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OSHA seeks to roll back major parts of electronic recordkeeping rule

At press time, OSHA was officially seeking to rescind two major parts of its "Improve Tracking of Workplace Injuries and Illnesses" final rule, according to a notice published in the July 30 *Federal Register.*

In the proposed rule, the agency states that it would require covered establishments with 250 or more employees – or those with 20 to 249 employees in certain high-hazard industries – to submit Form 300A injury and illness data electronically but would no longer require submissions of Forms 300 or 301, which give more detailed information than 300A.

OSHA states that the move is intended to "protect sensitive worker information from potential disclosure under the Freedom of Information Act," and the reporting "burden" on employers is "unjustified given the uncertain benefits of collecting the information."

OSHA already started on this path by stating on its website that it would not accept Forms 300 and 301. That action caused Public Citizen, the American Public Health Association, and the Council of State and Territorial Epidemiologists to file a lawsuit July 25 in the U.S. District Court for the District of Columbia.

Photo: Ridofranz/iStockphoto

Employers were supposed to submit those two forms by July 1, according to the published final rule. The organizations filing suit contend that OSHA's announcement of the suspended deadline for the forms happened "in or around" May on its website, and that the agency did not follow notice-and-comment protocol for those changes as mandated in the Administrative Procedure Act.

"The electronic recordkeeping rule is vital to worker safety. OSHA's turnabout flouts the law and will needlessly harm workers across the country," Sean Sherman, an attorney for Public Citizen, said in a July 25 press release. "Public Citizen and other worker advocacy organizations planned to use OSHA's data to conduct research on occupational health and safety, analyze the most serious workplace threats, and push for stronger regulatory protections."

In a comment on the proposed change, National Federation of Independent Business Senior Vice President and General Counsel David Addington stated his organization's support but cautioned OSHA that it needs to clarify its reasons for altering the rule, not just "avoidance of the impact of the [Freedom of Information Act]."

"Because federal judges handling cases involving FOIA Exemption 6 must balance two conflicting interests – invasion of privacy versus public understanding of government activities – the outcome

– article continues on p. 4

Groups petition OSHA to issue heat standard; Congresswoman to sponsor bill

More than 130 organizations and 90 individuals are petitioning OSHA to issue regulations aimed at protecting workers against heat stress.

The petition, addressed to acting OSHA administrator Loren Sweatt, is part of a national campaign led by advocacy groups Public Citizen, United Farm Workers Foundation and Farmworker Justice.

The organizations are asking OSHA to mandate rest breaks, access to water, heat acclimatization plans, worker training, and shaded or air-conditioned areas for approximately 130 million affected workers. California, Minnesota, Washington and the U.S. military are the only entities with formal protections against occupational heat stress.

OSHA offers informational resources on heat stress and can issue citations under its General Duty Clause. NIOSH published "Criteria for a Recommended Standard: Occupational Exposure to Heat and Hot Environments" in February 2016.

Rep. Judy Chu (D-CA) said she plans to introduce related legislation in the near future. "Workers, including farmworkers who endure difficult labor and long hours to put food on our tables, are vulnerable to dangerous working conditions," said Chu, a former California State Assembly member. "I'll never forget the stories of people like Asuncion Valdivia, who died after picking grapes for 10 hours straight in 105-degree temperatures. After Asuncion's death, I fought to pass a new California law to require water, shade and rest periods for workers. Now it is time we extend this protection nationally. No job should be worth your life."

In 2016, 39 heat-related deaths occurred (the most recent Bureau of Labor Statistics data available) – the most since 2011, when 61 workers died. The total also rose for the third consecutive year.

Among the individual petitioners are former OSHA administrators David Michaels and Eula Bingham.

Read the petition at *sh-m.ag/2norhh0*.

OSHA ALLIANCES

The OSHA Alliance Program fosters collaborative relationships with groups committed to worker safety and health. Alliance partners help OSHA reach targeted audiences and give them better access to workplace safety and health tools and information. For more on OSHA alliances, go to ***www.osha.gov/dcsp/alliances/index.html.***

International Window Cleaning Association

Date of alliance: Feb. 14, 2018

OSHA and IWCA are committed to providing IWCA members and others with information and access to training resources that will help them protect the health and safety of workers, and understand the rights of workers and the responsibilities of employers under the Occupational Safety and Health Act. Through the alliance, the organizations will continue to address slips, trips, falls from heights and other issues related to the proper and safe use of high-reach access equipment. The alliance goals and the objectives include:

Raising awareness of OSHA's rulemaking and enforcement initiatives

- To share information on occupational safety and health laws, standards such as, but not limited to, Walking-Working Surfaces, and Hazard Communication, as well as providing guidance resources, including the rights and responsibilities of workers and employers, whistleblower protections, and anti-retaliation responsibilities.
- To convene or participate in forums, roundtable discussions or stakeholder meetings on fall, caught-in-between and other scaffolding-related hazards.

Outreach and communication

- To share information on OSHA's National Initiatives (emphasis programs, regulatory agenda, outreach) and opportunities to participate in initiatives such as, but not limited to, OSHA's Safe + Sound Campaign, the National Stand Down to Prevent Falls in Construction, and Heat Illness Prevention.
- To develop information on the recognition and prevention of workplace hazards, and to develop ways of communicating such information (e.g., print and electronic media, electronic assistance tools, and OSHA's and IWCA's websites) to employers and workers in the industry.
- To share information among industry safety and health professionals regarding IWCA good practices or effective approaches through training programs, workshops, seminars and lectures.

Excerpted from *osha.gov/dcsp/alliances/iwca/iwca.html*.

