

**FEDERAL ELECTION COMMISSION****11 CFR Parts 104, 109, 110, 114**

[Notice 2015–09]

**Rulemaking Petition: Independent Spending by Corporations, Labor Organizations, Foreign Nationals, and Certain Political Committees (Citizens United)****AGENCY:** Federal Election Commission, Energy.**ACTION:** Rulemaking petition; notice of availability.

**SUMMARY:** On June 19 and June 22, 2015, the Federal Election Commission received two Petitions for Rulemaking that ask the Commission to issue new rules and revise existing rules concerning: (1) The disclosure of certain financing information regarding independent expenditures and electioneering communications; (2) election-related spending by foreign nationals; (3) solicitations of corporate and labor organization employees and members; and (4) the independence of expenditure-only political committees and accounts. The Commission seeks comments on these petitions.

**DATES:** Comments must be submitted on or before October 27, 2015.

**ADDRESSES:** All comments must be in writing. Commenters are encouraged to submit comments electronically via the Commission's Web site at <http://www.fec.gov/fosers>, reference REG 2015–04, or by email to [IndependentSpending@fec.gov](mailto:IndependentSpending@fec.gov). Alternatively, commenters may submit comments in paper form, addressed to the Federal Election Commission, Attn.: Amy L. Rothstein, Assistant General Counsel, 999 E Street NW., Washington, DC 20463.

Each commenter must provide, at a minimum, his or her first name, last name, city, state, and zip code. All properly submitted comments, including attachments, will become part of the public record, and the Commission will make comments available for public viewing on the Commission's Web site and in the Commission's Public Records Office. Accordingly, commenters should not provide in their comments any information that they do not wish to make public, such as a home street address, personal email address, date of birth, phone number, social security number, or driver's license number, or any information that is restricted from disclosure, such as trade secrets or commercial or financial information that is privileged or confidential.

**FOR FURTHER INFORMATION CONTACT:** Ms. Amy L. Rothstein, Assistant General Counsel, or Ms. Esther D. Gyory, Attorney, Office of General Counsel, 999 E Street NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

**SUPPLEMENTARY INFORMATION:** On June 19, 2015, the Federal Election Commission received a Petition for Rulemaking from Make Your Laws PAC, Inc. and Make Your Laws Advocacy, Inc. On June 22, 2015, the Commission received a Petition for Rulemaking from Craig Holman and Public Citizen. Both petitions, citing *Citizens United v. FEC*, 558 U.S. 310 (2010), ask the Commission to modify its regulations in four respects.

First, the Federal Election Campaign Act, 52 U.S.C. 30101–46 (the “Act”), and Commission regulations require every person who makes an electioneering communication aggregating in excess of \$10,000 in a calendar year and every person (other than a political committee) that makes independent expenditures in excess of \$250 with respect to a given election in a calendar year to report certain information to the Commission. 11 CFR 104.20(b) and (c), 109.10(b), (e); 52 U.S.C. 30104(c)(1) and (2), (f). The petitions ask the Commission to “[e]nsure full public disclosure of corporate and labor organization independent spending” by “requir[ing] that outside spending groups disclose their donors.”

Second, the Act and Commission regulations prohibit foreign nationals from “directly or indirectly” making contributions, expenditures, and electioneering communications. 11 CFR 110.20; 52 U.S.C. 30121(a). The petitions ask the Commission to “[c]larify that th[is] prohibition on foreign national campaign-related spending restricts such spending by U.S. corporations owned or controlled by a foreign national.”

Third, Commission regulations prohibit corporations and labor organizations from “using coercion . . . to urge any individual to make a contribution or engage in fundraising activities on behalf of a candidate or political committee,” 11 CFR 114.2(f)(2)(iv), and restrict how corporations and labor organizations may solicit contributions to their separate segregated funds from employees and members. 11 CFR 114.5(a)(2) through (5); *see also* 52 U.S.C. 30118(b)(3). The petitions ask the Commission to “[c]larify that corporations and labor organizations are prohibited from coercing their employees and members into providing

financial or other support for the corporation's or labor organization's independent political activities.”

Finally, the petitions ask the Commission to “[e]nsure that the expenditures made by” independent-expenditure-only political committees and accounts, *see, e.g., SpeechNow.org v. FEC*, 599 F.3d. 686 (D.C. Cir. 2010), “are truly independent of federal candidates.”

The Commission seeks comments on the petitions. The public may inspect the petitions on the Commission's Web site at <http://www.fec.gov/fosers>, or in the Commission's Public Records Office, 999 E Street NW., Washington, DC 20463, Monday through Friday, from 9 a.m. to 5 p.m. Interested persons may also obtain copies of the petitions by dialing the Commission's Faxline service at (202) 501–3413 and following its instructions. Request document #280.

The Commission will not consider the petitions' merits until after the comment period closes. If the Commission decides that the petitions have merit, it may begin a rulemaking proceeding. The Commission will announce any action that it takes in the **Federal Register**.

Dated: July 16, 2015.

On behalf of the Commission,

**Ann M. Ravel,***Chair, Federal Election Commission.*

[FR Doc. 2015–18494 Filed 7–28–15; 8:45 am]

**BILLING CODE 6715–01–P****DEPARTMENT OF LABOR****Occupational Safety and Health Administration****29 CFR part 1904**

[Docket No. OSHA–2015–0006]

**RIN 1218–AC84****Clarification of Employer's Continuing Obligation To Make and Maintain an Accurate Record of Each Recordable Injury and Illness****AGENCY:** Occupational Safety and Health Administration (OSHA), Labor.**ACTION:** Notice of proposed rule.

**SUMMARY:** OSHA is proposing to amend its recordkeeping regulations to clarify that the duty to make and maintain accurate records of work-related injuries and illnesses is an ongoing obligation. The duty to record an injury or illness continues for as long as the employer must keep records of the recordable injury or illness; the duty does not

expire just because the employer fails to create the necessary records when first required to do so. The proposed amendments consist of revisions to the titles of some existing sections and subparts, and changes to the text of some existing provisions. The proposed amendments add no new compliance obligations; the proposal would not require employers to make records of any injuries or illnesses for which records are not currently required to be made.

**DATES:** Written comments to this proposed rule must be submitted (postmarked, sent or received) by September 28, 2015. All submissions must bear a postmark or provide other evidence of the submission date.

**ADDRESSES:** You may submit comments, identified by Docket No. OSHA–2015–0006, by any of the following methods:

Electronically: You may submit comments and attachments electronically at <http://www.regulations.gov>, which is the Federal e-Rulemaking Portal. Follow the instructions on the Web site for making electronic submissions.

Fax: If your submission, including attachments, does not exceed ten pages, you may fax it to the OSHA Docket Office at (202) 693–1648. OSHA does not require hard copies of documents transmitted by facsimile. However, if you have supplemental attachments that are *not* delivered by facsimile, you must submit those attachments, by the applicable deadline, to the OSHA Docket Office, Technical Data Center, OSHA, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–2625, Washington, DC 20210. Any such attachment must clearly identify the sender's name, the date of submission, the title of the rulemaking (Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness), and the docket number (OSHA–2015–0006) so that the Docket Office can add the attachment(s) to the appropriate facsimile submission.

Mail, express mail, hand delivery, messenger, or courier service: You may submit comments to the OSHA Docket Office, Docket Number OSHA–2015–0006, Technical Data Center, OSHA, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–2625, Washington, DC 20210; telephone: (202) 693–2350. (OSHA's TTY number is (877) 889–5627). Please contact the OSHA Docket Office for information about Department of Labor security procedures that could affect the delivery of materials by express mail, hand delivery, and messenger or courier

service. Also note that security-related procedures may delay the Agency's receipt of comments submitted by regular mail. The Docket Office will accept deliveries by hand, express mail, or messenger and courier service during the Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m.

Instructions for submitting comments: All submissions must include the Agency's name (OSHA), the title of the rulemaking (Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness), and the docket number (OSHA–2015–0006). OSHA will place comments and other material, including any personal information you provide, in the public docket without revision, and the comments and other materials will be available online at <http://www.regulations.gov>. Therefore, OSHA cautions you about submitting statements and information that you do not want made available to the public or that contain personal information (about yourself or others) such as Social Security numbers, birthdates, and medical data. For further information on submitting comments, plus additional information on the rulemaking process, see the Public Participation heading in the **SUPPLEMENTARY INFORMATION** part of this document.

Docket: To read or download comments or other material in the docket, go to Docket Number OSHA–2015–0006 at <http://www.regulations.gov> or to the OSHA Docket Office at the address provided previously. The electronic docket for this proposed rule, established at <http://www.regulations.gov>, lists all of the documents in the docket. However, some information (e.g., copyrighted material) is not publicly available to read or download through that Web site. All submissions, including copyrighted material, are available for inspection at the OSHA Docket Office. Contact the OSHA Docket Office for assistance in locating docket submissions.

**FOR FURTHER INFORMATION CONTACT:** General information and press inquiries: *Press inquiries:* Mr. Frank Meilinger, Director, Office of Communications, OSHA, U.S. Department of Labor, Room N–3647, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–1999; email [meilinger.francis2@dol.gov](mailto:meilinger.francis2@dol.gov).

*Technical inquiries:* Mr. William Perry, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N–3718, 200 Constitution Avenue NW., Washington, DC 20210;

telephone (202) 693–1950; email [perry.bill@dol.gov](mailto:perry.bill@dol.gov).

Copies of this **Federal Register** notice and news releases: Electronic copies of these documents are available at OSHA's Web page at <http://www.osha.gov>.

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## II. Background

### A. The OSH Act and OSH Act Violations

The Occupational Safety and Health Act of 1970 (OSH Act or Act) arose out of a Congressional finding that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments. See 29 U.S.C. 651(a). Accordingly, the purpose of the statute is to assure so far as possible every working man and woman in the Nation safe and healthful working conditions. See 29 U.S.C. 651(b).

To effectuate the Act's purpose, Congress authorized the Secretary of Labor to promulgate occupational safety and health standards (29 U.S.C. 655); a standard, as defined in the Act, requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment. See 29 U.S.C. 652(8). The Act also grants broad authority to the Secretary to promulgate regulations related to recordkeeping, employer self-inspections, and keeping employees informed of matters related to occupational safety and health. 29 U.S.C. 657(c). OSHA issues citations and assesses monetary penalties when it finds that employers are not complying

with applicable standards and regulations. 29 U.S.C. 658, 659, 666.

