Comments of the AFL-CIO on OSHA's Proposed Rule on Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness.

Docket No. OSHA-2015-0006

October 28, 2015

The AFL-CIO welcomes the opportunity to submit comments on OSHA's Proposed Rule on 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). The AFL-CIO strongly supports the proposed rule which will clarify that the obligation of employers to make and maintain accurate records of work-related deaths, injuries and illnesses is ongoing for the entire period that the records must be maintained. The rule does not impose any new requirements or obligations, but simply makes clear in the regulatory text a requirement that has existed since OSHA issued its first recordkeeping regulations in 1972.

The rule is totally consistent with and necessary to carry out Congress' directive that employers keep such records and that the Secretary collect data and compile accurate statistics on work-related injuries and illnesses. Indeed, a regulation that fails to impose an ongoing employer obligation to make and maintain accurate records, and does not allow the Secretary to enforce this obligation, would totally undermine injury recordkeeping requirements and would not effectuate the requirements and purposes of the Act.

Complete and Accurate Injury Reporting is a Prerequisite for Effective Worker Protection Efforts and Achieving the Goals of the Occupational Safety and Health Act.

The collection of accurate and complete information on work-related injuries and illnesses was one of the key goals in the enactment of the Occupational Safety and Health Act of 1970. To this end, section 8(a)(2) of the Act directs the Secretary of Labor to "prescribe regulations requiring employers to maintain accurate records of, and 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. In addition, section 24 of the Act requires that "In order to further the purposes of the Act, the Secretary, in consultation with the Secretary of Health and Human Services, shall develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics." Section 24 of the Act directs the Secretary of Labor to "compile accurate statistics on work related 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."

OSHA and the Bureau of Labor Statistics have worked cooperatively to implement these requirements. Specifically, OSHA has adopted regulations requiring the recording of occupational injury and illnesses at the workplace and the reporting of fatalities and other injuries to OSHA (29 CFR 1904). These regulations require covered employers to record all work-related injuries and illnesses on the log of injuries and illnesses, develop and supplementary record with the details of each injury and illness, develop and post an annual summary of the log and maintain these records for a five year time period.[1]

The Bureau of Labor Statistics has been responsible for compiling the occupational injury and illness statistics required by the Act. The injury and illness statistics are compiled through an annual survey of employers based on the injury and illness records maintained by employers under the 1904 recordkeeping regulations. This survey produces the BLS Annual Survey of Occupational Injuries and Illnesses (SOII) and a supplemental survey with more detailed case and demographic injury and illness data. In addition, the BLS conducts a separate Census of Fatal Occupational Injuries (CFOI) to gather information on the extent and nature of fatal occupational injuries.

The injury and illness data recorded and maintained at the workplace, the injury and fatality information reported to OSHA and the occupational injury and illness statistics collected by BLS serve a broad range of purposes as is integral to the effective implementation of the Occupational Safety and Health Act. Indeed, as the legislative history of the Act noted: "Adequate information is a precondition for responsive administration of all sections of this bill." House Report No. 91-1291, 91st Congress. 2d Sess. 2 (1970) reprinted in Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print 1971) at 860 (Leg. Hist.).

> Specifically, the injury and illness data is used by federal and state agencies to establish priorities, in the development of occupational safety and health standards, targeting enforcement, surveillance, evaluation and for research purposes.[2] The data is also used by employers, unions and workers at the workplace to identify hazardous conditions and take corrective action to prevent future injuries and exposures. As OSHA explained in the preamble of the 2001 recordkeeping rule revision (29 CFR 1904):

[1] OSHA's injury recordkeeping and reporting regulations were first issued in 1972. A major update of the recordkeeping regulations was issued in 2001, which changed some of the criteria for which injuries and illnesses must be recorded. But the basic structure of the recordkeeping requirements and the components of the recordkeeping system remained the same.

[2] National Research Council, Panel on Occupational Safety and Health Statistics, *Counting Injuries and Illnesses in the Workplace: Proposals for a Better System*, National Academy Press, Washington, DC. 1987.

