leading companies in the world. While we don't support OSHA on every regulatory proposal, we strive to offer constructive suggestions and to identify solutions to safety and health challenges that are proactive, sustainable, and supportive of the safety and health mission.

Background: As OSHA notes in its current Notice of Proposed Rulemaking (NPRM), the national system for recording and reporting occupational injuries and illness is critically important to industry, labor, the government, and to achieving the purposes of the Act. So it comes as no surprise that OSHA has been actively attempting to enhance the system over the past several years.

While we recognize the Agency's need for better, more comprehensive data to administer its programs and direct its scarce resources where they are most needed, we believe that any changes to the recordkeeping system must be considered carefully, including the direct, indirect, and unintended consequences that are likely to result from Agency action.

Consequences that may be unintended, but are likely serious and detrimental, led us to oppose a November 8, 2013 proposal by the Agency to "modernize" the recordkeeping and reporting requirements by requiring establishments of a certain size or in certain industries to report their data electronically to OSHA so that it could be published on OSHA's web site. Our main concern was that OSHA was adding enormous pressure and burden to the system without any real plan for assessing its impact or for ensuring the quality of the reported information.

As a result, we expressed serious reservations and the belief that the changes to the rules, as proposed, were unlikely to achieve OSHA's stated (and implied) objectives. More importantly, we felt and still feel that the likely unintended negative consequences of the modernization proposal outweigh its projected benefits.

We identified seven specific problems with the OSHA proposal, and recommended that before launching a massive new data collection OSHA should:

- a. *Take significant steps to assess and improve the quality of the source data.*
- b. *Develop an interim plan to maximize the use of existing data NOW to target and address the most-serious hazards, while refining a long-term plan to fill key data gaps and needs.*
- c. *Support the funding of a comprehensive study of the nation's occupational injury and illness data systems to identify system gaps and current data needs, and eliminate system overlap and waste.*

- d. *Work with BLS to eliminate the double reporting burden that exists when employers have to provide essentially the same data to both OSHA and BLS.*

When OSHA reopened the record, we supported its seeking additional information. However, the Agency seemed to focus on one issue: employers having processes in place that discourage employees from reporting cases that are potentially recordable. While this problem is real, we were concerned that the proposal reflected a one-dimensional approach to a complex problem, and regrettably, a narrow understanding of the reasons cases are not reported and/or recorded properly. We feared that focusing solely on that one issue would likely lead the Agency to an incomplete and ineffective solution.

As part of our response, we made the following recommendations:

- a. *When it comes to worker safety and health in this country, OSHA has the ability to set the tone and lead by example. OSHA needs to change its own posture with regard to OSHA recordkeeping and lessen the negative consequences for reporting cases. This rulemaking is an opportunity for OSHA to exercise that leadership.*
- b. *This proposal is likely to drain scarce health and safety resources away from efforts that address more-serious issues, such as fatality and serious injury prevention. If OSHA decides to move forward the Agency should institute measures to offset the resource shift, which will be significant.*
- c. *Implementation of this proposal will increase the over-emphasis on OSHA injury and illness rates as the primary and often sole metric to drive and assess safety and health performance. OSHA should take the lead in identifying and promoting the use of leading indicators.*
- d. *Publication of the OSHA data will increase focus on less-serious cases and likely divert company attention from systems safety and preventing fatalities and catastrophic events.*

In both instances, we believed that the Agency had the best of intentions, but that its proposed “enhancements” to the recordkeeping and reporting system would, in the end, do much more harm than good. Our concerns about the unintended consequences of these recent proposed recordkeeping changes continue.

I. General Comments

Unintended consequences play a major role in shaping our opinion of the current NPRM and in the comments we include in this submission. However, in this instance the unintended consequences we fear are those that would result from the Court’s decision in *Volks II*.

Simply put, while we respect the legal arguments put forth in *Volks II* and the Court's decision, *applying the six-month Statute of Limitations in the OSH Act to recordkeeping violations would, in effect, make the OSHA recordkeeping and reporting requirements virtually unenforceable.*

That would likely have a huge detrimental impact on worker safety and health. Most employers work hard to record and report their injuries and illnesses accurately because they understand the key link between having good information on past incidents and the effectiveness of their prevention efforts. Regrettably, not all employers feel that way and some have demonstrated their preference for manipulating the numbers (through under-recording) instead of managing worker safety and health. They report largely because of the threat of OSHA enforcement and the potential consequences of that enforcement. It won't take long for those employers to figure out that application of the OSH Act's Statute of Limitations makes it virtually impossible for OSHA to effectively audit the records.