Section 9(c) of the OSH Act contains a statute of limitations providing that no citation may be issued after the expiration of six months following "the occurrence of any violation." 29 U.S.C. 658(c). Generally, OSH Act violations continue to occur for as long as employees are exposed to the hazard posed by the non-compliant workplace. See *Sec'y of Labor v. Cent. of Georgia R.R. Co.*, 5 BNA OSHC 1209, 1211 (Rev. Comm'n 1977) (explaining that a violation occurs "whenever . . . [a] standard is not complied with and an employee has access to the resulting zone of danger"). Thus, employers have an ongoing obligation to correct conditions that violate OSHA standards and regulations, and under section 9(c), violations are subject to citations and penalties for up to six months after the last instance of employee exposure to the relevant hazard.

### B. The History and Importance of OSHA's Recordkeeping Regulations

The OSH Act requires the Secretary of Labor to promulgate regulations requiring employers to make and maintain accurate records of work-related injuries and illnesses. 29 U.S.C. 657(c)(1) and (2), 673(a); see also 651(b)(12), 657(g)(2), 673(e). In 1971, the Secretary (via OSHA) issued the first recordkeeping regulations at 29 CFR part 1904. The Agency promulgated revisions to these regulations in 2001 in an effort to improve the quality of workplace injury and illness records by making OSHA's recordkeeping system easier to use and understand. See 66 FR 5916 (January 19, 2001).

OSHA's recordkeeping regulations require employers to record information about certain injuries and illnesses occurring in their workplaces, and to make that information available to employees, OSHA, and the Bureau of Labor Statistics (BLS). Employers must record work-related injuries and illnesses that meet one or more recording criteria, including injuries and illnesses resulting in death, loss of consciousness, days away from work, restricted work activity or job transfer, medical treatment beyond first aid, or a diagnosis of a significant injury or illness by a physician or other licensed health care professional. 29 CFR 1904.7. Employers must document each recordable injury or illness on an "OSHA 300" form, which is a log of all work-related injuries and illnesses. 29 CFR 1904.29(a) through (b)(1). Employers also must prepare a supplementary "OSHA 301 Incident Report" or equivalent form for each

recordable injury and illness; the Incident Reports provide additional details about the injuries and illnesses recorded in the 300 Log. 29 CFR 1904.29(b)(2).

At the end of each calendar year, employers must review their 300 Logs to verify that the entries are complete and accurate. 29 CFR 1904.32(a)(1). Employers also must correct any deficiencies identified during the annual review. *Id.* By February 1 of each year, employers must create, certify, and post annual summaries of the cases listed on their 300 Logs for the prior calendar year. 29 CFR 1904.32(a)(2) through (4) and (b)(6). Annual summaries must remain posted until April 30 each year. 29 CFR 1904.32(b)(6). Employers must retain their OSHA Logs, Incident Reports, and annual summaries for five years following the end of the calendar year that they cover. 29 CFR 1904.33(a). During the retention period, employers must update their 300 Logs to include newly discovered recordable cases and to show any changes in the classification, description, or outcome of previously-recorded cases. 29 CFR 1904.33(b)(1). The regulations do not require employers to update Incident Reports or annual summaries during the retention period. 29 CFR 1904.33(b)(2) and (3).

Accurate injury and illness records serve several important purposes. See 66 FR at 5916–17, January 19, 2001. One purpose is to provide information to employers. The information in the OSHA-required records makes employers more aware of the kinds of injuries and illnesses occurring 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. Injury and illness records are essential for employers to effectively manage their safety and health programs; these records permit employers to track injuries and illnesses over time so they can evaluate the effectiveness of protective measures implemented in response to identified hazards.

Similarly, employees—who have access to OSHA injury and illness records throughout the five-year retention period (see 29 CFR 1904.35)—can use information about the occupational injuries and illnesses occurring in their workplaces to become better informed about, and more alert to, the hazards they face. Employees who are aware of the hazards around them may be 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 those hazards, the overall level of safety and health in the workplace can improve.

OSHA also has access to employer injury and illness records during the retention period (see 29 CFR 1904.40 and 1904.41), and these records are an important source of information for the Agency and enhance the Agency's enforcement efforts. During the initial stages of an inspection, an OSHA representative reviews the employer's injury and illness data so that the Agency can focus its inspection on the hazards revealed by the records. In some years, OSHA has also surveyed a subset of employers covered by the OSH Act for their injury and illness data, and used that information to help identify the most dangerous types of worksites and the most prevalent types of safety and health hazards.

Additionally, BLS uses data derived from employers' injury and illness records to develop national statistics on workplace injuries and illnesses. These statistics include information about the source, nature, and type of the injuries and illnesses that are occurring in the nation's workplaces. To obtain the data to develop national statistics, BLS and participating State agencies conduct an annual survey of employers in almost all sectors of private industry. BLS makes the aggregate survey results available for research purposes and for public information. This data provides information about the incidence of workplace injuries and illnesses and the nature and magnitude of workplace safety and health problems. Congress, OSHA, and safety and health policymakers in Federal, State, and local governments use BLS statistics to make decisions concerning safety and health legislation, programs, and standards. And employers and employees can use BLS statistics to compare the injury and illness data from their workplaces with data from the nation as a whole.

### C. A Failure To Record a Recordable Illness or Injury is a Continuing Violation

A continuing violation exists when there is noncompliance with "the text of . . . [a] pertinent law [that] imposes a continuing obligation to act or refrain from acting." *Earle v. Dist. of Columbia*, 707 F.3d 299, 307 (D.C. Cir. 2012). Where there is an ongoing obligation to act, each day the action is not taken results in a continuing, ongoing violation. In other words, "a new claim accrues each day the violation is extant." *Interamericas Inv., Ltd. v. Fed.*

*Reserve Sys.*, 111 F.3d 376, 382 (5th Cir. 1997). For example, in *United States v. Edelkind*, 525 F.3d 388 (5th Cir. 2008), the Fifth Circuit found that the crime of willfully failing to pay child support as required by federal law was a continuing offense because "each day's acts . . . [brought] a renewed threat of the substantive evil Congress sought to prevent." *Id.* at 394–95 (internal quotation marks and citations omitted). And in *Postow v. OBA Federal Savings & Loan Association*, 627 F.2d 1370 (D.C. Cir. 1980), the D.C. Circuit held that a lender's failure to provide required disclosures to borrowers was a continuing violation of the Truth-in-Lending Act because the violation subverted the goals of the statute every day the borrowers did not have the information. *Id.* at 1379–80. See, also, e.g., *United States v. Bailey*, 444 U.S. 394, 413 (1980) (escape from federal custody is a continuing offense in light of "the continuing threat to society posed by an escaped prisoner"); *United States v. George*, 625 F.3d 1124 (9th Cir. 2010) (failure to comply with statute requiring registration as a sex offender is a continuing offense), *vacated on other grounds*, 672 F.3d 1126 (9th Cir. 2012); *United States v. Franklin*, 188 F.2d 182 (7th Cir. 1951) (Alien Registration Act imposes ongoing registration obligation; failure to register is a continuing violation).

Recordkeeping violations under the OSH Act are likewise continuing violations. OSHA's longstanding position is that an employer's duty to record an injury or illness continues for the full duration of the record-retention-and-access period, *i.e.*, for five years after the end of the calendar year in which the injury or illness became recordable. This means that if an employer initially fails to record a recordable injury or illness, the employer still has an ongoing duty to record that case; the recording obligation does not expire simply because the employer failed to record the case when it was first required to do so. As long as an employer fails to comply with its ongoing duty to record an injury or illness, there is an ongoing violation of OSHA's recordkeeping requirements that continues to occur every day employees work at the site. Therefore, OSHA can cite employers for such recordkeeping violations for up to six months after the five-year retention period expires without running afoul of the OSH Act's statute of limitations.<sup>1</sup>

<sup>1</sup>Of course, OSHA may not issue a citation more than six months after the employer corrects the violation. See, e.g., *Sec'y of Labor v. Manganas Painting Co.*, 21 BNA OSHC 2043, 2048 (Rev. Comm'n 2007) (citation was time-barred where the employer abated the violation more than six months prior to the issuance date).

The Occupational Safety and Health Review Commission has upheld OSHA's position on the continuing nature of recordkeeping violations. See, e.g., *Sec'y of Labor v. Gen. Dynamics*, 15 BNA OSHC 2122 (Rev. Comm'n 1993) (recordkeeping violations "occur" at any point during the retention period when records are inaccurate, so citations for those violations are not barred simply because they are issued more than six months after the obligation to record first arose); *Sec'y of Labor v. Johnson Controls, Inc.*, 15 BNA OSHC 2132 (Rev. Comm'n 1993) (recordkeeping violations continue until correction or expiration of the retention period). The Commission addressed this issue most recently in *Secretary of Labor v. AKM LLC (Volks I)*, 23 BNA OSHC 1414 (Rev. Comm'n 2011), confirming that an employer's failure to make a required OSHA record is a continuing violation, and that an uncorrected violation continues until the employer is no longer required to keep OSHA records for the year at issue.

### D. The D.C. Circuit's Decision in *Volks II*

A panel of the D.C. Circuit reviewed the Commission's *Volks I* decision, and on April 6, 2012, issued a decision—*Volks II*—reversing the Commission. *AKM LLC v. Sec'y of Labor (Volks II)*, 675 F.3d 752 (D.C. Cir. 2012). The majority opinion in *Volks II* disagreed with the Commission and held that "the . . . language in [the OSH Act] . . . which deals with record-keeping is not authorization for OSHA to cite the employer for a record-making violation more than six months after the recording failure." *Id.* at 758. According to the majority opinion, OSHA must cite an employer for failing to record an injury or illness within six months of the first day on which the regulations require the recording; a citation issued later than that is barred by the OSH Act's statute of limitations. *Id.* at 753–59.

In a separate concurring opinion in *Volks II*, Judge Garland recognized that the OSH Act allows for continuing violations of recordkeeping requirements. He concluded, however, that the specific language in OSHA's existing recordkeeping regulations does not implement this statutory authority and does not create continuing recordkeeping obligations. *Id.* at 759–64. No other appellate court has ruled on these issues.

