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Comments on Small Business Teleconferences Regarding Occupational Injury and Illness Recordkeeping Requirements, Notice of Proposed Rulemaking, 29 CFR Part 1904, May 17, 2011, Docket No. OSHA-2009-0044

Public Citizen is a non-profit research, lobbying, and litigation public interest organization with over 225,000 members and supporters. Based in Washington, D.C. and founded in 1971, Public Citizen accepts no government or corporate funds.

On May 30, 2010, Public Citizen submitted comments strongly supporting the Occupational Safety and Health Administration's (OSHA) proposal to add a separate column for recording work-related musculoskeletal disorders MSDs on Form 300 and Form 300A. In those comments, we also expressed our support for the proposal to remove language from OSHA Form 300, which states that cases of "minor musculoskeletal discomfort" are not reportable.

On April 11 and 12, 2011, OSHA held teleconferences with sixteen small business representatives. The purpose of the calls was to learn about participants' current experiences recording MSDs and how they believe the proposed recordkeeping changes would impact their businesses.

Public Citizen continues to support the addition of a column for MSDs and the deletion of the "minor musculoskeletal disorders" exception on OSHA recordkeeping forms. The comments gathered from the teleconferences support our view that the new requirements represent a minor, straightforward change in the recordkeeping process, which would provide valuable information to employers, workers, government, and epidemiologists without burdening small businesses.

Introduction

MSDs appear to be the most prevalent category of workplace injury in the United States. The Bureau of Labor Statistics (BLS) found that in 2009, MSDs accounted for 28% of all occupational illness and injury cases resulting in missed days of work. The incidence rate for MSD cases exceeded that of any other BLS-defined illness or injury category, with nearly 350,000 cases identified in 2009.¹ MSDs reduce quality of life for employees and, because they result in missed workdays and lowered worker productivity, they also impose real costs on businesses.

¹ Bureau of Labor Statistics. *Nonfatal Occupational Injuries and Illnesses Requiring Days Away from Work, 2009* (2010).

Current data collection methods for work-related MSD cases are insufficient. While the BLS gathers data on MSD cases resulting in missed work days, there are no surveillance systems in place to monitor other MSD cases. Current OSHA recordkeeping regulations require employers to categorize MSDs in the column labeled “All other illnesses” on OSHA Forms 300 and 300A. As a result, neither OSHA nor employers can disaggregate cases of MSDs from the variety of other conditions that must be recorded in the same column. Adding a column specifically for MSDs would provide an important source of data to OSHA, businesses, and employees that could be used to guide MSD reduction initiatives and allow for a better analysis of hazards in the work environment.

Public Citizen continues to support OSHA’s proposed changes to recordkeeping requirements. The small business teleconferences underscore the need for OSHA to implement these changes. Many participants agreed that the addition of the MSD column would constitute a very minor change to their recordkeeping practices and would not create burdens. A number of participants recognized the benefits that the proposed column would have to their workplace health and safety improvement efforts. Participants’ objections to the addition of the MSD column or the removal of the “minor skeletal disorders” language failed to adequately demonstrate that the proposed changes would adversely affect small businesses.

I. The proposed MSD column is likely to yield substantive benefits for small businesses and their employees.

The teleconferences show that a number of small businesses already use OSHA’s recordkeeping forms as a tool to evaluate health and safety in their workplaces as well as guide their workplace policies, hazard communication practices, and employee training. One participant said that he uses OSHA recordkeeping documents to inform his company’s tool box talks, an important hazard communication exercise involving on-site worker health and safety training. This participant expressed that having access to MSD information on the OSHA forms would allow him to develop MSD-related tool box talks. Another participant stated that his business reduced lifting limits at his workplace in response to an incident in which an employee developed a back injury. This employer’s action shows that small businesses are already attuned to MSDs occurring among their employees. Data collected from OSHA logs containing the proposed MSD column would provide small businesses with an additional tool to better address these health conditions in their workplaces.

Most participants acknowledged the importance of collecting MSD data on a larger scale, which they believed would improve OSHA’s work and result in industry-wide health and safety improvements. Some were eager to contribute data in order to facilitate these improvements. As one small business participant stated, “...I would not have a concern with this new rule and believe it would provide helpful data to identify the magnitude of the problem.”

