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October 28, 2015

OSHA Docket Office
Room N-2625
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Docket No. OSHA-2015-0006: Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness

Dear Dr. David Michaels,

I am writing to you on behalf of North America's Building Trades Unions (NABTU), AFL-CIO, our fourteen affiliated international unions and the millions of workers they represent.

We welcome the opportunity to submit the enclosed comments to OSHA's proposed regulation Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness. In our view, this is a foundational requirement in OSHA's and the Department of Labor's efforts to make sure injury and illness recordkeeping is as accurate and complete as possible.

Thank you for the opportunity to submit these comments. If you have any questions, please do not hesitate to contact me.

Sincerely,

Pete Stafford

Pete Stafford
Director of Safety and Health

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**COMMENTS OF NORTH AMERICA'S BUILDING TRADES UNIONS ON OSHA'S PROPOSED CLARIFICATION OF EMPLOYERS' CONTINUING OBLIGATIONS TO MAKE AND MAINTAIN AN ACCURATE RECORD OF EACH RECORDABLE INJURY AND ILLNESS**

**Docket No. OSHA-2015-0006**

North America's Building Trades Unions ("NABTU") is submitting these comments on behalf of itself, its fourteen affiliated national and international building and construction trades unions, and the three million employees they represent. We appreciate this opportunity to express our support for the Occupational Safety and Health Administration's proposed amendments to its recordkeeping rules. These amendments will make clear what the Agency, the Occupational Safety and Health Review Commission and most of the affected public have long understood: that for five years after a work-related accident or illness occurs, the employer has an enforceable obligation to ensure that its records accurately list and describe the occurrence, and that this obligation includes not only the responsibility to update the reports an employer actually makes within the seven-day grace period OSHA grants for creating the record, but also the duty to create new reports for any incidents the employer did not previously record.

OSHA's recordkeeping requirements are designed to implement the Act's objective of ensuring safe and healthful workplaces by providing a basis for assessing hazards and taking action to eliminate risk. The information is integral to understanding and fixing problems in the workplace. In enacting the OSH Act, Congress understood the extent to which an effective national program to improve the state of occupational safety and health would rely on accurate data. According to the Senate Report on the Occupational Safety and Health Act of 1970,

> Full and accurate information is a fundamental precondition for 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. . . . Thus an essential first action under this bill should be the institution of adequate statistical programs.[1]

Congress directed OSHA to fulfill this objective by "prescrib[ing] regulations requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses . . . ." 29 U.S.C. § 657(c)(2). Congress also directed each employer to "make, keep and preserve and make available to the Secretary . . . such records as the Secretary, in cooperation with the Secretary of Health and Human Services, may prescribe . . . for developing information regarding the causes and prevention of occupational accidents and illnesses." *Id.* § 657(c)(1). And it directed the Secretary to consult with the Secretary of HHS and "develop and maintain an effective program of collection, compilation, and analysis for health and safety statistics," and to "compile accurate statistics on work injuries and illnesses . . . ." *Id.* § 673.

OSHA responded to Congress' directives by creating an integrated system of employer recordkeeping and reporting requirements, which forms the database on which employers, the Agency, NIOSH and public policymakers rely. As OSHA explained in the version of the regulations it promulgated in 1972, the rules

> provide for recordkeeping and reporting by employers . . . as necessary or appropriate for enforcement of the Act, for developing information regarding the causes and prevention of occupational accidents and illnesses, and for maintaining a program of collection, compilation, and analysis of occupational safety and health statistics.

29 C.F.R. § 1904.1 (1972). In addition to providing employers, workers and OSHA with information about the state of individual workplaces, these records form the underpinnings of the

[1] S. Rep. No. 91-1282 at 16, *reprinted in* S. Comm. on Labor and Public Welfare, LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 ["LEG. HIST."] at 156; *see also* H.R. Rep. No. 91-1291, at 30, *reprinted in* LEG.HIST. at 860.

data collected and compiled by the Bureau of Labor Statistics (BLS). BLS conducts an annual survey of employers based on the injury and illness records employers maintain under OSHA's recordkeeping rules, and use the statistics compiled through the survey to produce the BLS Annual Survey of Occupational Injuries and Illnesses (SOII), as well as a supplemental survey with more detailed data. BLS also conducts a separate Census of Fatal Occupational Injuries (CFOI) to gather information about the extent and nature of occupational fatalities.