Comm'n 2007) (citation was time-barred where the employer abated the violation more than six months prior to the issuance date).

The *Volks II* decision has led to a need for OSHA to clarify employers' obligations under its recordkeeping regulations and to elaborate on its understanding of the statutory basis for those obligations. The Agency is proposing changes to its recordkeeping regulations to clarify that the duty to make and maintain an accurate record of a work-related illness or injury is an ongoing obligation that continues until the required record is made or until the end of the record-retention-and-access period prescribed by the regulations. To that end, OSHA is proposing revisions to the titles of some existing sections and subparts in part 1904, and changes to the text of some existing recordkeeping requirements. The Agency describes the proposed changes in **SUPPLEMENTARY INFORMATION**, Section IV, later in this notice.

#### *E. Advisory Committee on Construction Safety and Health*

OSHA consulted with the Advisory Committee on Construction Safety and Health (ACCSH) on this rulemaking. The Agency provided ACCSH with a summary and explanation of this proposal and a statement regarding the need for the proposed revisions to 29 CFR part 1904. On December 4, 2014, ACCSH voted to recommend that OSHA proceed with this proposal.

### III. Legal Authority

#### *A. Overview*

As explained previously, in **SUPPLEMENTARY INFORMATION**, Section II.A, the OSH Act authorizes the Secretary of Labor to issue "standards" and other "regulations." See, e.g., 29 U.S.C. 655, 657. An occupational safety and health standard, issued pursuant to section 6 of the Act, prescribes measures to be taken to remedy an identified occupational hazard. Other regulations, issued pursuant to general rulemaking authority found, *inter alia*, in section 8 of the Act, establish enforcement or detection procedures designed to further the goals of the Act generally. 29 U.S.C. 657(c); *Workplace Health and Safety Council v. Reich*, 56 F. 3d 1465, 1468 (D.C. Cir. 1995). The proposed amendments are to a regulation issued pursuant to authority expressly granted by sections 8 and 24 of the Act. 29 U.S.C. 657, 673. They simply clarify existing duties under part 1904, and do not impose any new substantive recordkeeping requirements. Numerous provisions of the OSH Act both underscore Congress' acknowledgement that accurate injury and illness records are a critical component of the national occupational safety and health program

and give the Secretary broad authority to enact recordkeeping regulations that create a continuing obligation for employers to make and maintain accurate records of work-related illnesses and injuries. Section 2(b)(12) of the Act states that one of the purposes of the OSH Act is to assure, so far as possible, safe and healthful working conditions by providing for appropriate reporting procedures that will help achieve the objectives of the Act and "accurately describe" the nature of the occupational safety and health problem. See 29 U.S.C. 651(b)(12). Section 8(c)(1) requires each employer to "make, keep and preserve" and "make available" to the Secretary such records prescribed by regulation as necessary or appropriate for the enforcement of the Act or for developing information regarding the causes and prevention of occupational accidents and illnesses. See 29 U.S.C. 657(c)(1). Section 8(c)(2) requires the Secretary to prescribe regulations requiring employers to "maintain accurate records" of, and to make periodic reports on, work-related deaths, injuries and illnesses. See 29 U.S.C. 657(c)(2). Section 8(g)(2) of the Act generally empowers the Secretary to prescribe such rules and regulations as he may deem necessary to carry out his responsibilities under the Act. See 29 U.S.C. 657(g)(2). Section 24(a) requires the Secretary to develop and maintain an effective program of collection, compilation and analysis of occupational safety and health statistics and to compile accurate statistics on work injuries and illnesses. See 29 U.S.C. 673(a). Section 24(e) provides that on the basis of the records made and kept pursuant to section 8(c) of the Act, employers must file such reports with the Secretary that the Secretary prescribes by regulation as necessary to carry out his functions under the Act. See 29 U.S.C. 673(e). Some of these provisions will be addressed more thoroughly in **SUPPLEMENTARY INFORMATION**, Section III.B, later in this notice.

#### *B. The OSH Act Authorizes the Secretary To Impose a Continuing Obligation on Employers To Make and Maintain Accurate Records of Work-Related Injuries and Illnesses, and Incomplete or Otherwise Inaccurate Records Create Ongoing, Citable Conditions*

##### 1. Section 8(c) of the Act Governs Employers' Recordkeeping Obligations, and That Provision Imposes Continuing Obligations on Employers To Make and Maintain Accurate Records of Work-Related Illnesses and Injuries

"Whether [an] . . . obligation is continuing is a question of statutory construction," *Earle*, 707 F.3d at 307. The express language of the OSH Act readily supports a continuing violation theory in recordkeeping cases. And, section 8(c) grants the Secretary broad authority to issue requirements he considers "necessary or appropriate," including recordkeeping regulations that provide that an employer's duty to make records of injuries and illnesses is an ongoing obligation. 29 U.S.C. 657(c).

Section 8(c)(2) requires the Secretary to prescribe regulations requiring employers to "*maintain accurate records*" of work-related deaths, injuries and illnesses. See 29 U.S.C. 657(c)(2) (emphasis added). And section 8(c)(1) requires employers to "*make, keep and preserve*" and to "*make available*" records that the Secretary identifies as necessary or appropriate for the enforcement of the Act or for developing information regarding the causes and prevention of occupational accidents and illnesses. See 29 U.S.C. 657(c)(1) (emphasis added). The language Congress used in these provisions therefore authorizes the Secretary to require employers to have on hand and make available records that accurately reflect *all* of the recordable injuries and illnesses that occurred during the years for which the Agency requires the keeping of records. And this statutory language also is inconsistent with any suggestion that Congress intended the duty to record an injury or illness to be a discrete obligation that expires if the employer fails to comply on the first day the Agency's regulations require recording.

Moreover, the words "accurate" and "maintain" in section 8(c)(2) of the Act connote a continued course of conduct that includes an ongoing obligation to create records. The word "maintain" means to "[c]ause or enable (a condition or state of affairs) to continue," an example being when one works to ensure that something stays "in good condition or in working order by checking or repairing it regularly."

[http://www.oxforddictionaries.com/us/definition/american\\_english/maintain?searchDictCode=all](http://www.oxforddictionaries.com/us/definition/american_english/maintain?searchDictCode=all).

“Maintain” is also synonymous with “keep.” <http://thesaurus.com/browse/maintain>. In ordinary speech, an instruction to “keep records” of something requires both creating and preserving the records, and may include organizing and managing them as well. Therefore, “maintain” plainly implies an ongoing action. See, e.g., *Carey v. Shiley, Inc.*, 32 F.Supp.2d 1093, 1103 (S.D. Iowa 1998) (“continuing duty to maintain records for” the Food and Drug Administration). And “accurate” means “conforming exactly to truth,” and is synonymous with “exact.” <http://www.meriam-webster.com/dictionary/accurate>. See also, e.g., *Huntington Sec. Corp. v. Busey*, 112 F.2d 368, 370 (6th Cir. 1940) (noting that the term “accurately” . . . in its ordinary use [ ] means precisely, exactly correctly, without error or defect”). Therefore, the OSH Act’s call for regulations requiring employers to “maintain accurate [injury and illness] records” is a mandate for the Secretary to impose an ongoing or continuing duty on employers to have (or keep) true or exact documentation of recordable incidents. An employer cannot be said to have (or to be keeping or maintaining) accurate (or true or exact) records of injuries and illnesses for a particular calendar year if there are recordable injuries or illnesses that occurred during that year that are missing from those records. Put simply, the Secretary cannot fulfill the statutory obligation of ensuring that employers “maintain” (or keep) “accurate records” without imposing on employers an ongoing duty to create records for injuries and illnesses in the first place; a duty to make and maintain accurate records inherently implies an ongoing obligation to create the records that must be maintained.

The Fourth Circuit recognized as much in *Sierra Club v. Simkins Industries*, 847 F.2d 1109, 1115 (4th Cir. 1988), a Clean Water Act case, when it refused to allow a company to defend against its failure to file and retain water sampling records on the grounds that it never collected the data it needed to create the records in the first place. The court ruled that an ongoing duty to maintain records implies a corresponding, and continuing, duty to have those records, explaining that it would not allow the company “to escape liability . . . by failing at the outset to sample and to create and retain the necessary . . . records.” *Id.* See also, e.g., *Big Bear Super Mkt. No. 3 v.*

*INS*, 913 F.2d 754, 757 (9th Cir. 1990) (per curiam) (statutory and regulatory scheme described by the court as requiring companies to “maintain” documents is interpreted to impose a “continuing duty” on those companies “to prepare and make” the documents in the first instance); *Park v. Comm’r of Internal Revenue*, 136 T.C. 569, 574 (U.S. Tax Ct. 2011) (noting that a party that did not create required records thereby failed to “keep” those records), *rev’d and remanded on other grounds*, 722 F.3d 384 (D.C. Cir. 2013).

The “make, keep, and preserve” and “make available” language in section 8(c)(1) similarly envisions a continuing duty to record and provides additional support for the Agency’s interpretation of the “maintain accurate records” language in section 8(c)(2). The corresponding authorization to the Secretary to prescribe such recordkeeping regulations as he considers “necessary or appropriate” emphasizes the breadth of the Secretary’s discretion in implementing the statute. As mentioned previously, “keep” is a synonym for “maintain,” and both words imply a continued course of conduct, as of course does “preserve.”<sup>2</sup> See e.g., *Powerstein v. Comm’r of Internal Revenue*, T.C. Memo 2011–271, 2011 WL 5572600, at \*13 (U.S. Tax Ct. Nov. 16, 2011) (interpreting statutory and regulatory requirements to “keep” tax records to mean that taxpayers must “maintain” such records); *Freedman v. Comm’r of Internal Revenue*, T.C. Memo 2010–155, 2010 WL 2942167, at \*1 (U.S. Tax Ct. July 21, 2010) (same).