II. Many of the participants' concerns related to OSHA's longstanding requirement to report MSDs, not the addition of the MSD checkbox.

Work-related MSDs have always been reportable under OSHA's recordkeeping regulations if they result in medical treatment beyond first aid, work restriction, job transfer, or missed days of work. Requirements for reporting MSDs are the same as those for any other injury or illness.² The proposed regulation would not create additional requirements for reporting MSDs.³ Many of the concerns that participants raised in the teleconferences related to issues of MSD reportability, including the challenges of determining a condition's work-relatedness, the subjectivity of MSD symptoms, and potential liability created by reporting MSDs. Many of these concerns are unfounded and none directly relates to the proposed addition of the MSD column. OSHA should not take these concerns into account when considering the proposed recordkeeping regulation.

A number of participants expressed concerns over the challenges of determining an MSD's work-relatedness. While participants used their existing relationships with medical professionals to determine the work-relatedness of MSDs, some questioned providers' ability to make this determination. But employers are already required to make determinations regarding the work-relatedness of their workers' injuries and illnesses. The proposed regulation would not change an employer's responsibility to make this determination. The issue of discerning a condition's work-relatedness is separate from the proposal to categorize MSDs under a different column. Additionally, determining the work-relatedness of an MSD case is not difficult for employers. If a worker who regularly lifts heavy boxes on the job develops debilitating low back pain, the employer can clearly discern that the condition is work-related. It is unnecessary for employers to prove that work-related activities were the sole cause of an MSD; they must only establish that occupation factors likely contributed to the MSD.⁴

Some participants were concerned that reporting MSDs would create undue liability for their businesses. Again, these unfounded concerns are related to the reportability of MSDs in general rather than the proposed MSD column addition. One concern related to the subjectivity of MSD symptoms and the employer's belief that a worker can fraudulently claim a case of MSD in order to receive workers' compensation benefits. Another fear was that recording MSDs would leave the employer vulnerable to government sanctions. These concerns are unjustified. Recording a case on OSHA's recordkeeping forms does not establish employer liability for a workers' compensation claim, nor does it constitute a violation of OSHA regulations. OSHA's guidance on

² Occupational Safety and Health Administration, *Recordkeeping Policies and Procedures Manual*. Directive Number: CPL 02-00-135, (2004).

³ 29 CFR Part 1904.12(b)(2)

⁴ See Occupational Safety and Health Administration, "Administrative law judge upholds OSHA citation issued to Peoria, Ill.-based Caterpillar Logistics Services: Affirms musculoskeletal disorder should be recorded on OSHA 300 Injury and Illness Log". Region 5 News Release: 11-768-CHI, (2011). In a recent case regarding MSD recordability, an administrative judge concluded that "an employee's work activities do not have to be *the* cause, but rather *a* cause of injury or illness" (emphasis added).

penalties for recordkeeping violations emphasizes the agency's desire to collect accurate information, not to unduly burden or punish employers.⁵

Some participants worried that the proposed MSD column would increase their illness and injury reporting. They feared that an increased number of reported MSD cases would compromise their ability to win contracts if their OSHA logs were reviewed. If employers have been following OSHA recordkeeping requirements correctly, there is no reason that the addition of an MSD column would cause illness and injury reporting to increase. Work-related MSD cases are already reportable. While the proposed column would change the categorization for MSD cases, it should not result in an increased number of cases reported. The proposal may even decrease the number of reported cases for workplaces that use the updated OSHA logs to inform MSD reduction initiatives.

It is possible that the inclusion of the proposed column would increase reporting of MSDs by making businesses aware that the conditions are indeed reportable. If the inclusion of the column increases awareness about the reportability of MSDs, it may cause employers to better adhere to recordkeeping requirements and reduce underreporting of MSDs. OSHA should see this as a potential benefit. A 2009 report by the Government Accountability Office (GAO), citing several academic studies, found underreporting of illness and injuries on OSHA Form 300 to be widespread.⁶ In response to the report, OSHA initiated a National Emphasis Program, which audits certain workplaces to ensure recordkeeping compliance.⁷ The proposed MSD column could complement the National Emphasis Program's goal of improving workplace recordkeeping. If improved recordkeeping indeed results from the addition of the new column, there is no reason to believe that small businesses would experience a disproportionate increase in reported MSD cases vis-à-vis larger firms.