In Other News…

OSHA offers free stickers on trenching safety

OSHA has unveiled a new sticker intended to raise awareness of trenching safety by reminding workers to "slope it, shore it, shield it."

According to the agency, 23 construction workers were killed in trench collapses in 2016, exceeding the combined total from 2014 and 2015.

"When done safely, trenching operations can limit worker exposure to cave-ins, falling loads, hazardous atmospheres and hazards from mobile equipment," OSHA states. "The best way to prevent a trench collapse is to slope or bench trench walls, shore trench walls with supports, or shield trench walls with trench boxes."

The free stickers are available in English and Spanish. Go to *osha.gov/pls/publications* to order them.

OSHA proposes rule exempting certain railroad work, machines from parts of crane standard

As part of a settlement agreement, OSHA has issued a proposed rule that would grant exemptions to its Cranes and Derricks in Construction Standard for work on or along railroad tracks.

The proposed rulemaking, published in the July 19 *Federal Register,* includes exempting railroad equipment operators from certification requirements in the standard and full exemption of certain railroad "roadway maintenance machines." It would provide exemptions for "other equipment used by railroads for track-related construction activities," with the exception of bridge construction.

After settling a lawsuit brought by the Association of American Railroads, OSHA agreed to the changes on Sept. 2, 2014.

The agency will accept comments on the proposed rule until Sept. 17.

OSHA STANDARD INTERPRETATIONS

OSHA requirements are set by statute, standards and regulations. Interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. Enforcement guidance may be affected by changes to OSHA rules.

Reusable microblading tools in the cosmetic tattoo industry

Standard: 1910.1030(d)(2)(i), 1910.1030(d)(4)(iii), 1910.1030(d)(2)(vii)(A) and 1910.1030(g)(2)
Date of response: Jan. 6, 2017

Background: Microblading is a technique for the application of permanent cosmetic eyebrow tattooing. The technique creates hair strokes with a manual device with a tightly soldered needle grouping used to insert pigments under the skin. These manual devices are available as either a disposable tool or a tool with reusable handles that allow the worker to replace used microblades with new ones.

Question 1: Would the removal of contaminated microblades from a reusable microblade tool place the employee at greater risk of sharps injuries than a single-use, disposable microblade tool?

Response: Unless the reusable tool has engineered sharps injury protections, it would very likely create a greater hazard than single-use tools because of the increased manipulation of the used blade that would be required of users. OSHA's Bloodborne Pathogens Standard requires that employers use engineering and work practice controls to eliminate or minimize occupational exposure to blood or other potentially infectious materials (as defined in the standard) to the lowest feasible extent in the workplace. [29 CFR 1910.1030(d)(2)(i)] [See also, OSHA Instruction CPL 02-02-069, Enforcement Procedures for the Occupational Exposure to Bloodborne Pathogens, paragraph XIII.D.2]. In particular, the BBP standard prohibits the bending, recapping, or removal of a contaminated needle or other contaminated sharp [29 CFR 1910.1030(d)(2)(vii)(A)]. The standard provides an exception where an "employer can demonstrate that no alternative is feasible or that such action is required by a specific medical or dental procedure." As you explained in your letter, there are commercially available, single-use, disposable microblade tools that reduce the handling of a contaminated microblade. Therefore, this exception does not apply. It should be noted, however, that the single-use tools you discussed in your letter are not without potential sharps hazards. Users must be trained to use them properly and to immediately dispose of used microblades in sharps containers that meet the requirements of paragraphs 29 CFR 1910.1030(d)(4)(iii) and 29 CFR 1910.1030(g)(2).

Question 2: Would the use of a secondary tool for microblade removal, such as pliers or similar, be acceptable?

Response: No. As explained in the response in Question 1, the BBP Standard strictly prohibits removal of contaminated sharps unless the employer can demonstrate that no alternative is feasible or that such actions are required by the permanent cosmetic application procedure. Your letter did not describe a scenario that meets either of these exceptions.

Sincerely,
Thomas Galassi, Director
Directorate of Enforcement Programs

Excerpted from *osha.gov/laws-regs/standardinterpretations/2017-01-06.*

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In This Issue

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of the balancing may vary from judge to judge," Addington wrote. "Thus, as OSHA states, there is a 'meaningful risk' that some courts may require disclosure of employee private medical information from Forms 300 and 301.

"Unmentioned in the notice, but also of concern, is that OSHA might in the future decide intentionally not to withhold under FOIA employee private medical information in Forms 300 or 301, or might disclose such information accidentally in the course of the high-volume FOIA processing activities of OSHA."

Secretary of Labor R. Alexander Acosta hinted at changes to the electronic recordkeeping rule April 12 during a Senate appropriations subcommittee hearing.

"We are looking at methods where we can obtain this data while at the same time respecting the privacy of individuals," Acosta said in response to a question from Sen. Tammy Baldwin (D-WI). "We are looking at methods where we can obtain the data en masse without individual identifying information because once we receive the data, it can eventually become subject to disclosure."

After the hearing, former OSHA Deputy Assistant Secretary Jordan Barab said in a blog post that the agency did not require submission of personally identifiable information "or would have automatically scrubbed out of the submission" using software.

"What we're seeing here is not a concern about employee privacy but an effort by the Chamber of Commerce and the anti-OSHA lobby to kill the rule because they're afraid that if OSHA collects injury or illness information about companies' health and safety record, the companies' information – not the PII – will eventually be publicly released," Barab wrote on his "Confined Space" website. "And that won't look good for those companies with poor health and safety records. Transparency is great – unless it hurts your bottom line."

The deadline to comment on the proposed rule is Sept. 28. To read the lawsuit, go to *sh-m.ag/2OnyNoG*.