The fact that Congress included the word “make” in a phrase with two other terms that both call for a continuing action suggests that “make” was also intended to signify a continuing course of conduct in the recordkeeping context. The most reasonable reading of section 8(c)(1), particularly in light of the “maintain accurate records” language in section 8(c)(2), is that the phrase “make, keep, and preserve” authorizes one continuous recordkeeping requirement that includes both the creation and the keeping of records. See, e.g., *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 809 (1989) (noting a “fundamental canon of statutory construction that the

<sup>2</sup>The legislative history of the OSH Act shows that Congress used “keep” and “maintain” synonymously. In a Senate Report, Congress described section 8(c)(2)—which talks about “maintaining” records—as “requiring employers to keep records of all work-related injuries and diseases.” S. Rep. No. 91–1282, at 31 (1970), reprinted in Subcomm. on Labor of the Comm. on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970, at 171 (1971) (emphasis added).

words of a statute must be read in their context and with a view to their place in the overall statutory scheme”).

Thus, the Secretary does not believe that section 8(c) authorizes two and only two discrete duties: A duty to create a record that can arise at only one moment in time, and a duty to preserve that record, if it should be created. Such a view would be inconsistent with the most relevant provision of the Act, section 8(c)(2), which is the provision that specifically addresses the Secretary’s authority to prescribe regulations for injury and illness recordkeeping, *i.e.*, to prescribe regulations that require employers to “maintain accurate records” of workplace illnesses and injuries. Nothing about the Congressional direction to “maintain accurate records” is naturally read as creating two entirely discrete obligations, or as conveying Congressional intent to limit the duty to make a required record to a single point in time. Records that omit work-related injuries and illnesses are not accurate, and no purpose is served by maintaining inaccurate records. Instead, Congress intended employees, and the Secretary, to have access to accurate information about injuries and illnesses occurring in workplaces.

The requirement in section 8(c)(1) that employers “make available” such records as the Secretary prescribes regarding accidents and illnesses further illustrates that section 9(c)’s statute of limitations does not limit the Secretary to acquiring only six months of injury and illness data. A regulation requiring employers, if requested, to make available accurate records showing injuries and illness that have occurred within the past few years is on its face well within the OSH Act’s grant of authority. Nothing in the statutory language suggests that the Secretary can only require employers to provide information regarding work-related injuries and illnesses that have occurred within the past six months. Such a limitation would cripple the Agency’s ability to gather complete information and to improve understanding of safety and health issues, contrary to Congressional intent. Furthermore, the duty to make accurate multi-year records available upon request arises when the request is made, and the statute of limitations therefore does not begin to run until the request is made and the employer fails to comply.<sup>3</sup>

<sup>3</sup>This does not mean that the Secretary’s authority is unconstrained. Under section 8(c)(1), the records the Secretary requires must be “necessary or appropriate” to enforcement of the Act or to gathering information regarding the causes

It therefore follows that section 8(c) of the Act authorizes the Secretary to enact regulations that impose a continuing obligation on employers to make and maintain accurate records of work-related illnesses and injuries. Not only are such recordkeeping regulations expressly called for by the language of section 8(c), but they are also consistent with Congressional intent and the purpose of the OSH Act. The Supreme Court recognizes a “familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes.” *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). And reading the statute in light of its protective purposes further supports the Secretary’s interpretation that the Act calls for treating the duty to record injuries and illnesses as a continuing obligation. *See, e.g., United States v. Advance Mach. Co.*, 547 F.Supp. 1085, 1090–91 (D.Minn. 1982) (requirement in Consumer Product Safety Act to “immediately inform” the government of product defects is read as creating a continuing obligation to report because any other reading would frustrate the statute’s goal of protecting the public from hazards).

Finally, the legislative history of the OSH Act also demonstrates that Congress wanted employers to have accurate injury and illness records both for the purpose of making workplaces safer and healthier, and for the purpose of allowing the Agency to study the nation’s occupational safety and health problems. As the House Committee on Education and Labor noted, before passage of the OSH Act it was impossible to know the extent of national occupational safety and health issues due to variability in state reporting measures; thus, Congress viewed it as an “evident Federal responsibility” to provide for “[a]ccurate, uniform reporting standards.” H.R. Rep. No. 91–1291, at 15 (1970), *reprinted in* Subcomm. on Labor of the Comm. on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970, at 845 (1971). *See also* 29 U.S.C. 673(a) (“The Secretary shall compile accurate statistics on work injuries and illnesses . . . .”); *Sec’y of Labor v. Gen. Motors Corp.*, 8 BNA OSHC 2036, 2039

or prevention of occupational accidents or illnesses. 29 U.S.C. 657(c)(1). Under section 8(d), the Secretary must obtain information with a minimum burden on employers, especially small businesses, and reduce unnecessary duplication to the maximum extent feasible. 29 U.S.C. 657(d). Moreover, under the Paperwork Reduction Act, the Secretary and the Office of Management and Budget must determine that a recordkeeping requirement will have practical utility and will not be unduly burdensome. 44 U.S.C. 3506(c)(3).

(Rev. Comm’n 1980) (“Examination of the legislative history of [sections 8(c)(1) and 8(c)(2)] . . . shows a clear congressional intent that th[e] reporting requirement be interpreted broadly in order to develop information for future scientific use.”).

## 2. The OSH Act’s Statute of limitations Does Not Define OSHA Violations, or Address When Violations Occur, Nor Does the Language in Section 9(c) Preclude Continuing Recordkeeping Violations

As explained previously, it is section 8(c) of the OSH Act that determines the nature and scope of employers’ recordkeeping obligations. The statute of limitations in section 9(c) deals only with the question of *when* OSHA can cite a violation; it says nothing about what *constitutes* a violation, or when a violation *occurs*. A violation is a breach of a duty, and the question of what duties the Secretary may prescribe must logically be dealt with prior to addressing the statute of limitations. Section 9(c) cannot be read as prohibiting the Secretary from imposing continuing recordkeeping obligations on employers covered by the OSH Act, when the text and legislative history of the Act show that section 8(c) authorizes the Secretary to create such obligations. Thus, the OSH Act’s statute of limitations simply sets the period within which legal action must be taken *after* the obligation ceases to continue or the employer comes into compliance. *See, e.g., Inst. For Wildlife Prot. v. United States Fish & Wildlife Serv.*, No. 07–CV–358–PK, 2007 WL 4117978, at \*6 (D.Or. Nov. 16, 2007) (declining to apply applicable statute of limitations to “nullify . . . [the government’s] ongoing duty to designate critical habitat” for an endangered species “and . . . insulate the agency from challenges to any continued inaction”).

In any event, “statutes of limitation in the civil context are to be strictly construed in favor of the Government against repose,” *Interamericas*, 111 F.3d at 382 (citing *Badaracco v. Comm’r of Internal Revenue*, 464 U.S. 386 (1984) and *E.I. Dupont De Nemours & Co. v. Davis*, 264 U.S. 456 (1924)), and nothing in section 9(c) precludes continuing violations in recordkeeping cases. To the contrary, the language in section 9(c) is very broad, providing only that “[n]o citation may be issued . . . after the expiration of six months following the occurrence of any violation.” 29 U.S.C. 658(c). The “occurrence” of something is not necessarily a discrete event; it can encompass actions or events that continue over time. For example, one dictionary defines “occurrence” as “the

existence or presence of something.” [http://dictionary.cambridge.org/dictionary/american-english/occurrence\\_2](http://dictionary.cambridge.org/dictionary/american-english/occurrence_2). *See also, e.g., PECO Energy Co. v. Boden*, 64 F.3d 852, 856–57 (3d Cir. 1995) (scheme of repeated thefts over the span of six years constituted a single “occurrence” such that only one insurance deductible applied to the resulting loss). Similarly, the term “occurrence of any violation” in section 9(c) does not mean that an OSHA violation is necessarily a discrete event that takes place at one, and only one, point in time.

Had Congress wanted the statute of limitations to run from the time a violation *first* occurred, it could have used language so stating. Indeed, Congress has used language more readily susceptible to that interpretation in other statutes. *See, e.g., the Multiemployer Pension Plans Amendments Act*, 29 U.S.C. 1451(f)(1) (statute of limitations runs from “the date on which the cause of action arose”); the Federal Employers’ Liability Act, 45 U.S.C. 56 (statute of limitations runs from “the day the cause of action accrued”); the general statute of limitations governing civil actions against the United States, 28 U.S.C. 2401(a) (claims barred unless “filed within six years after the right of action first accrues”).

Neither OSHA nor the Commission has ever treated section 9(c) as precluding continuing violations. Indeed, continuing violations are common in the OSHA context, with the Commission taking the position that violations of OSHA requirements, including recordkeeping violations, generally continue as long as employees are exposed to the non-complying conditions. *See, e.g., Sec’y of Labor v. Arcadian Corp.*, 20 BNA OSHC 2001 (Rev. Comm’n 2004) (violation of the OSH Act’s general duty clause stemming from the unsafe operation of a urea reactor); *Johnson Controls*, 15 BNA OSHC 2132 (recordkeeping); *Sec’y of Labor v. Safeway Store No. 914*, 16 BNA OSHC 1504 (Rev. Comm’n 1993) (hazard communication program and material safety data sheets); *Sec’y of Labor v. Yelvington Welding Serv.*, 6 BNA OSHC 2013 (Rev. Comm’n 1978) (fatality reporting); *Cent. of Georgia R.R.*, 5 BNA OSHC 1209 (housekeeping). Indeed, the *Volks II* panel also acknowledged that the duties to preserve records, to train employees, and to correct unsafe machines may continue. 675 F.3d 756, at 758. The OSH Act simply would not achieve Congress’ fundamental objectives if basic employer obligations were not continuing.



These cases reflect fundamental OSH Act principles. Safety and health standards are rules that require, *inter alia*, “conditions.” 29 U.S.C. 652(8). The absence of a required condition violates the standard. It does not matter when the absence first arose or how long it has persisted. If a condition is required and is not present (e.g., a machine is not guarded or a hazardous materials container is not labeled), a violation occurs and a citation requiring abatement may be issued within six months of the observed noncompliance. This construction follows from the language of the Act and is essential to the Secretary’s ability to enforce compliance. Accordingly, continuing obligations and violations are a regular occurrence under the OSH Act. Nothing in section 9(c), which applies equally to standards and recordkeeping violations, bars them.