> "Occupational injury and illness records have several distinct functions or uses. One use is to provide information to employers whose employees are being injured or made ill by hazards in their workplace. The information in OSHA records makes employers more aware of the kinds of injuries and illnesses occurring in the workplace and the hazards that cause or contribute to them. When employers analyze and review the information in their records, they can identify and correct hazardous workplace conditions on their own. Injury and illness records are also an essential tool to help employers manage their safety and health programs effectively.
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> "Employees who have information about the occupational injuries and illnesses occurring in their workplace are also better informed about the hazards they face. They are therefore more likely to follow safe work practices and to report workplace hazards to their employers. When employees are aware of workplace hazards and participate in the identification and control of hazards, the overall level of safety and health in the workplace improves." (66 Fed. Reg., Jan. 19, 2001, pp. 5916-7).

The injury and illness data that is recorded, maintained and reported by employers under the OSHA recordkeeping regulation is utilized to track trends and progress, not only in the workplace, but also at the national level. In many industries, such as construction, the employer's injury and illness record is a factor in assessing the employer's safety performance for the purpose of awarding contracts.

Injury and Illness data can only be relied on for these purposes if the data is complete and accurate.

The legislative history of the Occupational Safety and Health Act shows that in drafting and adopting the injury and illness recording and reporting requirements of the Act, the Congress was most concerned that the data collected be complete and accurate:

> "Full and accurate information is a fundamental precondition for the meaningful administration of an occupational safety and health program. At the present time, however, the federal government and most of the states have inadequate information on the incidence, nature or causes of occupational injuries, illnesses and deaths. Not only are the serious deficiencies in the present data collection procedures, but adherence to the commonly used method of work injury measurement –the Z16.1 standard of the American National Standards Institute—thwarts the collection of information regarding many significant work related injuries and occupational illnesses. This an essential first action under the bill should be the institution of adequate statistical programs.
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> "Section 8(c) of the bill directs the Secretary of Labor to cooperate with the Secretary of Health Education and Welfare in devising regulations which

will implement *the goal of completeness in the recording and reporting of pertinent data*." (Emphasis added). Leg. Hist. at 156.

Thus, it imperative that OSHA's recordkeeping regulations are designed and implemented in a manner that achieves the Act's purpose and directive of collecting complete and accurate injury and illness data and that these regulations can be enforced by the agency.

Collection of Complete and Accurate Work-related Injury and Illness Data and Underreporting of Injuries and Illnesses Have Been and Remain a Serious Problem.

Unfortunately, since the Act was passed, the accuracy and completeness of the injury and illness information recorded by employers and collected by BLS have been a major concern and problem.

In the 1980's OSHA through its inspection program uncovered widespread problems of under recording and under reporting of injuries and illnesses by major employers including Union Carbide, Chrysler, Ford Motor Company, IBP and ConAgra Turkey.[3,4,5,6,7] In all of these workplaces, OSHA identified hundreds of cases of work-related injuries and illnesses that the employers had failed to record on the log of injuries and illnesses. The unreported injuries were directly related to hazardous conditions that posed a serious risk to workers. To respond to these extensive violations, OSHA developed its egregious enforcement policy, under which each instance of a violation was treated by OSHA employers were cited and penalized as a separate willful violation. Total penalties for the recordkeeping violations were the largest penalties ever assessed by the agency with $1.28 million in proposed penalties for Union Carbide in 1986 and $2.59 million for IBP in 1987.

Concerns about the completeness and accuracy of injury and illness data also led to other efforts to improve the quality of injury and illness data. In 1986, in response to a congressional directive, BLS funded and the National Academy of Sciences convened an expert panel and conducted a major study on the issue: *Counting Injuries and illnesses in the Workplace: Proposals for a Better System*, which made major

[3] Associated Press. "OSHA Fines Carbide $1.3 Million: Violations Show 'Willful Disregard' for Safety – Brock." Los Angeles Times Article Collections. Los Angeles Times, April 1, 1986. http://articles.latimes.com/1986-04-01/news/mn-1467_1_osha-fines

[4] Occupational Safety and Health Administration. (Nov. 5, 1986). OSHA Cites Chrysler Corporation for 182 alleged willful violations, proposes $910,000 in penalties [Press release].

