SUMMARY OF COMMENTS SUBMITTED BY EMPLOYER REPRESENTATIVES ON OSHA MSD RECORDKEEPING PROPOSAL

On March 30, 19 associations including the U.S. Chamber, submitted extensive comments to OSHA raising a wide array of concerns with the proposed regulation requiring employers to record musculoskeletal disorders (MSDs) in a separate column on the OSHA 300 Log. The following summarizes these concerns.

Chief among these concerns is that there is no workable definition for MSDs that will allow employers to identify and record them, as they would with other injuries. Typically, the only indication for an MSD is a subjective symptom that the employer will not be able to verify. Because of this definitional problem, OSHA’s proposal will result in employers recording injuries that will be inconsistent with OSHA’s statutory authority which allows the agency to require employers to record only significant injuries related to the workplace.

OSHA’s proposal is also problematic because it would remove an exemption currently in place that allows employers to not record “minor musculoskeletal discomforts” even if they put the employee in some form of restricted duty to keep the condition from worsening, or for the employee’s comfort (such moves would ordinarily trigger a recording requirement). In the Federal Register notice, OSHA announces that they plan to remove this distinction which will result in a great expansion of the cases employers will have to consider and record—literally any level of musculoskeletal discomfort would now trigger the recording requirement if there is an appropriate relationship to the workplace—but they do not include it in the regulatory changes, or request comments on this change. While OSHA tries to characterize this proposal as a simple recordkeeping change, where employers would just be checking a box for injuries that they are already recording, the elimination of this exemption means that this proposal represents a tremendous expansion of the number of these cases employers will have to consider and record.

The comments also point out how OSHA has grossly underestimated the costs of this proposal, particularly on small businesses, and accordingly should have conducted a small business review panel to learn more about how small businesses would deal with this regulation.

For these, and several other reasons, the comments call for OSHA to withdraw this proposed regulation.

I. EXECUTIVE SUMMARY

Sections 8 and 24 of the OSH Act direct OSHA to adopt reasonably clear injury and illness recordkeeping rules that will result in the creation of accurate records of significant work-related injuries and illnesses, which are demonstrated to be necessary to assist OSHA, employers and employees in furthering the objectives of the OSH Act with a minimum burden upon employers. The stated purpose of the Proposed Rule is to add a separate column on the OSHA Form 300 Log for conditions referred to as musculoskeletal disorders (“MSDs”), and a new Section 1904.12 that would define the term “MSD” and provide further guidance in using the
MSD column. The term “MSD” is a broadly and vaguely defined “term of art” used to describe a generally unrelated collection of conditions, many of which are based entirely on subjective symptoms that are not subject to objective verification. Despite many years of study and research, the scientific community remains unable to reliably define, diagnose or determine the cause of MSDs, or identify appropriate remedial measures with any degree of precision. This absence of medical and scientific consensus on such fundamental issues as how to define an MSD, or how best to respond, means that OSHA’s rulemaking to require employers to record MSDs is beyond what the statutory authority permits.

In proposing to broadly define the term “MSD” to include any disorder of any tissue in the musculoskeletal system, which might be evidenced by any subjective symptoms appearing at work, OSHA would gloss over both these fundamental scientific shortcomings and the applicable legal requirements of the OSH Act to impose an insurmountable, counterproductive and unauthorized recordkeeping burden on employers. Contrary to the provisions and objectives of Sections 8 and 24 of the OSH Act, the Proposed Rule would require the burdensome collection of inaccurate and misleading data, including a multitude of insignificant conditions, and a multitude of conditions unrelated to work, that would undermine the current recordkeeping system, produce meaningless and misleading statistical “analyses,” and trigger a misallocation of resources by OSHA and employers -- all of which would retard rather than advance workplace safety and health.

The Proposed Rule would also make two other material changes to the OSHA Recordkeeping Rule, although the OSHA did not highlight these changes and only careful reading of the Federal Register notice reveals them. First, the Proposed Rule would change the currently applicable criteria for recording cases involving a restricted duty or transfer by revoking the exemption for “preventive restrictions” established under the Settlement Agreement between the National Association of Manufacturers and OSHA that resolved the NAM’s legal challenge to the Revised Recordkeeping Rule issued on January 19, 2001. If implemented, that change would cause employers to record insignificant conditions and discourage employers from taking proactive preventive measures by penalizing them for taking those measures. It would also subject the real world managers of businesses, focused on efficiently running their operations, to the enormous and distracting burden of determining, on an ongoing basis, when any subjective deviation from a worker’s normal sense of wellness might potentially rise to the level of an abnormal condition that would constitute an “injury or illness,” and trying to ensure they discover that condition before the worker begins to work.