In addition, continuing violations have been found to exist under other laws with statutes of limitations that contain language similar to that in section 9(c) of the OSH Act. For example, in *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002), the Supreme Court addressed the statute of limitations in Title VII of the Civil Rights Act of 1964, which precludes the filing of claims a certain number of days after the alleged unlawful employment practice “occurred.” See 42 U.S.C. 2000e–5(e)(1). The Court concluded that the statute authorized application of a continuing violations doctrine in hostile work environment cases, holding that in such cases, an unlawful employment action can “occur” over a series of days or even years. *Morgan*, 536 U.S. at 116–20. Similarly, in *Havens Realty Corporation v. Coleman*, 455 U.S. 363 (1982), the Supreme Court found continuing violations of the Fair Housing Act, which at the time required the commencement of civil actions within 180 days “after the alleged discriminatory housing practice occurred.” And in *Postow*, 627 F.2d 1370, the D.C. Circuit found a continuing violation of the Truth-in-Lending Act, which, at 15 U.S.C. 1640(e), provides that actions must be brought within one year from the date of the “occurrence” of the violation. The language of section 9(c) of the OSH Act is at least equally receptive to continuing violations, since it allows citation within six months of “the occurrence of any violation.” “Occurrence” of “any” violation is open-ended language that does not suggest that a violation can exist at only one moment of time.

Notably, even the *Volks II* panel appeared to recognize that the word “occurrence” does not necessarily have a single fixed meaning, stating that “[o]f course, where . . . a company continues to subject its employees to unsafe machines . . . or continues to send its employees into dangerous situations without appropriate training . . . OSHA may be able to toll the statute of limitations on a continuing violations theory since the dangers created by the violations persist.” 675 F.3d at 758. The court also stated that a violation of the record-retention requirement—through the loss or destruction of a previously-created record—is a violation that continues from the time of the loss or destruction until the conclusion of the five-year retention period. *Id.* at 756.

Moreover, continuing violations have been found even under statutes of limitations that contain language that is arguably *less* receptive to continuing violations than section 9(c); courts implicitly recognize that the underlying legal requirement, not the statute of limitations, determines whether there is a continuing legal obligation. For example, courts have found continuing violations of various laws that are governed by the general five-year statute of limitations for criminal cases in 18 U.S.C. 3282(a), which requires initiation of an action “within five years . . . after . . . [the] offense shall have been committed.” See, e.g., *United States v. Bell*, 598 F.3d 366, 368–69 (7th Cir. 2010) (continuing violation of child support payment requirements), *overruled on other grounds*, *United States v. Vizcarra*, 668 F.3d 516 (7th Cir. 2012); *Edelkind*, 525 F.3d 388 (same); *United States v. Are*, 498 F.3d 460 (7th Cir. 2007) (crime of being found in the United States after deportation is a continuing violation).

The D.C. Circuit has suggested that suits alleging a continuing failure to act are permissible even under the general statute of limitations governing civil actions against the United States (28 U.S.C. 2401(a)), which provides that claims are barred unless “filed within six years after the right of action first accrues.” *Wilderness Soc’y v. Norton*, 434 F.3d 584 (D.C. Cir. 2006). In *Wilderness Society*, the court intimated, but did not decide, that an agency’s failure to act in accordance with a statutory deadline for action was a continuing violation, such that a lawsuit to compel agency action would not be time barred just because it was filed more than six years after the agency first missed the statutory deadline. The court explained that because the suit “does not complain about what the agency has done but rather about what the agency

has yet to do,” it likely would not be time-barred. *Id.* at 589 (quoting *In re United Mine Workers of America Int’l Union*, 190 F.3d 545, 549 (D.C. Cir. 1999)). See also, e.g., *Padres Hacia Una Vida Mejor v. Jackson*, No. 1:11–CV–1094 AWI DLB, 2012 WL 1158753 (E.D. Cal. April 6, 2012) (28 U.S.C. 2401(a) did not bar a claim based on EPA’s ongoing failure to act on complaints of discrimination within regulatory deadlines). And the Fifth Circuit found continuing violations of the Bank Holding Company Act in a case governed by the general statute of limitations in 28 U.S.C. 2462, which requires actions to enforce civil fines, penalties, or forfeitures to be “commenced within five years from the date when the claim first accrued.” *Interamericas*, 111 F.3d 376. See also, e.g., *Newell Recycling Co. v. EPA*, 231 F.3d 204 (5th Cir. 2000) (finding a continuing violation of disposal requirements for polychlorinated biphenyls under the Toxic Substances Control Act in a case involving the general statute of limitations at 28 U.S.C. 2462); *Advance Mach Co.*, 547 F.Supp. 1085 (finding a continuing violation of the Consumer Product Safety Act in a case governed by 28 U.S.C. 2462); <sup>4</sup> *cf. Capital Tel. Co v. FCC*, 777 F.2d 868, 871 (2d Cir. 1985) (per curiam) (deferring to FCC determination that company’s “actions constituted a ‘continuing violation’” despite an applicable statute of limitations (47 U.S.C. 415(b)) requiring the filing of complaints “within two years from the time the cause of action accrues”).

Finally, concerns about stale claims have little bearing on OSHA recordkeeping cases. The Agency recognizes that statutes of limitations are designed to “keep stale claims out of the courts.” *Havens Realty*, 455 U.S. at 380. They protect parties from having to defend against stale claims and ensure that courts are not faced with “adjudicat[ing] claims that because of their staleness may be impossible to resolve with even minimum accuracy.” *Stephan v. Goldinger*, 325 F.3d 874, 876 (7th Cir. 2003). Claims generally are considered stale when so much time has passed that relevant evidence has been

<sup>4</sup> In *Gabelli v. SEC*, 133 S.Ct. 1216 (2013)—a case involving a civil enforcement action under the Investment Advisers Act—the Supreme Court held that the five-year statute of limitations in 28 U.S.C. 2462 ran from the date a fraud was complete, not from the date the government discovered the fraud. *Gabelli* does not, however, stand for the proposition that the language in 28 U.S.C. 2462 precludes application of a continuing violation theory. In *Gabelli*, the government agreed that the alleged illegal activity ended more than five years prior to the filing of the complaint, so there was no issue about the duration of the violative conduct.



lost and witnesses are no longer available or do not have reliable memories of the relevant occurrence. *Id.* But “[w]here the challenged violation is a continuing one, the staleness concern disappears.” *Havens Realty*, 455 U.S. at 380. And nothing about continuing violations in the context of OSHA recordkeeping violations undermines this general principle.

In the vast majority of OSHA cases stemming from an employer’s failure to record an injury or illness, the issues will be very straightforward. The first question will be whether a work-related injury or illness occurred that required more than a minimum level of treatment. And the second question will be whether the employer recorded the injury or illness as required by the OSHA regulations. The availability of evidence and witnesses should not be a problem on either question—especially given that even under a continuing violation theory, OSHA must cite the recordkeeping violation within six months after the end of the five-year retention period for injury and illness records.

One can ordinarily ascertain whether an injury or illness occurred, and what treatment was necessary, by looking at medical reports, workers’ compensation documents, and other relevant records, even if the affected employee or other witnesses are no longer available. In fact, OSHA’s Recordkeeping Policies and Procedure Manual, CPL 02–00–135 (Dec. 30, 2004), directs compliance officers to review medical records to determine whether an employer has failed to enter recordable injuries and illnesses on the OSHA forms. And with respect to whether the employer recorded the injury or illness, the only evidence the parties and the court will need are the employer’s OSHA Log and Incident Report Forms, which existing regulations require employers to maintain for five years. Furthermore, given that OSHA ultimately bears the burden of proving that an injury or illness occurred and the employer did not record it, the absence of documents and witnesses generally will be more prejudicial to OSHA’s case than to the employer’s defense. And, any limited staleness concerns that exist are outweighed by the fact that ongoing recordkeeping requirements are essential to fulfilling the purposes of the OSH Act. *See generally Connecticut Light & Power Co. v. Sec’y of Labor*, 85 F.3d 89, 96 (2d Cir. 1996) (“Consideration of limitations periods requires a fair and reasonable weighing of the conflicting concerns of the remedial intent of the [statute] . . . and

the desire to keep stale claims out of the courts.”).

### 3. Incomplete or Otherwise Inaccurate Records of Work-Related Illnesses and Injuries Create an Ongoing Condition Detrimental to Full Enforcement of the Act

OSHA records “are a cornerstone of the Act and play a crucial role in providing the information necessary to make workplaces safer and healthier.” *Gen. Motors Corp.*, 8 BNA OSHC at 2041. As explained previously, in **SUPPLEMENTARY INFORMATION**, Section II.B, employers must give employees (as well as OSHA and BLS) access to injury and illness records. OSHA injury and illness records are designed to be used by employers, employees, and the government to learn about the injuries and illnesses that are occurring in American workplaces. Accurate OSHA injury and illness records enable employers to identify, and correct, hazardous conditions, allow employees to learn about the hazards they face, and permit the government to determine where and why injuries are occurring so that appropriate regulatory or enforcement measures can be taken. (*See SUPPLEMENTARY INFORMATION*, Section II.B, earlier in this preamble, for a full discussion of the purposes served by OSHA injury and illness records.) Thus, Congress viewed accurate records as necessary for the enforcement of the Act. 29 U.S.C. 657(c). Inaccurate or incomplete injury and illness records, however, will leave all of the relevant parties underinformed, and thereby create an ongoing condition detrimental to full enforcement of the Act. The Commission has recognized as much. *See, e.g., Gen. Dynamics*, 15 BNA OSHC at 2131 n. 17 (recordkeeping regulations “clearly are safety- and health-related”); *Johnson Controls*, 15 BNA OSHC at 2135–36 (“[A] failure to record an occupational injury or illness . . . does not differ in substance from any other condition that must be abated pursuant to . . . occupational safety and health standards . . .”).

Nor is there any meaningful distinction to be drawn between cases involving inadequate training or unsafe machines (which may be seen as involving repeated affirmative acts, for example, sending untrained employees to work in hazardous conditions) and recordkeeping cases (which may be seen as failures to right past wrongs). The lack of access—by employers, employees and OSHA—to accurate records is as much an ongoing non-complying condition under the Act as is an untrained employee or an unguarded machine. Whether the condition was

created by an act of omission or of commission, the condition is one that continues to violate the Act until it is abated.