From their first iteration, OSHA's recordkeeping regulations have required employers to create and maintain for five years (§ 1904.6 in the 1972 version) reports of individual incidents of work-related illnesses and injuries (§ 1904.4), logs and summaries of those incidents (§ 1904.2), and annual summaries of the logs, certified as "true and complete" (§ 1904.5). Although OSHA substantially revised its recordkeeping regulations and the accompanying forms in 2001 – primarily to make more explicit the criteria for recordability – the fundamental elements of its data collection system have remained substantially unchanged. Thus, the rules continue to require employers to document the condition of safety and health in their workplaces by recording each illness and injury that meets specified criteria, § 1904.7; preparing an incident report for each reportable illness or injury, *id.* § 1904.29(b)(2); documenting the illnesses and injuries on a log, *id.* § 1904.29(a)-(b)(1); annually verifying that the log entries are complete and accurate and posting an annual summary of their logs, *id.* § 1904.32(a)(1), (2); and retaining their incident reports, logs and annual summaries for five years, *id.* § 1904.33(a).

Two aspects of OSHA's 2001 revisions are noteworthy here. First, OSHA underscored the importance of ensuring the records accurately reflect the state of safety and health in each workplace. While the 1973 rules had required employers to certify that their annual reports were

"true and complete," the current regulations explicitly require employers to verify that the entries are "complete and accurate, and [to] correct any deficiencies." § 1904.32(a)(1).

The Agency also reaffirmed the importance of having records that accurately reflect workplace conditions over time. In the rulemaking leading up to its 2001 revisions, OSHA had proposed shortening the retention period from five to three years. A number of parties objected, including NIOSH, which argued that the five-year 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 employee 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.

66 Fed. Reg. 5916, 6049 (Jan. 19, 2001). Based on NIOSH's comments, and those of other parties opposing the proposed change, OSHA decided to retain the five-year retention period, "because the longer time period will enable employers, employees and researchers to obtain sufficient data to discover patterns and trends of illnesses and injuries and, in many cases, to demonstrate the statistical significance of such data." *Id.*

The information OSHA's regulations require employers to record and report thus does not simply form a roster of the incidents of work-related illnesses and injuries in individual workplaces. Instead, it provides the basic source material for employers, employees, the government and the public health community. "For individual employers and workers, accurate counting of injuries, illnesses and other safety and health indicators is essential to identify the root causes of workplace incidents and illnesses, to address unsafe workplace conditions, to ensure that workers get appropriate medical treatment and to establish an effective management

safety system."[2] As Tish Davis, a public representative from the Massachusetts Department of Public Health to the Advisory Committee on Construction Safety (ACCSH) explained when ACCSH reviewed OSHA's draft proposal, illness and injury records enable the parties at a workplace, as well as the government, to target effective prevention programs. ACCSH Transcript (Dec. 4, 2014) (Docket No. OSHA-2014-0007-0090) at 127. Employers, unions and employees can use reports of workplace incidents to identify hazards and to correct problems in the workplace immediately and eliminate risks over time. The longitudinal information is particularly important in the construction industry, where employees are constantly moving from one worksite and safety culture to another. The records enable workers and unions to evaluate and compare the effectiveness of different employers' practices and procedures. They also form a crucial body of information on which construction employers can draw in fulfilling their obligations under Subpart C to develop safety and health programs for their worksites.

Accurate records are also fundamental to OSHA's ability to establish its regulatory and enforcement priorities, and to evaluate the effectiveness of its programs. On a national or regional basis, OSHA uses the records to focus its limited enforcement and consultative resources on the most hazardous worksites and workplace conditions. "Inspectors also use the data during inspections to help direct their efforts to the hazards that are hurting workers," (Recordkeeping Policies and Procedures Manual, CPL 02-00-135, Chapter 5.II), by focusing on the areas of the worksite that may be the most hazardous and, as Tennessee State OSHA representative Steve Hawkins explained to ACCSH, to look for trends (ACCSH Tr. at 126). Problems that persist over time may form the basis for general duty clause citations. And the

[2] The Committee on Education and Labor, U.S. House of Representatives, Majority Staff Report, *Hidden Tragedy: Underreporting of Workplace Illness and Injuries*, p. 4 (2008) ("*Hidden Tragedy*"), available at http://www.bls.gov/iif/laborcommreport061908.pdf (accessed October 20, 2015).

gravity of a violation may be influenced by records that reveal repeated, unaddressed problems on the one hand, or quick responses to reported incidents on the other.