Second, having previously determined, after an extensive analysis of the issue, that all MSDs are injuries, the Proposed Rule would, without any analysis or discussion of the issue, arbitrarily reclassify all MSDs as illnesses. The distinction between illnesses generally covered by OSHA health standards and injuries generally covered by OSHA safety standards has potentially enormous consequences. No rationale is offered for this apparent about-face in OSHA’s characterization of these conditions. It is unclear whether OSHA even considered this issue and recognizes this change, or whether it was simply trying to ensure that BLS would collect certain data. Given the lack of any discussion of this issue, and the short comment period provided, this rulemaking is not the appropriate forum to address this issue.
For the foregoing reasons, which are explained in greater detail below, we believe it would be inappropriate for OSHA to proceed with the proposed rule and that it should be withdrawn.

II. INTRODUCTION

The Revised Recordkeeping Rule, issued on January 19, 2001, contained a Section 1904.12, scheduled to take effect on January 1, 2002, which would have defined the term MSD, required employers to identify all recordable occurrences of MSDs by entering a check in a special MSD column, and provided further guidance regarding the use of the MSD column.

Several intervening events led OSHA to delay and then revoke that rule. In March 2001, Congress took the unprecedented step of rescinding OSHA’s newly promulgated Ergonomics Program Standard, based, at least in part, on the failure of the standard to take into account the scientific controversies and uncertainties underlying MSDs, including their means of diagnosis,

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2 Section 1904.12 of the Final Rule read as follows:

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

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

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

(2) How do I decide which musculoskeletal disorders to record? There are no special criteria for determining which musculoskeletal disorders to record. An MSD case is recorded using the same process you would use for any other injury or illness. If a musculoskeletal disorder is work-related, and is a new case, and meets one or more of the general recording criteria, you must record the musculoskeletal disorder. The following table will guide you to the appropriate section of the rule for guidance on recording MSD cases.

(i) Determining if the MSD is work-related. See § 1904.5.
(ii) Determining if the MSD is a new case. See § 1904.6.
(iii) Determining if the MSD meets one or more of the general recording criteria:
   (A) Days away from work, see § 1904.7(b)(3).
   (B) Restricted work or transfer to another job, or see § 1904.7(b)(4).
   (C) Medical treatment beyond first aid. See § 1904.7(b)(5).

(3) If a work-related MSD case involves only subjective symptoms like pain or tingling, do I have to record it as a musculoskeletal disorder? The symptoms of an MSD are treated the same as symptoms for any other injury or illness. If an employee has pain, tingling, burning, numbness or any other subjective symptom of an MSD, and the symptoms are work-related, and the case is a new case that meets the recording criteria, you must record the case on the OSHA 300 Log as a musculoskeletal disorder.
their attribution to work, and the nature and effectiveness of workplace interventions designed to address them. The MSD provisions in Part 1904 were adopted as companion components for the agency’s Ergonomics Program Standard and reflected the same scientific shortcomings.

Shortly after the Ergonomics Program Standard was rescinded, Secretary of Labor Elaine L. Chao announced that she would be conducting a series of forums to explore the fundamental controversies and unanswered questions, including the appropriate definition of "MSD,” with the objective of developing a “comprehensive approach to ergonomics.” Recognizing that it would be inappropriate to proceed with a recordkeeping revision that presumed a workable definition of an MSD, even as this issue was still being debated in the forums and deliberated within the agency, OSHA wisely extended the effective date of the MSD revisions until January 1, 2003.

When Secretary Chao announced her "comprehensive approach to ergonomics" on April 5, 2002, she found that variations among industries and jobs, along with other barriers to a universally applicable standard, were insurmountable. Accordingly, she opted for industry-or-task-specific guidelines, coupled with enforcement measures, workplace outreach, and additional research into the science underlying MSDs. The comprehensive plan did not include a single definition for MSDs. To the contrary, as stated by the agency (68 FR 38602, col. 2):

OSHA recognized that “MSD” is a term of art in scientific literature that refers collectively to a group of injuries and illnesses that affect the musculoskeletal system and that there is no single diagnosis for these disorders [emphasis added].

Furthermore, OSHA has explicitly stated “that no single definition of 'ergonomic injury' [is] appropriate for all contexts.” In making these determinations, OSHA again properly acknowledged that additional research into MSDs was necessary in order to create and implement a clear, concise definition—if possible—of what constitutes an MSD. Accordingly, OSHA further extended the effective date of the MSD provisions of Section 1904 until January 1, 2004.