Moreover, under the scheme Congress established in the OSH Act, any distinction that can be drawn between overt action and inaction lacks legal significance. As the Commission recognizes, “unlike other federal statutes in which an overt act is needed to show *any* violation, the OSH Act penalizes both overt acts *and* failures to act in the face of an ongoing, affirmative duty to perform prescribed obligations.” *Volks I*, 23 BNA OSHC at 1417 n.3 (emphasis in original). *See also, e.g., Gen. Dynamics*, 15 BNA OSHC at 2130 (“[T]he Act penalizes the occurrence of noncomplying conditions which are accessible to employees and of which the employer knew or reasonably could have known. That is the only ‘act’ that the Secretary must show to prove a violation.”). That is why it is still a citable violation if an employer has left a hazardous machine unguarded for years—even though the employer has not done anything to the machine since first removing the guard. That is why it is a violation if an employer fails to label containers of hazardous chemicals or have safety data sheets on hand, regardless how long the inaction persists. And courts regularly find that a failure to act in accordance with an ongoing legal obligation constitutes a continuing violation. Such cases have included a lender’s failure to make required disclosures to a borrower (*Postow*, 627 F.2d 1370), a sex offender’s failure to register with authorities (*George*, 625 F.3d 1124), a parent’s failure to pay child support (*Edelkind*, 525 F.3d 388), an agency’s failure to comply with statutory mandates and deadlines (*Wilderness Soc’y*, 434 F.3d 584), a company’s failure to create and maintain water sampling records (*Sierra Club*, 847 F.2d 1109), and a failure on the part of the government to act on complaints of discrimination (*Padres Hacia Una Vida Mejor*, 2012 WL 1158753).

Additionally, the legislative history of the Act reflects Congress’ concern about harm resulting to employees in workplaces with incomplete records of occupational injuries and illnesses. Most notably, a report of the Senate Committee on Labor and Public Welfare stated that “[f]ull and accurate information is a fundamental precondition for meaningful administration of an occupational safety and health program.” S. Rep. No. 91–1282, at 16 (1970), *reprinted in* Subcomm. on Labor of the Comm. on Labor and Public Welfare, Legislative

History of the Occupational Safety and Health Act of 1970, at 156 (1971) (emphasis added). Additionally, a report from the House of Representatives shows that Congress recognized “comprehensive [injury and illness] reporting” as playing a key role in “effective safety programs.” H.R. Rep. No. 91–1291, at 15 (1970), *reprinted in* Subcomm. on Labor of the Comm. on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970, at 845 (1971).

Incomplete and inaccurate OSHA records therefore result in an *ongoing non-complying condition*—namely employers, employees, and the government, being denied access to information necessary to full enforcement of the Act. And this non-complying condition continues every day that the records are inaccurate.

#### 4. Interpreting the Duty To Record as a Continuing One Under the Act’s Civil, Remedial Scheme Is Entirely Consistent With the General Case Law

As touched upon previously in this notice, general case law on continuing violations also supports a continuing violation theory for OSHA recordkeeping violations. The *Volks II* majority stated that recordkeeping violations are not “the sort of conduct we generally view as giving rise to a continuing violation[.]” *i.e.*, the kind of violation “whose ‘character as a violation . . . [does] not become clear until . . . repeated during the limitations period . . . because it is . . . [the] cumulative impact . . . that reveals . . . illegality.’” *Volks II*, 675 F.3d at 757 (quoting *Taylor v. FDIC*, 132 F.3d 753, 765 (D.C. Cir. 1997)). On the other hand, all OSHA violations—including recordkeeping violations—“continue” only insofar as non-compliant conditions exist and employees are exposed to the relevant hazards. While the “cumulative impact” theory is one way to establish a continuing violation (*see, e.g., Morgan*, 536 U.S. 101 (hostile environment claims under Title VII)), established precedent recognizes an additional type of continuing violation—a violation that continues to occur on a day-by-day (or act-by-act) basis and whose illegality was clear from the beginning. *See, e.g., Edelkind*, 525 F.3d 388 (failure to pay child support is a continuing offense); *Sierra Club*, 847 F.2d 1109 (finding continuing violations of the Clean Water Act where the company failed to comply with permit requirements for reporting and record retention); *Postow*, 627 F.2d 1370 (violation of Truth-in-Lending Act’s disclosure requirements is a continuing violation).

The DC Circuit explicitly recognized the existence of these two types of continuing violation cases in *Earle*, 707 F.3d 299. The court explained that where a statute “‘imposes a continuing obligation to act, a party can continue to violate it until that obligation is satisfied and the statute of limitations will not begin to run until it does.’” *Id.* at 307 (quoting Judge Garland’s concurring opinion in *Volks II*, 675 F.3d at 763). And “[w]hether the obligation is continuing is a question of statutory construction.” *Earle*, 707 F.3d at 307. The court explained that *Postow* had found a continuing violation of the Truth-in-Lending Act because the “goals of the Act” required construing the obligation to be continuing. *Id.* So too, the goals of the OSH Act require construing the recordkeeping obligation to be continuing. The purpose of recording injuries is so that the recorded information can be used thereafter, throughout the retention and access period. Accurate and complete OSHA records enable employers, employees, and the Government to understand the hazards present in the workplace, so that corrective measures can be taken. Inaccurate and incomplete records, by contrast, are likely to be misleading.

The Secretary recognizes that one court has said that: “The Supreme Court has made clear . . . that the application of the continuing violations doctrine should be the exception, rather than the rule.” *Cherosky v. Henderson*, 330 F.3d 1243, 1248 (9th Cir. 2003) (not referring to any specific decision) (quoted in *Volks II*, 675 F.3d at 757). Even so, the Secretary believes that the language and purposes of the OSH Act make it clear that the duty to maintain and make available records is a continuing obligation for all the reasons set forth previously.<sup>5</sup>

<sup>5</sup> In *Toussie v. United States*, 397 U.S. 112 (1970), the Supreme Court stated that “the doctrine of continuing offenses should be applied in only limited circumstances since . . . ‘the tension between the purpose of a statute of limitations and the continuing offense doctrine is apparent.’” *Id.* at 115 (citations omitted). But *Toussie* was a criminal case subject to the general principle that “criminal limitations statutes are ‘to be liberally interpreted in favor of repose.’” *Id.* (emphasis added and citations omitted). *See also Diamond v. United States*, 427 F.2d 1246, 1247 (Ct. Cl. 1970) (*per curiam*) (“[T]he considerations moving the Court to decide [in *Toussie*] that the offense was not a continuing one were entwined with the criminal aspects of the matter, and the holding was limited to criminal statutes of limitations.”). In contrast, as noted previously, in **SUPPLEMENTARY INFORMATION**, Section III.B.2, OSHA civil enforcement cases are subject to the opposing principle that “statutes of limitation in the civil context are to be strictly construed in favor of the Government against repose.” *Interamericas*, 111 F.3d at 382.

#### IV. Summary and Explanation of the Proposed Rule

OSHA is proposing to amend its recordkeeping regulations, 29 CFR part 1904, to clarify that employers covered by the recordkeeping requirements have a continuing obligation to make and maintain accurate records of all recordable injuries and illnesses. This obligation continues for as long as the employer must maintain records for the year in which an injury or illness became recordable, and it does not expire if the employer fails to create a record when first required to do so.

The continuing obligation to make and maintain accurate records of work-related illnesses and injuries is in accord with longstanding OSHA policy. Thus, this proposal is not meant to impose new or additional obligations on employers covered by part 1904. Employers will not be required to make records of any injuries or illnesses for which records are not currently required; nor are the recording requirements themselves changing. As discussed at length previously, the amendments are meant simply to clarify employers’ obligations in the wake of the *Volks II* decision. The amendments being proposed consist of revisions to various sections of the regulatory text as well as changes to the titles of some sections and subparts.

As discussed in more detail later in this notice, the amendments clarify the following: (1) *OSHA 300 Log*. Employers must record every recordable injury or illness on the Log. This obligation continues through the five-year record retention-and-access period. In addition, during that period, employers must update the Log by adding cases not previously recorded and by showing changes to previously recorded cases.

(2) *OSHA 301 Incident Report*. Employers must prepare a Form 301 Incident Report for each recordable illness or injury. This obligation continues throughout the five-year retention-and-access period. Employers are not required to update the form to show changes to the case that occur after the form is initially prepared. (3) *Year-end records review; preparation certification, and posting of the Form 300A annual summary*. These ancillary tasks are intended to be performed at particular times during each year. They are not continuing obligations.

##### A. Description of Proposed Revisions

###### 1. Section 1904.0—Purpose

OSHA is proposing to revise this section to clarify and emphasize employers’ ongoing duties to make and maintain accurate records of each and

every recordable injury and illness under part 1904. The proposed new language reflects the existing requirement for employers to provide their injury and illness records to certain government representatives, and to employees and former employees and their representatives. The proposed additions to the regulatory text include language reiterating that these recordkeeping requirements are important in helping the Agency achieve its mission of providing safe and healthful working conditions for the nation's workers.

OSHA is proposing to add a new sentence at the end of this section to explain what the Agency deems to be an "accurate" record. Records will be considered "accurate" if correct and complete records are made and maintained for each and every recordable injury and illness in accordance with the provisions of part 1904. This concept is not new, as the requirement for employers to maintain accurate records is derived directly from the OSH Act, 29 U.S.C. 657(c)(2).

## 2. Subpart C—Making and Maintaining Accurate Records, Recordkeeping Forms, and Recording Criteria

OSHA is proposing to amend the title of this Subpart to better reflect the content of revised §§ 1904.4 and 1904.29, which address employers' duties to make and maintain accurate records, as well as recordkeeping forms and criteria.

### 3. Paragraph (a) of § 1904.4—Basic Requirement

OSHA is proposing to revise this paragraph to reiterate the requirement that employers make and maintain accurate records of every injury and illness that meets the recording criteria in paragraphs (a)(1) through (3) of § 1904.4. The current version of paragraph (a), which requires employers to "record" injuries and illnesses, is less explicit in expressing OSHA's intent that employers both create and keep accurate records. The proposed language is intended to express that an employer's duty includes both creating and preserving accurate records of recordable injuries and illnesses. To be accurate, these records must be correct and complete. The proposed language is also meant to reflect more closely the language of the OSH Act at 29 U.S.C. 657(c)(1) and (2). OSHA is not proposing to change the recording criteria in paragraphs (a)(1) through (3) of existing § 1904.4.