[5] Ellis, Lisa. "Ford to Pay OSHA Fines of $1.2 Million."Philly.com. Philadelphia Inquirer, July 24, 1990. http://articles.philly.com/1990-07-24/news/25898411_1_osha-fines-ergonomics-cumulative-trauma-disorders

[6] Shabecoff, Philip. "OSHA Seeks $2.59 million fine for meatpacker's injury reports." The New York Times Online. New York Times, July 22, 1987. http://www.nytimes.com/1987/07/22/us/osha-seeks-2.59-million-fine-for-meatpacker-s-injury-reports.html

[7] Occupational Safety and Health Administration. (June 12, 1989) OSHA proposes $1 million penalty against ConAgra Turkey Co. for 250 alleged violations.

recommendations for improving the accuracy and completeness of data and the injury and illness data system.[8]

In 1987, The Keystone Center, at the request of BLS and OSHA, convened representatives from unions, employers, health and safety professionals, government agencies and academia for a dialogue about how to improve occupational injury and illness reporting and data. That dialogue group produced a report with numerous recommendations on how to improve injury recordkeeping as well as the injury and illness data system.[9] Those recommendations helped guide OSHA in the development of its revised and updated recordkeeping regulations (29 CFR 1904) which were proposed in 1996 and finalized in January 2001.

Despite these efforts to improve injury reporting and data, underreporting of work-related injuries and illnesses remains a significant and wide spread problem.

In response to concerns about the underreporting of injuries and illnesses, numerous studies have been conducted to assess the extent of the problem. Many of these studies have examined the completeness of the Bureau of Labor Statistics (BLS) Survey on Occupational Injuries and Illnesses (SOII), and have found that the survey, which is based upon employer recorded injury and illness data collected on the OSHA log, failed to capture one third to two-thirds of all work-related injuries and illnesses that actually occurred.[10,11,12,13,14]

As a follow-up to these findings, BLS funded additional research to examine the subject of undercounting and underreporting of work-related injuries and illnesses. The results of this research were published in a special issue of the *American Journal of Industrial Medicine* in October 2014. The research studies focused on injury reporting in three states—California, Massachusetts and Washington. The studies used different methodologies, but all examined data reported to different systems (e.g., BLS SOII, state workers' compensation, and health care facility data). Each of the studies found

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[8] National Research Council, *Counting Injuries and Illnesses in the Workplace: Proposals for a Better System*, *op. cit.*

[9] The Keystone Center, *Keystone National Policy Dialogue on Work-Related Illness and Injury Recordkeeping: Final Report,* Colorado, January 31, 1989.

[10] Boden L, and Ozonoff A, Capture-recapture estimates of nonfatal workplace injuries and illnesses. *Ann Epidemiol.* 2008 Jun;18(6):500-6. Epub 2008 Feb 20.

[11] Nestoriak N and Pierce B. Comparing Workers' Compensation claims with establishments' responses to the SOII. *Monthly Labor Review*. 2009 May, 57-64.

[12] Rosenman, KD, Kalush A, Reilly MJ, Gardiner JC, Reeves M, Luo Z. How much work-related injury and illness is missed by the national surveillance system? *J Occup Environ Med.* 2006 Apr;48(4):357-65.

[13] Leigh JP, Marcin JP, Miller TR. An Estimate of the U.S. Government's Undercount of Nonfatal Occupational Injuries. 2004 Jan. *J Occup Environ Med*, 46(1):10-18.

[14] Galizzi M, Miesmaa P, Punnett L, Slatin C, The Phase in Healthcare Research Team. Injured Workers' Underreporting in the Health Care Industry: An Analysis Using Quantitative, Qualitative, and Observational Data.
Industrial Relations A Journal of Economy and Society. 12/2009; 49(1):22 - 43.

that the BLS SOII significantly undercounted the injuries that occurred. [15,16,17]

These studies and others have identified a number of factors that contribute to the undercount of workplace injuries and illnesses in the United States, including the fact that one in six U.S. workers are excluded from coverage under the BLS survey.[18]

But the studies have also identified incentives and disincentives that impact the reporting of injuries by employers and workers. For employers these incentives or disincentives may include concern about increased workers' compensation costs for increased reports of injuries; fear of being denied government contracts due to high injury rates; concern about being targeted by OSHA for inspection if a high injury rate is reported; and the promise of monetary bonuses for low injury rates.