III. The MSD column would not burden small businesses.

OSHA has previously determined that the proposed checkbox would not have a significant impact on small entities. This conclusion relied on OSHA's regulatory flexibility analysis conducted for the 2001 overhaul of its injury and illness reporting logs.⁸ The impact to small businesses is further diminished by the fact that 82% of small businesses are exempt from OSHA illness and injury reporting requirements. Businesses with less than 10 employees and or those involved in many retail, financial, and service industries are not required to maintain illness and injury records.⁹ The proposed change

⁵ See Occupational Safety and Health Administration, Citation Policy for Paperwork and Written Program Requirement Violations. CPL 02-00-111. (1995). "Where citations are issued, penalties shall be proposed only in the following cases: (1) Where OSHA can document that the employer was previously informed of the requirements to keep records; or, (2) Where the employer's deliberate decision to deviate from the recordkeeping requirements, or the employer's plain indifference to the requirements, can be documented."

⁶ Government Accountability Office. *Enhancing OSHA's Records Audit Process Could Improve the Accuracy of Worker Injury and Illness Data*. Publication Number: GAO-10-10, (2009).

⁷ Occupational Safety and Health Administration, *Injury and Illness Recordkeeping National Emphasis Program (RK NEP)*. Directive Number: 09-08 (CPL 02), (2009).

⁸ 75 Fed. Reg. 4,736 & 66 Fed. Reg. 6,108.

⁹ 66 Fed. Reg. 6,089.

would have an even smaller impact on small businesses than the 2001 rule because it proposes just one change to a form in current use, whereas the 2001 rule required employers to begin using three entirely new recordkeeping forms.

Comments raised in the small business teleconferences support OSHA's determination that the impact of the new recordkeeping regulations on small businesses would be minimal. A number of participants acknowledged that the proposed MSD column was a minor, straightforward change that would not significantly alter the recordkeeping process. One referred to the change as "just checking a box." OSHA estimated that the new checkbox would involve minimal time and costs for small businesses. The agency projected that the new rule would require an extra 11 minutes per business in the first year and one minute in subsequent years. It estimated the proposal would cost small businesses \$7.27 in the first year and \$0.60 in subsequent years. A number of participants with experience reporting MSDs agreed with these time and cost estimates.

A number of the concerns that participants raised during the conversations were too vague to inform OSHA's analysis of the proposal. One participant stated, "It's not just about checking a box," but failed to articulate the difficulties that he imagined would arise. Another believed that checking one more box would expose businesses to "more problems," but did not explain what these problems were. One participant believed the time and costs requirements to be higher than OSHA's projections, but he had no experience reporting MSD cases and was unable to offer alternative projections. OSHA should disregard such concerns because they are insufficiently specific to guide policy.

A few participants were concerned that defining and classifying MSDs would be challenging for their businesses. These concerns are not justified. Classifying a case of illness or injury as an MSD is a simple, straightforward process. It does not require specialized medical knowledge, only common sense. MSD classification does not involve any more difficulty than the existing categorization process, which involves placing a case of illness or injury into one of the six categories on the current version of OSHA Form 300.

Some participants believed that it would be difficult for their human resources personnel to learn the variety of unrelated illness and injuries that fall under the MSD category. This concern is unfounded because employers and their human resources staff are not required to learn particular diagnoses within any of the injury columns on OSHA Form 300. The "respiratory conditions" column on the current version of the form, like the proposed MSD column, also comprises a large variety of unrelated illnesses such as asbestosis, occupational asthma, and pneumoconiosis. An employer or human resources staff member does not have to become familiar with particular clinical diagnoses to recognize a case of illness that is classifiable as a respiratory condition. He or she simply must recognize that an employee's symptoms are "associated with breathing hazardous biological agents, chemicals, dust, gases, vapors, or fumes at work."¹⁰ Similarly, employers or their designated personnel would not require knowledge of particular MSD

¹⁰ OSHA Form 300.

diagnoses for the proposed MSD column. They would simply need to determine that an employee's symptoms involved "disorders of muscles, nerves, tendons, ligaments, joints cartilage and spinal discs, except those caused by slips, trips, falls, motor vehicle accidents, or other similar accidents." This definition is straightforward and allows for rapid, simple classification of MSD cases.