Researchers also rely on these illness and incident reports to understand the state of workplace safety and health, identify emerging trends, and target effective prevention programs. To cite only a few examples, researchers at CPWR – The Center for Construction Research and Training, have recently published three reports about the state of occupational safety and health in the construction industry, based on BLS data.[3]

These employer self-reports thus provide the main source of the information Congress understood as the "fundamental precondition for meaningful administration of an occupational safety and health program." LEG. HIST. at 156. It is well-recognized, however, that the quality of this information is questionable, due in large part to underreporting, particularly in the construction industry. For example, the fact that statistics show a significant drop in non-fatal workplace injuries at the same time the number of cases of workers with restricted work activity has increased and the fatality rate has remained stubbornly high strongly suggests that the numbers do not come close to accurately representing the actual incidence of illnesses and injuries in our industry.[4]

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[3] Dong, X., Wang, X., Largay, J. (2015), Occupational and Non-Occupational Factors Associated with Work-Related Injuries Among Construction Workers in the USA, Int'l J. Occup. and Environ. Health, 21:142-150; Dong, X., Wang, X., Largay, J., Sokas, R. (2015), Long-Term Health Outcomes of Work-Related Injuries Among Construction Workers—Findings From the National Longitudinal Survey of Youth, Am.J. Indus.Medicine, 58:308–318; Wang, X., Largay, J., Dong, X. (2015), Fatal and nonfatal injuries among construction trades between 2003 and 2014, CPWR Quarterly Data Report, *available at* http://www.cpwr.com/publications/third-quarter-fatal-and-nonfatal-injuries-among-construction-trades-between-2003-and (accessed October 27, 2015).

[4] Welch, L.S., Dong, X., Carre, F., Ringen, K. (2007), Is the Apparent Decrease in Injury and Illness Rates in Construction the Result of Changes in Reporting?, Int'l J. Occup.Environ.Health, 13:39-45.

In its 2008 report detailing the reasons illnesses and injuries are underreported, the House Committee on Education and Labor listed both the incentives for employers to underreport – which include decreasing the likelihood of an OSHA inspection, decreasing workers compensation expenses, enhancing one's reputation, and increasing business opportunities – and the barriers employers erect to discourage employee reporting.[5] We similarly discussed the significant economic incentives for construction employers to underreport, as well as the pressures their employees feel not to report their illnesses and injuries, in our comments in response to OSHA's Supplemental Notice of Proposed Rulemaking on its Proposed Rule to Improve Tracking of Workplace Injuries and Illnesses, Docket No. OSHA-2013-0023-1647 at 3-6. Compounded with the fact that a large segment of our industry is exempted from the recordkeeping rules because they employ ten or fewer workers, it is imperative that OSHA obtain as much accurate information from construction employers as it can.

OSHA is addressing some of these issues through parallel initiatives to modify its recordkeeping requirements. We regard OSHA's current effort to ensure that employers understand that their obligation to document each and every recordable event does not expire after a mere six months as another element in the agency's effort to strengthen the quality of its data. As the Review Commission noted in *Johnson Controls*, "inaccuracies must be minimized so as not to compromise the important goals the records serve." 15 OSHA 2132, 2134 (Rev. Comm'n 1993). In light of all of the impediments to collecting accurate information, it is important that OSHA make abundantly clear that all incidents that are reported to or detected by employers must actually be captured on the incident reports and logs. And it is important that, as a counterbalance to the incentives to underreporting, OSHA have the ability effectively to

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[5] *Hidden Tragedy,* at 11-24.

enforce its recordkeeping requirements. Given how infrequently most employers are inspected, employers will have little incentive to be vigilant in their recordkeeping if they are only held accountable for six months.

The opponents of this effort appear to have the view that for each recordable illness or injury, OSHA's regulations establish a single, limited seven-day window for reporting, and that the statute of limitations for a failure to report therefore beings to run when the window closes. In our view, OSHA has instead consistently made clear that its rules impose an on-going obligation to ensure accurate records are created and maintained for a five-year period – and that just as "maintaining" a car includes actively ensuring it remains in working order, "maintaining" a record is an active process that includes correcting it when necessary.

OSHA has long enforced the regulations in this way, with the Occupational Safety and Health Review Commission's endorsement. As the Review Commission explained in upholding this reading of the regulations in *Johnson Controls, Inc.*,

> Just as a condition that does not comply with a standard issued under the Act violates the Act until it is abated, an inaccurate entry on an OSHA form 200 [now, form 300] continues until it is corrected or until the 5-year retention period . . . expires. Thus, a failure to record an occupational injury or illness as required by the Secretary's recordkeeping regulations . . . does not differ in substance from any other condition that must be abated pursuant to the occupational safety and health standards in 29 C.F.R. Part 1910 and promulgated pursuant to section 6 of the Act . . . .