For workers these incentive and disincentives include employer programs that provide financial rewards or prizes to individual workers or groups of workers for having no injuries or a low injury rate; programs or policies that discipline workers for having an injury, regardless of the cause of the injury; and drug testing on all workers who report an injury. All of these policies and practices can suppress the reporting of injuries by workers.

Studies conducted by the U.S. Government Accountability Office have documented that disincentives to report and record injuries in the workplace are real and significant and present in many workplaces. A survey conducted by GAO as part of a 2009 investigation on injury reporting found that 67 percent of 1,000 health professionals surveyed reported they had observed fear among workers of disciplinary action for reporting injuries. Fifty-three percent of the health practitioners reported pressure from company officials to downplay the seriousness of injuries and illnesses, and more than one-third had been asked by employers or workers not to provide needed medical treatment to keep the injury from being recorded.[19] A follow-up study conducted by GAO in 2012 estimated that three-quarters of U.S. manufacturers had safety incentive programs or other workplace policies that could affect workers' reporting of injuries and illnesses"[20]

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[15]Boden, L.I., "Capture-Recapture Estimates of the Undercount of Workplace Injuries and Illnesses: Sensitivity Analysis," *American Journal of Industrial Medicine,* Vol. 57, No. 10 (2014).
[16]Davis, L, Grattan, K, Tak, S, Bullock, L, Ozonoff, A and Boden, L., "Use of Multiple Data Sources for Surveillance of Work-related Amputations in Massachusetts, Comparisons with Official Estimates and Implications for National Surveillance," *American Journal of Industrial Medicine,* Vol. 57, No. 10, 2014.
[17]Wuellner, S. and Bonato, D, "Injury Classification Agreement in Linked Bureau of Labor Statistics and Workers' Compensation Data," *American Journal of Industrial Medicine,* Vol. 57, No. 10, 2014.
[18]Leigh, J. Paul, Marcin, J.P. and Miller, T.R., "An Estimate of the U.S. Government's Undercount of Non-Fatal Occupational Injuries," *Journal of Occupational and Environmental Medicine,* Vol. 46, No. 1, 2004.
[19]"Workplace Safety and Health: Enhancing OSHA's Records Audit Process Could Improve the Accuracy of Worker Injury and Illness Data," GAO-10-10, Oct. 15, 2009, www.gao.gov/new.items/d1010.pdf.
[20] "Workplace Safety and Health: Better OSHA Guidance Needed on Safety Incentive Programs," GAO-12-329, April 2012, www.gao.gov/assets/590/589961.pdf.

In response to these studies documenting the underreporting of injuries and illnesses and findings by GAO concerning disincentives to reporting injuries, OSHA launched several initiatives to address these problems. In 2009, the agency announced a National Emphasis Program on Recordkeeping (RK NEP) to assess the accuracy of employer injury and illness data. As Acting Assistant Secretary for OSHA Jordan Barab noted in the announcement of that initiative:

> "Accurate and honest recordkeeping is vitally important to workers' health and safety. This information is not only used by OSHA to determine which workplaces to inspect, but it is an important tool employers and workers can use to identify health and safety problems in their workplaces."[21]

The RK NEP was conducted over a two year period, during which time OSHA conducted 350 targeted inspections to assess compliance with recordkeeping requirements. During the inspections, OSHA inspectors examined employer injury and illness records covering a two-year time period (CY 2007 and CY 2008). The NEP found that 47 percent of inspected establishments had injury or illness cases that were not recorded or cases that were under recorded (e.g. DART case classified as a non-DART case).[22] Overall, inspectors found that on average 3.74 cases per establishment were not recorded or had other recording errors. The meat and poultry processing sectors had the most extensive under recording with an average of 8.67 cases per inspected establishment. The evaluation on the NEP found that widespread underreporting was concentrated among certain establishments, which received citations and significant penalties for these violations, including $224,000 proposed penalties for the VPP Group, LLC (animal slaughtering) in Wisconsin for 123 cases of unreported or under reported injuries and $35,000 in proposed penalties for 80 cases of recordkeeping violations at Case Farms Processing (poultry processing) in North Carolina.