Some participants were worried that they would have to conduct a thorough investigation to determine that an illness or injury constituted a MSD. This concern is also unfounded. It is highly unlikely that confusion would arise when categorizing an illness or injury on Form 300. Distinctions between MSDs, respiratory conditions, poisoning, and hearing loss are unambiguous, even to those without specialized knowledge. While there are possible similarities between cases of injury and MSDs, OSHA's proposed definition for MSDs clearly differentiates the two categories because it explicitly excludes cases resulting from slips, trips, falls, and accidents. Finally, distinctions between the MSD category and the "All other illnesses" column are also unambiguous. The directions for Form 300 provide thermal stress, radiation sickness, and infectious disease as examples for the "All other illnesses" column. These types of conditions are clearly distinct from MSDs. It is hard to imagine a case of illness or injury that would prove too ambiguous to easily categorize.

IV. The teleconferences support OSHA's proposal to delete the exception that "minor musculoskeletal discomfort" is not recordable as a restricted work case.

OSHA proposes to change its Recordkeeping Compliance Directive by deleting the exception that "minor musculoskeletal discomfort" is not recordable as a restricted work case.¹¹ This exception was inserted as a result of a settlement agreement OSHA entered with the National Association of Manufacturers (NAM) in 2001.¹² Public Citizen continues to support the proposed change as an objective and appropriate reporting standard. The teleconferences show that eliminating the language would simplify the recordkeeping process and therefore benefit small businesses with limited resources. Additionally, the comments suggest that the change may help address the systematic underreporting of occupational illness and injury cases.

Small business representatives found the current exemption regarding "minor musculoskeletal discomfort" to be confusing. Most participants wanted a more specific definition of what constitutes minor musculoskeletal discomfort. The entire concept of "minor musculoskeletal discomfort" however is excessively vague and open to a high degree of subjectivity. As there is no clinical definition for a minor MSD, it is unclear how OSHA would establish an objective and straightforward definition. Removing the statement altogether is the best way to increase the clarity and consistency of reporting.

Removing the current "minor musculoskeletal discomfort" exception would likely increase compliance with OSHA recordkeeping requirements for work-related injuries

¹¹ 75 Fed. Reg. 4,735.

¹² 66 Fed. Reg. 66,493. (Dec. 27, 2001).

and illnesses. Again, underreporting on OSHA Form 300 is pervasive.¹³ The subjectivity involved in distinguishing between an MSD and a case of “minor musculoskeletal discomfort” likely contributes to underreporting. The GAO study of worker injury and illness data quality found that a variety of forces create pressure for employers to underreport cases.¹⁴ Among the occupational health care practitioners that GAO surveyed, a plurality (41%) believed that misinterpretations of OSHA’s recordkeeping requirements undermined the accuracy of illness and injury data.¹⁵ Removing the “minor musculoskeletal discomfort” exception would likely improve adherence to requirements, thus complimenting OSHA’s efforts to improve recordkeeping through its National Emphasis Program.¹⁶

Conclusion

Public Citizen continues to support OSHA’s effort to improve reporting of work-related MSDs through the inclusion of a separate MSD column on the OSHA 300 Log. The data collected through this recordkeeping checkbox will help the agency to allocate resources to indentify patterns of injury and illness, conduct research, schedule inspections, and plan any future rulemaking efforts. The implementation of this proposal is long overdue.

The comments raised during the small business teleconferences show that the proposal represents a minor change to recordkeeping practices that would provide businesses with tangible benefits and pose minimal time and cost requirements. As OSHA has previously determined, the impact to small businesses would be minimal. There were no specific objections to the proposed changes on the part of small business representatives that should be of concern to the agency.

¹³ *Supra* note 6.

¹⁴ *Id.*

¹⁵ *Id.* at 51.

¹⁶ *Supra* note 7.