On June 30, 2003, OSHA formally announced its determination that the MSD column was not necessary or supported by the rulemaking record, and the MSD provisions in Section 1904.12 were revoked. On November 17, 2004, the National Advisory Committee on Ergonomics (NACE) announced that it was unable to reach a consensus on the definition of the term “MSDs” and further concluded that agreement on a definition of the term would not help to reduce their number:

The pursuit of a single definition of MSDs has not reached consensus. The various/numerous MSD definitions cover a host of conditions limited only by those doing the defining, none of which directly help to reduce the number of such disorders. OSHA

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5 68 FR 38601.
6 http://www.osha.gov/SLTC/ergonomics/recommendations.html
should continue the development of guidelines independent of any final definition of MSDs.  

Nothing has changed since June of 2003 to provide the definitional content and certainty that was lacking when Section 1904.12 was revoked in June of 2003, nor has OSHA offered any scientific or other supporting evidence to the contrary in this rulemaking. It has become abundantly clear that OSHA’s earlier conclusion was and remains correct—the term “MSD” remains a broadly and vaguely defined term of art that means different things to different people. Accordingly, no workable definition of work-related “musculoskeletal disorders” is currently possible in light of the limited medical understanding of those disorders, their multifactorial etiology and their subjective nature. Against this backdrop of great uncertainty, and without a new foundation, the agency, acting under a new political administration, would have us accept the idea that the unworkable MSD provisions in the Proposed Rule are necessary for the agency to carry out its statutory responsibilities under the Occupational Safety and Health Act (“the OSH Act”). We respectfully disagree. For OSHA to proceed with the Proposed Rule would be manifestly inappropriate and it should be withdrawn.

III. SUMMARY OF POINTS

A. OSHA’s assertion that the proposed rule would simply require the employer to review the cases that have been recorded on the OSHA 300 Log, make a determination as to whether they are MSDs and, if so, place a check in the MSD column is based on the erroneous premise that the current level of scientific knowledge is adequate to identify, diagnose and determine the cause of conditions known as MSDs.

B. The Proposed Rule would improperly require employers to record conditions on the OSHA 300 Log that (1) are not significant and (2) have no meaningful relationship to the workplace.

C. The Proposed Rule would require employers to make determinations that go beyond their abilities and the abilities of many medical professionals. Employers would be faced with the untenable choice of recording a condition which does not have an adequate definition, or immediately undertaking extensive inquiries, often into an employee’s otherwise private medical history and personal life, to enable the employer to make the necessary determinations (whether an injury, work-related, preexisting etc.).

D. The incorporation of the MSD provisions into the OSHA recordkeeping system will produce materially inaccurate and misleading “injury and illness” records of disparate and unrelated conditions that will result in a misallocation of OSHA’s resources.

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7 More revealing is the initial version of this point as approved by the Guidelines Workgroup before it was presented to the full committee on November 17, 2004:

There is not a widely-agreed upon definition of musculoskeletal disorders (MSDs), so the Workgroup decided that the pursuit of a definition of MSDs is unproductive, suggesting that NACE, OSHA, and others should continue their work and not get caught up in finding a definition.

E. OSHA has materially understated the costs of compliance with the proposed rule and has no factual basis for certifying that the Proposed Rule would not have a significant economic impact on a substantial number of small entities and therefore avoiding compliance with the Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act.

F. The proposed rule does not comply with the Paperwork Reduction Act.

G. OSHA omitted material information and mischaracterized the nature and scope of this proposal by erroneously stating that the Proposed Rule would not change the currently applicable criteria for recordability.

H. There is insufficient time to implement the proposed rule by January 1, 2010.

For the foregoing reasons, which we address in further detail below, we believe it would be inappropriate for OSHA to proceed with the Proposed Rule and that it should be withdrawn.

CONCLUSION

In light of the obvious inability to define, diagnose or determine the cause of MSDs with any degree of precision, the logical conclusion, mandated by the applicable OSH Act criteria, is that OSHA must acknowledge the limitations it faces in implementing a workable MSD provision in Part 1904 consistent with its statutory authority and withdraw the Proposed Rule. There simply is no medically and scientifically supported definition for the injuries that OSHA expects employers to record. OSHA’s attempt to establish an MSD column for the OSHA 300 Log fails to serve any useful purpose and would only lead to an inappropriate misallocation of resources that would detract from efforts to advance workplace safety and health in the United States. OSHA’s cost estimate for this proposal strained credulity and the agency utterly failed to provide an adequate factual basis for the certification necessary to avoid having to comply with the Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act. Finally, the Federal Register notice was defective as OSHA mischaracterized the scope of this proposal and failed to acknowledge the critical re-characterization of MSDs from injuries to illnesses affected by language in the preamble. We urge OSHA to abandon this ill-fated attempt to classify that which is impossible objectively to verify or categorize.