In addition to the Recordkeeping NEP, through its regular enforcement program OSHA has identified other employers in recent years with widespread recordkeeping violations showing that injury recordkeeping problems continue. In 2010, OSHA cited Lowe's Home Centers for major recordkeeping violations at its facilities in Cincinnati and

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[21] Occupational Safety and Health Administration. (October 1, 2009). U.S. Labor Department's OSHA begins National Emphasis Program on recordkeeping to determine accuracy of worker injury and illness data [Press release]. https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=16488

[22] ERG, (Prepared for the Office of Statistical Analysis, Occupational Safety and Health Administration), *Analysis of OSHA's National Emphasis Program on Injury and Illness Recordkeeping (RK NEP), Final Report,* November 1, 2013.

Dayton, Ohio and Rockford, Illinois proposing $110,000 and $182,000 in penalties for willful and repeated violations for failure to record injuries.[23,24]

In 2010, Goodman Manufacturing, an air conditioning manufacturer in Houston, in response to a complaint, was issued 83 willful violations and assessed $1.2 million in penalties for failing to record work-related injuries and illnesses. According to the OSHA press release, Goodman had not recorded or had failed to properly record 72 percent of the work-related injuries and illnesses that occurred.[25]

In 2011, OSHA cited another employer for widespread injury recordkeeping violations identified as a result of an inspection following a worker complaint. Superior Energy Services, an oil and gas service company based in Louisiana, and five of its subsidiaries were cited for 38 recordkeeping violations, many of them willful, for 187 instances of improperly or failing to record job injuries and assessed $337,500 in penalties.[26]

Thus underreporting of work-related injuries and illnesses and inaccurate and incomplete injury and illness data remain serious problems that OSHA must address.

OSHA's Recordkeeping Regulations Have Imposed on Ongoing Obligation on Employers to Make and Maintain Accurate Injury and Illness Records for Decades, and OSHA Has Enforced This Obligation Consistently in Order to Ensure the Accuracy and Completeness of Employer Injury and Illness Records and Data.

Since the first recordkeeping regulations were issued in 1972, OSHA has required that employers record all work-related injuries and illnesses on the OSHA log, develop a supplementary record for each recordable injury and illness, develop and post an

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[23] Occupational Safety and Health Administration. (April 28, 2010)). U.S. Labor Department's OSHA fines Lowe's Home Center $110,000 for continual recordkeeping violations at Cincinnati and Dayton stores [Press release]. https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=17595

[24] Occupational Safety and Health Administration. (Oct. 27, 2010). U.S. Labor Department's OSHA fines Lowe's Rockford Distribution Center $182,000 for willful and repeat recordkeeping violations [Press release]. https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=18630

[25] Occupational Safety and Health Administration. (Sept. 1, 2010). U.S. Labor Department's OSHA cites Houston manufacturing company for hiding work-related injuries and illnesses; fines exceed $1.2 million [Press release]. https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=18261

[26] Occupational Safety and Health Administration. (Feb. 9, 2011). U.S. Labor Department's OSHA cites oil and gas field service company and its subsidiaries in Louisiana with injury and illness recordkeeping violations. [Press release]. https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=18630 https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=19239

annual summary of all recordable injuries and illnesses and maintain the log, the supplementary record and summary for a period of five years. And since 1972, OSHA has always interpreted the employer's obligation to make and maintain accurate records to be an ongoing obligation from the date of the injury or illness, until the five year retention period had expired.