15 OSHC at 2135-36; *see also General Dynamics Corp.,* 15 OSHC 2122, 2128 (Rev. Comm'n 1993) (same). In fact, as long ago as 1978, in a case involving an analogous recordkeeping requirement, the Commission endorsed the Secretary's view that employers' obligations to make and maintain accurate records continue beyond a specified reporting period. In *Yelvington Welding Service,* 6 OSHC 2013 (Rev. Comm'n 1978), the Commission rejected the employer's argument that if it failed to report a fatality within the 48-hour period designated in the standard,

its reporting obligation ceased. While "[t]he reason for the 48-hour reporting requirement is to provide the Secretary with prompt notification of serious accidents so that he can take timely action to avoid further injuries[, . . .] the Secretary's need for reports does not cease after 48 hours." Instead, the reports "reveal particularly hazardous working conditions that may otherwise continue unchecked." The Commission therefore refused to read the regulation as imposing an obligation that was extinguished if the employer failed to act with the 48-hour window. *Id.* at 2014-15.[6]

The regulations have consistently supported this reading. In their current form, they require employers to verify that the records are complete and accurate, and *to correct any deficiencies.* § 1904.32(a)(2). Moreover, the rules explicitly require employers to update their logs "to include newly discovered recordable injuries and illnesses" and, "[i]f the description or outcome of a case changes, . . . [to] enter the new information." § 1904.33(b)(1). Ensuring the records are complete and accurate obviously requires employers to include not only "newly discovered" recordable events, but also events they previously discovered but have not yet recorded.

During ACCSH's consideration of the proposed clarification, industry representatives complained that the revised regulations would impose new obligations that they reassess incidents of illnesses and injuries on a daily basis. To illustrate this point, National Association of Home Builders representative Don Pratt calculated the time involved in complying with the

[6] Since at least 1996, OSHA has also directed its inspectors to evaluate compliance with the Agency's recordkeeping rules by reviewing an establishment's injury and illness records for three prior years. *See* Policies and Procedures Manual, CPL-02-00-135, Ch.2, Sec. II.A. (2004) (directing CSHOs conducting inspections to "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").

proposed revisions by multiplying OSHA's estimate of the time to evaluate and record an incident by 1,818 days, the number of days in the five-year retention period. (ACCSH Tr. 118-120). This argument misconstrues the meaning of these regulations, both as currently written and with the proposed clarifications. OSHA has always required employers to maintain accurate records – to fix incorrect entries and to add mistakenly omitted entries. This includes the continuing duty to record cases an employer previously learned about and failed to record. 66 Fed. Reg. at 45127. There is nothing new here, and nothing that demands daily reassessments.

Because the proposed revisions do not impose any new obligations, there is no reason for OSHA to assess the economic impact of this proposal. The Agency certainly should not have to account for the costs any non-complying employers would incur in bringing themselves into compliance with their longstanding obligations. Instead, as OSHA has done in other rulemaking proceedings, the Agency should assume compliance with the existing rule in analyzing whether there are any incremental costs in complying with the revised language, rather than using non-compliance as its baseline. Here, OSHA is imposing no new obligations, so there are no incremental costs.

For all of these reasons, we fully endorse OSHA's initiative to remove any ambiguity about employer's ongoing obligation to ensure their records are complete and accurate. To that end, we have one suggestion for further clarifying the nature of employers' continuing obligations, which may remove any lingering question whether the recording obligation extends beyond the first seven days. OSHA has both characterized and treated the seven-day period as a grace period. We therefore suggest that the regulations clearly state that although employers are expected to report as soon as possible, and remain obligated to report for the full five-year

retention period, OSHA will not cite any employer for failing to report within the first seven days. For example, § 1904.29(b)(3) could be amended to read:

> *How quickly must each injury or illness be recorded?* You must enter each and every recordable injury or illness on the OSHA 300 Log and on a 301 Incident Report as soon as possible. However, OSHA will not cite any employer for failing to make entries on these reports during the first seven (7) calendar days of receiving information that the recordable injury or illness occurred. The obligation to make a record of the injury and illness and to maintain accurate records of all recordable injuries and illnesses in accordance with the requirements of this part continues through the entire record retention period described in § 1904.32(a)(1).

*Compare* proposed § 1904.29(b)(3), 66 Fed. Reg. at 45131. We understand that this revision should be unnecessary, since it states nothing different from OSHA's longstanding interpretation of its rules. It would, however, eliminate any possible confusion that may be created by referring to the seven-day reporting period as a "deadline." *See id.* ("[A] failure to meet this *deadline* does not extinguish your continuing obligation . . .") (emphasis added).

NABTU supports OSHA's effort to clarify these rules, and urges the Agency to complete this rulemaking as soon as possible.