### 4. Note to Paragraph (a) of § 1904.4

OSHA is proposing to add this note to § 1904.4(a) to clarify the Agency's longstanding position that the duty to make and maintain accurate injury and illness records continues throughout the entire record-retention period set out in § 1904.33(a). This retention period runs for five years from the end of the calendar year that the records cover. An employer who fails to create a required record during the seven-day period provided for in § 1904.29(b)(3) must still create the record so long as the retention period has not elapsed. Given this ongoing duty, OSHA may issue recordkeeping citations to employers that have incomplete or otherwise inaccurate records at any point during the retention period, and, under the six-month statute of limitations set out in 29 U.S.C. 658(c), for up to six months thereafter.

### 5. Paragraph (b)(3) of § 1904.29—How quickly must each injury or illness be recorded?

Proposed paragraph (b)(3) of § 1904.29 states the Agency's long-standing requirement that each and every recordable injury and illness must be recorded on both the OSHA 300 Log for that year and a 301 Incident Report within seven calendar days of when the employer gets information that the injury or illness occurred. OSHA is proposing minor wording changes to the first sentence of existing paragraph (b)(3). The remainder of proposed paragraph (b)(3) is designed to make clear that employers that miss this seven-day recording deadline are not excused from the recording obligations after the seven-day period expires. Thus the obligation to record continues until the five-year retention period in § 1904.33(a) has run.

OSHA has always interpreted the seven-day recording period in the existing recordkeeping rules as a grace period when an employer can gather information on an injury or illness without fear of being cited by OSHA for a failure to record. Similarly, OSHA has always interpreted the obligation to record as continuing throughout the record retention period. The amendments to this paragraph simply clarify OSHA's long-held positions.

### 6. Section 1904.32—Year-End Review and Annual Summary

OSHA is proposing to amend the title of this section to more accurately describe the topics covered by § 1904.32, which include an employer's year-end review of records.

### 7. Paragraph (a) of § 1904.32—Basic Requirement

OSHA is proposing revisions to paragraph (a)(1) of § 1904.32 to make clear that employers must examine each year's OSHA 300 Log at the end of the year to ensure that each and every recordable injury and illness is recorded on the Log, and that each entry is accurate. If an employer discovers, during this review, that an injury or illness is missing or that any aspect of an entry is inaccurate, the employer must correct the deficiency.

The Agency is also proposing a new paragraph (a)(2) for § 1904.32. This proposed paragraph provides that after reviewing and verifying the Log entries under § 1904.32(a)(1), employers must verify that all entries on the Log are accurately recorded on OSHA 301 Incident Reports. Proposed paragraph (a)(2) clarifies that if an employer discovers, during the § 1904.32(a)(1) review, that an injury or illness was initially left off of the OSHA 300 Log, the employer must both add it to the log and create an accurate Incident Report for that injury or illness.

OSHA is proposing to move the language from existing paragraph (a)(2) in § 1904.32 to proposed paragraph (a)(3) in the same section. The Agency is proposing to add a clause to that paragraph to explain that the annual summary should be created only after an employer verifies the accuracy of the Log. This language is for clarification purposes only and does not add any new compliance requirements. OSHA is also proposing to renumber existing paragraphs (a)(3) and (4) of § 1904.32 as paragraphs (a)(4) and (5), respectively. The Agency is not proposing any substantive changes to these provisions.

The specific tasks required of employers under § 1904.32(a)—to conduct a year-end review of the Log, and to prepare, certify and post the annual summary—are in addition to the duties described elsewhere in part 1904, and do not supersede or modify them. These other duties include the fundamental continuing obligation for employers to ensure that Logs are accurate and complete and that all recordable cases are included on them. The specific steps required under § 1904.32(a) are supplementary tasks designed to help ensure that employers are maintaining accurate records. These supplementary tasks are to be performed at specified times (at the end of each calendar year, and from February 1 to April 30 for posting). Failure to perform one of these supplementary tasks by the required deadline or during the required time period is a violation of § 1904.32

that may be cited during the following six months. See *Volks II*, 675 F.3d at 761–62 (concurring opinion).

8. Paragraph (b)(1) of § 1904.32—How extensively do I have to review the OSHA 300 Log at the end of the year?

OSHA is proposing to amend paragraph (b)(1) of § 1904.32 to reflect the proposed revisions to § 1904.32(a)(1). The proposed changes to paragraph (b)(1) reiterate that employers must review the Log and its entries sufficiently to verify that all recordable injuries and illnesses for the relevant year are entered, and that those entries are accurate. In addition, OSHA is proposing one minor, non-substantive change to the heading of existing paragraph (b)(1).

9. Section 1904.33—Retention and Maintenance of Accurate Records

OSHA is proposing to update the title of this section to more accurately reflect the obligations described in proposed § 1904.33.

10. Paragraph (b)(1) of § 1904.33—Other than the obligation identified in § 1904.32, do I have further recording duties with respect to OSHA 300 Logs and 301 Incident Reports during the five-year retention period?

OSHA is proposing to amend the heading for this paragraph to reflect that employers have recording duties with respect to Incident Reports, as well as OSHA 300 Logs, during the five-year retention period. The Agency is also proposing to amend the text of paragraph (b)(1) of § 1904.33 to provide an introduction to the paragraphs that follow.

OSHA is proposing to add paragraphs (b)(1)(i) through (iii) to § 1904.33 to provide further guidance to employers on the existing duties to update Log entries and Incident Reports. Proposed paragraph (b)(1)(i) clarifies employers' duties to make and keep OSHA 300 Log entries for each and every recordable injury and illness that occurs during the year to which the Log relates. There must also be an associated Incident Report for each illness and injury recorded on the Log. As the proposed language makes explicit, these duties continue until the five-year retention period ends; thus, an employer may be required to make an entry on the OSHA Log or fill out an Incident Report for an illness or injury that occurred several years ago.

Proposed paragraph (b)(1)(ii) addresses changes that must be made to OSHA Logs throughout the retention period. As emphasized throughout this proposed rule, employers' OSHA 300

Logs must be accurate. This means that if an employer discovers that any aspect of a previously-recorded case (such as the classification, description, or outcome of the case) has changed, or that a case was recorded incorrectly at the outset, the employer must amend the entry to reflect the new or corrected information.

Proposed paragraph (b)(1)(iii) reiterates the requirement in proposed paragraph (b)(1)(i) that there must be an Incident Report for each and every recordable injury and illness. The primary purpose of proposed paragraph (b)(1)(iii) is to explain that employers are not required to update or correct existing Incident Reports during the retention period. This principle is currently stated in existing § 1904.33(b)(3).

These proposed requirements are not intended to change, but rather to state more clearly, what is required under the existing rule. The existing rule provides that during the five-year retention period, the employer must update the Logs to include newly discovered recordable injuries and illnesses and to show changes that have occurred in previously recorded cases. It does not explicitly state the employer's continuing duty to record cases it had previously learned about. Judge Garland's concurring opinion in *Volks II* drew the inference that the regulation does not create a continuing obligation to record such cases, as compared with newly discovered cases. *Volks II*, 675 F.3d at 760–61. This was not the Secretary's intention. At the time the current regulation was issued in 2001, it was well-established law in the Commission that employers had a continuing duty to record these older cases on their Logs. See *Gen. Dynamics*, 15 BNA OSHC 2122; *Johnson Controls*, 15 BNA OSHC 2132. Nothing in the 2001 rulemaking suggested that the Agency had any intention of changing this fundamental requirement.

The existing recordkeeping regulations explain that the employer must promptly record cases on the 300 Log, and that, throughout the five-year retention period, if the employer discovers a case that occurred previously, it must record that case on the applicable Log. As with nearly all rules, this rule is written to describe compliance. As with other rules, it does not assume noncompliance, in other words, it does not explicitly state what an employer must do if it fails to record a case it knows about. By stating that newly discovered cases should be recorded, the Secretary did not intend to signify that other cases the employer had learned about need not be recorded.

The command to update was not intended to signify permission to ignore knowledge that had been acquired earlier.

The current regulations also state that the employer is *not* required to "update" Form 301 Incident Reports. In *Volks II*, Judge Garland read this to mean that employers do not have to create a form at all, once the initial seven-day recording period is over. See *Volks II*, 675 F.3d at 760–61 (concurring opinion). That was not the Secretary's intention. The intent was to distinguish between the Log, which employers must update to reflect new and changed information, and the 301 Form, which employers do not need to update. (The Secretary explained that although updating the Log would provide useful, accurate information, updating Incident Reports would not enhance the information in the employer's records sufficiently to warrant the additional burden that would be associated with such a requirement. See 66 FR at 6050, January 19, 2001.) The fact that the Agency does not require employers to update Incident Reports does not mean that the Agency does not require employers to create the forms in the first place. The language in the proposed rule clarifies this.

11. Paragraph (b)(2) of § 1904.33—Do I have to make additions or corrections to the annual summary during the five-year retention period?

OSHA is proposing minor changes to paragraph (b)(2) of § 1904.33. These changes are not substantive. Neither the proposed nor the existing rules require employers to update or make changes to annual summaries during the five-year retention period.

12. Paragraph (b)(3) of § 1904.33

OSHA is proposing to delete existing paragraph (b)(3). In the proposal, this paragraph has been moved, in slightly modified form, to paragraph (b)(1)(iii) in § 1904.33.

13. Paragraph (b)(2) of § 1904.35—Do I have to give my employees and their representatives access to the OSHA injury and illness records?

Paragraph (b)(2) of existing § 1904.35 addresses employee access to records created under part 1904. OSHA is proposing only one minor change to this paragraph—the addition of the word "accurate" to describe the records to which employees, former employees, and their representatives must be given access. Accurate records are described in proposed § 1904.0.

14. Paragraph (b)(2)(iii) of § 1904.35—If an employee or representative asks for access to the OSHA 300 Log, when do I have to provide it?

In proposed paragraph (b)(2)(iii) of § 1904.35, OSHA is simply adding the term “accurate” to describe the OSHA 300 Logs to which employees, former employees, and their representatives must be given access. Accurate records are described in proposed § 1904.0. Records are required so they can be used, and records must be accurate if they are to serve this purpose. The duty to provide an accurate record upon request arises when the request is made, not before, so the six-month statute of limitations cannot begin to run until the request is made.