Indeed, in the major recordkeeping enforcement cases conducted by OSHA during the Reagan administration 1980's, the agency cited employers for their failure to record injuries and illnesses over a multi-year time period. For example, in the case of Union Carbide, the recordkeeping violations were for failure to record injuries over a several year period.[27] The 1986 citations at the Chrysler Corporation were for the failure to record injuries over a 16 month time period (January 1985 through April 1986), and the recordkeeping citations for IBP in1987 were for the failure to record injuries for the two year time period spanning January 1985 through December 1986.[28, 29]

Reviewing the companies' recordkeeping practices and failures over a period of time was critical to establish the extensive pattern of failing to record injuries and that the companies' behavior was willful and constituted and egregious violation. In all of these cases, and other cases, the strong enforcement action taken by the agency resulted not only in significant changes in the recordkeeping practices of the companies but also in major changes and improvements in the companies' safety and health programs and practices to address the underlying hazards that caused the injuries. In the vast majority of cases, these changes were achieved through settlement agreements that applied corporate wide, extending these improvements and protections to facilities and workers throughout the corporation. If OSHA had not been able to hold employers accountable for their recordkeeping violations over an extended period, it is unlikely that OSHA's enforcement actions would have had as significant an impact in changing employer practices and workplace conditions.

The egregious enforcement policy initiated in 1986, under which OSHA cited employers on a per instance basis for recordkeeping violations, remains in effect today. The current enforcement directive, issued in 1990, makes clear that it has been OSHA's long standing policy to cite employers for recordkeeping violations covering a multi-year period. The directive states that is OSHA's policy states that per instance recordkeeping

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[27] Associated Press. "OSHA Fines Carbide $1.3 Million: Violations Show 'Willful Disregard' for Safety – Brock." Los Angeles Times Article Collections. Los Angeles Times, April 1, 1986. http://articles.latimes.com/1986-04-01/news/mn-1467_1_osha-fines

[28] Occupational Safety and Health Administration. (Nov. 5, 1986). OSHA cites Chrysler Corporation for 182 alleged willful violations, proposes $910,000 in penalties [Press release].

[29] Shabecoff, Philip. "OSHA Seeks $2.59 million fine for meatpacker's injury reports." The New York Times Online. New York Times, July 22, 1987. http://www.nytimes.com/1987/07/22/us/osha-seeks-2.59-million-fine-for-meatpacker-s-injury-reports.html

violations may be issued for violations that occur during the current calendar year [of the inspection] and the previous two calendar years.[30]

It is worth noting that the major recordkeeping enforcement cases cited above, were for violations of OSHA's earlier recordkeeping regulation, which was updated and replaced by a new recordkeeping regulation in 2001. However, the 2001 recordkeeping regulation retained the same basic requirements of the prior regulation - maintaining a log of injuries and illnesses; recording each work-related injury and illness on the log; developing a supplementary record for each work-related injury and illness; preparing and posting an annual summary of the log; and maintaining the injury and illness records for a five year period.

In proposing the recordkeeping update, OSHA had proposed to reduce the records retention requirement to three years, but based on comments and record evidence, maintained the five year retention period in the final 2001 regulation. As OSHA noted in the preamble of the final rule, several organization's including the American Industrial Hygiene Association and NIOSH opposed reduces the record retention period, stating that the longer 5 year retention period would assist with efforts to evaluate injury experience and trends and to take preventing action. (66 FR 6049).

AIHA stated that "[A]IHA opposes OSHA's proposed change of OSHA recordkeeping record retention from five to three years. There is little work in record retention, and much information lost if they are discarded. We recommend maintaining the five year retention for OSHA Logs and supporting 301 forms."

NIOSH explained that the longer retention period "[a]llows the aggregation of data over time that is important for evaluating distributions of illnesses and injuries in small establishments with few employees in each department/job title. Also, the longer retention period is important for the observation of trends over time in the recognition of new problems and the evaluation of the effectiveness of intervention in large companies. In addition, the longer retention period makes possible the assessment of trends over time or to determine if a current cluster of cases is unusual for that industry. Reducing the retention period would thus have a detrimental effect on these types of analysis, which are frequently used by NIOSH in field studies."