If the data are no longer enforceable, and no longer comparable, how will OSHA set priorities? How will research be conducted? How will companies know if they are making progress? How will workers become aware of the risk? And how will our safety and health professionals compete for resources in their companies if there is no longer any accepted yardstick to gauge their performance?

As we have stated repeatedly, the OSHA recordkeeping and reporting system is far from perfect. If the Agency cannot enforce the requirements, it will only get worse. In the end, workers and the safety and health mission will pay the price.

Therefore, despite the legal issues that have been identified, *we support the Agency's modification of the rule to clarify that an employer's obligation to make and maintain accurate records of occupational injuries and illnesses is an ongoing one that continues throughout the maintenance and retention period specified in the regulations.*

We do not see any viable alternative to the OSHA proposal. We have even considered what would happen if the system were to implode due to *Volks II*. Could that be an opportunity to "start over" and address issues that have plagued record keepers for years? That would be highly unlikely given the fact that congressional action would be required for that to happen.

II. Considerations in Supporting this Proposed Rulemaking:

The Court in *Volks II* applied the six-month Statute of Limitations in the OSH Act to recordkeeping violations. That means that OSHA must issue a citation for the violation within six months of when the case should have been recorded. That makes it virtually impossible for OSHA to enforce the recordkeeping requirements.

Why? Because with OSHA's scarce inspection resources it will be impossible to find many recordkeeping violations within six months of the occurrence of the case (actually six months and seven days). When OSHA issues citations for recordkeeping it is frequently for patterns of recordkeeping violations that extend over time. For example, citations have been issued for sites that don't record work-related ergonomics cases and for sites that don't record cases for contractors that they supervise on a day-to-day basis. Given the Agency's broad mandate and limited resource pool, it will be virtually impossible for OSHA to pursue these types of violations within the constraints imposed by a six-month Statute of Limitations.

So what is the problem with the OSHA recordkeeping requirements being unenforceable? Shouldn't most employers see this as a positive development?

We believe that employers committed to the safety and health mission will realize that making compliance with the regulation in effect voluntary would undermine the consistency and comparability of the data and hinder their efforts at prevention.

Consistency and comparability are clearly central to the usefulness of the information. Good quality injury and illness data clearly have value for prevention purposes when sites or companies use the data to track their own safety and health performance over time.

The consistency and quality of the data becomes even more important when they are used for comparative purposes. Why? Because sites reporting lower OSHA rates are not necessarily the better performers. Without regular detailed recordkeeping audits (that access personal medical information) there will be no way to tell whether sites reporting lower injury and illness rates actually have better safety and health programs. Lower rates may also reflect employer-driven under-reporting; new recordkeeping staff; the need for recordkeeping training; a lack of understanding of the nuances embedded in the rules; a culture of risk taking, where employees pride themselves in being tough; or a host of other issues that have very little to do with actual performance. Sites and companies that are diligent in recording and reporting cases will no doubt look worse than inferior performers that don't pay attention to the rules.

III. Conclusion

We are sympathetic to employers who inadvertently make honest mistakes in recording or reporting occupational injuries and illnesses because they don't understand OSHA's complicated and sometimes counter-intuitive recordkeeping rules. We also respect the legal arguments put forth in *Volks II* by the counsel representing the company, and by OSHA in the current NPRM. However, the issue at hand is not purely a legal one. It is an important issue for the Agency and for the safety and health community at large because it goes to the heart of the safety and health mission and will likely impact our collective efforts at prevention.

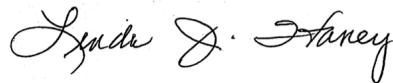
Most would agree that we need outcome data to identify risks and direct prevention efforts. To be effective the data need to be accurate, precise, consistent, and comparable. The OSHA recordkeeping and reporting system is our only source for that kind of information. To serve our needs, the OSHA recordkeeping requirements must be clear, reasonable, and enforceable.

Application of the six-month Statute of Limitations in the OSH Act to recordkeeping violations will undermine the Agency's ability to enforce the requirements and degrade the quality and consistency of the data, which some already believe is suspect.

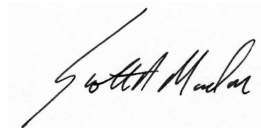
Therefore, ORCHSE Strategies, LLC strongly supports the Agency's proposal to modify the rule to clarify the employer's continuing obligation to make and maintain an accurate record of each recordable injury and illness. If for some reason OSHA is unable to successfully modify the rule for this purpose, we strongly urge OSHA to explore other means to address this important issue.

Thank you for the opportunity to comment.

Sincerely,



Linda Haney



Scott Madar



Stephen Newell



Dee Woodhull
Partners, ORCHSE Strategies, LLC