In its implementation of the 2001 recordkeeping regulation, OSHA was clear that it would examine employer's recordkeeping practices over a several year period in its enforcement of the rule. The OSHA Recordkeeping Policies and Procedures Manual issued in January 2001 (CPL-2.0.31) specified that in conducting worksite inspections to

[30] OSHA Directive CPL 02-00-080 (CPL 2.80), October 21, 1990, Handling of Cases to be proposed for Violation-by-Violation Penalties.
https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=1657

evaluate compliance with the 2001 recordkeeping regulation, CSHO's were to review records injury and illness records for the prior three years and to cite employers if the employer failed to record injuries or illnesses that occurred during that period. Chapter 2, section II of the manual, *Inspection and Citation Procedures* contains the following instructions:

II. Inspection and Citation Procedures.

A. Review Records and Collect Data. All CSHOs on all inspections must review and record the establishment's injury and illness records for the three prior calendar years in accordance with the Deputy Assistant Secretary's Memorandum to Regional Administrators dated June 21, 1996 regarding FIRM Change: Mandatory Collection of OSHA 200 and Lost Workday Injury and Illness (LWDII) Data During Inspections. Following a records review, the CSHO may expand the inspection as described in Chapter II, paragraph A.1.b. of the FIRM (CPL 2.103).

At the end of this chapter are some tools to assist the compliance officer: Figure 2-1 has a Compliance Officer Checklist; Figure 2-2 has a blank Optional Violation Documentation Worksheet; Figure 2-3 has a completed sample Optional Violation Documentation Worksheet; and Figure 2-4 has the Health Care Practitioners' Abbreviations.

For all inspections, except for construction, as part of the CSHO's case preparation, the CSHO must obtain any OSHA Data Initiative (ODI) survey information available on the establishment from www.ergweb3.com:8087 (site will require user name and password). During the inspection the CSHO will compare this data with the OSHA 200 or OSHA 300 logs for the three prior calendar years at the establishment. Note: The first ODI for construction establishments will collect the 2001 injury and illness data in 2002; the data will be available in 2003.

B. Citations and Penalties for Violation of Part 1904 Requirements. The following incorporates paragraph G.2. of OSHA Instruction CPL 2.111, and supersedes and replaces Paragraph C.2.n.(2)(b), and Paragraphs C.2.n.(3), (4), and (5)(a) in Chapter IV of the FIRM (CPL 2.103).

1. OSHA 300 and OSHA 301 Forms. The employer must record cases on the OSHA 300 Log of Work-Related Injuries and Illnesses, and on the OSHA 301 Incident Report, (or equivalent form), as prescribed in Subpart C of §1904. Where no records are kept **and** there have been injuries or illnesses which meet the requirements for recordability, as determined

> by other records or by employee interviews, a citation for failure to keep records will normally be issued.[31]

The current OSHA Recordkeeping Policies and Procedure Manual issued in December, 2004, (CPL-02-00-135) maintained the same instructions to CSHO's to review three years of employer's injury and illness records.[32]

As the recordkeeping manual indicates the procedure to review three years of records and cite employers for recordkeeping violations that were identified for the three year period was not a new procedure or a new interpretation, but in fact a continuing of the policy that had been in place since at least 1996.

OSHA's 2009 Recordkeeping NEP also called for a review of injury and illness records covering a multi-year period. The 2009 NEP directive CPL 02-09-08, instructed CSHOs to review injury and illness records for the prior two calendar years (i.e. CY 2007 and 2008) to assess the accuracy and completeness of the employer injury and illness records, and to cite employers for identified violations for that period according to the procedures set forth in the OSHA Recordkeeping Policies and Procedures Manual.[33]

The Proposed Amendments to OSHA's Recordkeeping Rules Clarify that an Employer's Obligation to Make and Maintain Accurate and Complete Injury and Illness Records is Ongoing and are Important to Ensure that Accurate Records are Kept as Required by the OSH Act.

The AFL-CIO supports OSHA's proposed amendments to clarify employers' recordkeeping obligations under the recordkeeping regulations. The amendments simply make explicit what has been the understanding of OSHA, most employers, workers and the public since the first recordkeeping regulations were issued in 1972- that the obligation of employers to make and maintain accurate injury and illness records is an ongoing enforceable obligation for a five year time period after the incident occurs. The proposed amendments are directly responsive to the requirement of section 8(c)(2) that the Secretary "prescribe regulations requiring employers to maintain **accurate** records of, and make periodic reports on, work-related deaths, injuries and illnesses**…"** (emphasis added). These amendments will assist the Secretary in meeting its obligation to see that such records are made and maintained, and to "compile

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[31] OSHA Directive CPL-2.0.13, January 1, 2002, "Recordkeeping Policies and Procedures Manual (RKM). https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=2574

[32] OSHA Directive CPL-02.00-135, December 30, 2004, "Recordkeeping Policies and Procedures Manual. https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-135.pdf

[33] OSHA Directive CPL 02-09-08, Issued September 30, 2009, Injury and Illness Recordkeeping National Emphasis Program (RK NEP) at pp 9 and 15.

accurate statistics on work injuries and illnesses" as mandated under Section 24 of the Act.

As we have discussed in our comments above, and as OSHA, NIOSH and other parties have stated, employer injury and illness records form the basis for identifying hazard conditions and exposures at individual workplaces, targeting control efforts and assessing the effectiveness of control measures. These records also form the basis for the BLS injury and illness survey which produces national and state level data on work-related injuries and illnesses. For these and other purposes, it is important that the data be accurate and complete.

As OSHA explained in the preamble of the 2001 recordkeeping regulation, the overarching goal of the 2001 revised recordkeeping rules was to improve the quality of employer injury and illness data:

> "OSHA had several interrelated reasons for revising its recordkeeping rule. The overarching goal of this rulemaking has been to improve the quality of workplace injury and illness records. The records have several important purposes, and higher quality records will better serve those purposes. OSHA also believes that an improved recordkeeping system will raise employer awareness of workplace hazards and help employers and employees use and analyze these records more effectively. In revising its recordkeeping rule, the Agency also hopes to reduce underreporting and to remove obstacles to complete and accurate reporting by employers and employees." (66 FR 5198).

To achieve accurate and complete data, the OSHA recordkeeping regulations must impose an ongoing obligation on employers to make and maintain accurate records and OSHA must be able to enforce this obligation. The only way that OSHA can ensure that accurate records are being made and maintained by employers is to review employers' recordkeeping practices over an extended period as has been OSHA's practice for decades.

If an employer's obligation to make and maintain accurate and complete records expired six months after the occurrence of an injury or illness, it would be impossible for OSHA to effectively enforce against recordkeeping violations. OSHA's recordkeeping inspection procedures are extensive and the investigations typically take a number of months. By the time OSHA documented problems with recordkeeping, the six month time from the occurrence of most of the incidents documented would have lapsed. OSHA would be unable to enforce against most of the recordkeeping violations identified. Most importantly, it would make it impossible for OSHA to take enforcement

actions against employers with widespread recordkeeping abuses - the very employers whose recordkeeping practices need to change. Indeed, with such a six month limit in place, OSHA would not have been able to enforce against the widespread recordkeeping violations identified at Union Carbide, IBP and other employers in the 1980's and more recent widespread recordkeeping violations cited at Lowe's and Goodman Manufacturing that occurred over a several year time period.

And as has been well documented, OSHA has a very small inspection staff – fewer than 1,000 inspectors – and can inspect workplaces under its jurisdiction on average only once every 140 years.[34] When OSHA does inspect workplaces, it must be able to review all of the injury and illness records that are maintained by the employer for the past five years, and enforce against recordkeeping violations for incidents that occurred throughout that period.

As explained previously, these amendments do not impose any new obligations on employers, as some in the business community have claimed. For decades, OSHA has consistently interpreted its recordkeeping regulations to impose an ongoing obligation to make and maintain accurate injury and illness records, and has made that obligation clear in its compliance directives and enforcement actions. The amendments clarify, but do not change, these long standing requirements. Thus the regulations impose no new costs on employers and no new economic analysis of the proposed amendment is necessary.

The AFL-CIO urges OSHA to finalize these amendments as soon as possible so that the system of work-related injury and illnesses recordkeeping and data collection can be effectively implemented in a manner that ensures the completeness and accuracy of the information so that the purpose of the Act to prevent workplace injuries, illnesses and deaths can be achieved.

[34] AFL-CIO, *Death on the Job: the Toll of Neglect. A National and State-by-State profile of Worker Safety and health in the United States*. 24th Edition. April 2015.