15. Subpart E—Reporting Accurate Fatality, Injury, and Illness Information to the Government

OSHA is proposing to revise the title of Subpart E to more precisely reflect the requirement in the Subpart that government representatives be given access to *accurate* fatality, injury, and illness information.

16. Section 1904.40—Providing Accurate Records to Government Representatives

OSHA is proposing to revise the title of § 1904.40 to reflect the proposed changes to paragraph (a) of that section.

17. Paragraph (a) of § 1904.40—Basic Requirement

OSHA is proposing to add the term “accurate” to paragraph (a) of § 1904.40(a) to reflect OSHA’s long-standing expectation that employers provide government representatives with *accurate* records upon request. OSHA is also proposing some non-substantive wording changes to this paragraph.

## V. State Plans

The 27 States and U.S. Territories with their own OSHA-approved occupational safety and health plans must adopt a rule comparable to any amendments that Federal OSHA ultimately promulgates to 29 CFR part 1904. The States and U.S. Territories with OSHA-approved occupational safety and health plans covering private employers and State and local government employees are: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. In addition, five States and U.S. Territories have OSHA-approved State plans that

apply to State and local government employees only: Connecticut, Illinois, New Jersey, New York, and the Virgin Islands.

Under 29 CFR 1952.4(a), States with approved occupational safety and health plans under section 18 of the OSH Act (29 U.S.C. 667) must adopt recordkeeping and reporting regulations that are “substantially identical” to those set forth in 29 CFR part 1904. State plans’ recording and reporting requirements for determining which injuries and illnesses must be recorded, and how they will be recorded, must be the same as the Federal requirements. 29 CFR 1952.4(a). Otherwise, State plans may promulgate injury or illness recording and reporting requirements that are more stringent than, or supplemental to, 29 CFR part 1904, after consulting with, and obtaining approval from, Federal OSHA. *Id.*

State plans may not grant variances from injury and illness recording and reporting requirements for private sector employers; any such variances must be granted by Federal OSHA. 29 CFR 1952.4(b). And a State may grant such a variance for a State or local government entity only after obtaining Federal OSHA approval. *Id.*

## VI. Preliminary Economic Analysis

The proposed revisions to OSHA’s recordkeeping rules do not constitute an economically significant regulatory action under Executive Order 12866. (See 58 FR 51735, September 30, 1993). Executive Order 12866 requires regulatory agencies to conduct an economic analysis for significant rules. A rule is economically significant under Executive Order 12866 if it will have an annual effect on the economy of \$100 million or more. This proposal does not satisfy that criterion; as explained later in this notice, neither the benefits nor the costs of the proposal equal or exceed \$100 million. OSHA has also determined that this proposal does not meet the definition of a major rule under the Congressional Review provisions of the Small Business Regulatory Enforcement Fairness Act (SBREFA). See 5 U.S.C. 804(2).

The Regulatory Flexibility Act of 1980, as amended by SBREFA in 1996, requires OSHA to determine whether the Agency’s regulatory actions will have a significant impact on a substantial number of small entities. See 5 U.S.C. 601 *et seq.* OSHA’s analysis indicates that the proposed rule will not have such an impact.

This proposal simply reiterates and clarifies employers’ existing obligations to record work-related injuries and illnesses. This proposal would not

require employers to make records of any injuries or illnesses for which records are not currently required. OSHA estimated the costs to employers of these requirements when the existing regulations were promulgated in 2001, *see* 66 FR 6081–6120, January 19, 2001. The proposed revisions impose no new cost burden.

Moreover, even if the proposed revisions to OSHA’s recordkeeping rules would result in some costs beyond those the Agency estimated in 2001, any such costs would be nominal. According to OSHA’s 2014 request to the Office of Management and Budget for an extension of the approval of the information collection requirements in the recordkeeping rules, an estimated 2.44 million injuries and illnesses must be recorded on OSHA logs each year. See [http://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201405-1218-003](http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201405-1218-003). Although OSHA accounted for the costs associated with full recordkeeping compliance as part of the 2001 rulemaking, the Agency assumes, for the sake of this analysis, a non-compliance rate under the current rule of 1 percent of recordable injuries and illnesses, or an additional 24,400 injuries and illnesses that would be recorded as a result of the proposal. (In OSHA’s view, this is a high, or conservative, estimate.)

In 2014, OSHA prepared a Final Economic Analysis for a final rule addressing the industries entitled to a partial exemption from recordkeeping requirements and the reporting of injuries and fatalities to the Agency. In that analysis, OSHA estimated that it takes .38 of an hour to record an injury or illness on all required OSHA forms, taking into account requirements for providing access to records. *See* 79 FR 56130, 56165 (September 18, 2014). And according to the 2014 ICR, the average hourly rate for an Occupational Health and Safety Specialist (Standard Occupational Classification code 29–9011) is estimated to be \$46.72 (which includes a 43% addition for benefits). See [http://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201405-1218-003](http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201405-1218-003). This means that the total estimated cost of preparing OSHA records is \$17.75 per injury or illness.

Thus, if 24,400 cases would be newly recorded as a result of the proposal, the total cost associated with this regulatory action would be 24,400 times \$17.75, or approximately \$433,100 per year. (The Agency notes that if it makes the even more conservative assumption that 5 percent of 2.44 million injuries and illnesses (122,000) would be newly recorded as a result of the proposal, the total estimated cost of the proposed

rule, across all affected employers, would be under \$2.2 million per year.)

Just as there are no (or minimal) new costs associated with this proposal, the proposal will result in no new economic benefits. OSHA believes the proposed revisions to the recordkeeping rules are technologically feasible because they do not require employers to perform any actions that they are not performing under existing requirements. And because the proposal does not impose any significant new compliance costs, the Agency deems it economically feasible.

#### VII. Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (as amended), OSHA examined the regulatory requirements of the proposed rule to determine if they would have a significant economic impact on a substantial number of small entities. As indicated in Section VI, Preliminary Economic Analysis, earlier in this notice, the proposed rule is expected to have no effect, or at most a nominal effect, on compliance costs and regulatory burden for employers, whether large or small. Accordingly, the Agency certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities.

#### VIII. Environmental Impact Assessment

OSHA has reviewed the proposed rule in accordance with the requirements of the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*), the regulations of the Council on Environmental Quality (40 CFR parts 1500 through 1508), and the Department of Labor's NEPA procedures (29 CFR part 11). The Agency finds that the revisions included in the proposal would have no major negative impact on air, water, or soil quality, plant or animal life, the use of land or other aspects of the environment. And recordkeeping and reporting requirements normally qualify for categorical exclusion from NEPA requirements in any event. *See* 29 CFR 11.10(a).

#### IX. Federalism

OSHA reviewed this proposed rule in accordance with the most recent Executive Order on Federalism (Executive Order 13132, 64 FR 43255, August 10, 1999). This Executive Order requires that Federal agencies, to the extent possible, refrain from limiting State policy options, consult with States prior to taking any actions that would restrict State policy options, and take such actions only when clear

constitutional authority exists and the problem is national in scope. Executive Order 13132 provides for preemption of State law only with the expressed consent of Congress. Any such preemption must be limited to the extent possible. Because this proposed rulemaking action involves a regulation that is not an occupational safety and health standard under section 6 of the OSH Act, it does not preempt State law. *See* 29 U.S.C. 667(a). The effect of a final rule on states and territories with OSHA-approved occupational safety and health plans is discussed previously in Section V, State Plans.

#### X. Unfunded Mandates

OSHA cannot enforce compliance with its regulations or standards on "any State or political subdivision of a State." 29 U.S.C. 652(5). Under voluntary agreement with OSHA, some States enforce compliance with their State standards on public sector entities, and these agreements specify that these State standards must be equivalent to OSHA standards. But the proposed rule does not involve any unfunded mandates being imposed on any State or local government entity. Moreover, as discussed previously, OSHA estimates that there are no, or minimal, compliance costs associated with the proposed rule. Therefore, this proposed rule would not impose a Federal mandate on the private sector in excess of \$100 million in expenditures in any one year. Thus, OSHA certifies that this proposed rule is not a significant regulatory action within the meaning of Section 202 of the Unfunded Mandates Reform Act (2 U.S.C. 1532).

#### XI. Consultation and Coordination With Indian Tribal Governments

OSHA reviewed this proposed rule in accordance with Executive Order 13175 (65 FR 67249, November 6, 2000) and determined that it does not have "tribal implications" as defined in that order. The proposed rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.

#### XII. Public Participation

Recordkeeping requirements promulgated under the Occupational Safety and Health Act of 1970 (OSH Act) are regulations, not standards. Therefore, this rulemaking is governed by the notice and comment requirements in the Administrative Procedure Act (APA), 5 U.S.C. 553, rather than by section 6(b) of the OSH

Act (29 U.S.C. 655(b)) and 29 CFR part 1911 (both of which apply only to promulgating, modifying or revoking occupational safety or health standards). The OSH Act requirement for the Agency to hold an informal public hearing on a proposed rule, when requested, does not apply to this rulemaking. *See* 29 U.S.C. 655(b)(3).

The APA, which governs this rulemaking, does not require a public hearing; instead, it states that the agency must "give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. 553(c). To promulgate a proposed regulation, the APA requires the Agency to provide the terms of the proposed rule (or a description of those terms) and specify the time, place, and manner of rulemaking proceedings. *See* 5 U.S.C. 553(b). The APA does not specify a minimum period for submitting comments. In accordance with the goals of Executive Order 12866, OSHA is providing 60 days for public comment (*see* section 6(a)(1) of Executive Order 12866).

Public Submissions: OSHA invites comments on all aspects of the proposed rule. OSHA will carefully review and evaluate any comments, information, or data received, as well as all other information in the rulemaking record, to determine how to proceed.

When submitting comments, please follow the procedures specified in the sections titled **DATES** and **ADDRESSES** of this document. The comments should clearly identify the provision of the proposal being addressed, the position taken with respect to each issue, and the basis for that position. Comments, along with supporting data and references, submitted by the end of the specified comment period will become part of the rulemaking record, and will be available for public inspection at the Federal eRulemaking Portal (<http://www.regulations.gov>) and at the OSHA Docket Office, 200 Constitution Avenue NW.—Room N-2625, Washington, DC 20210. (See the section titled **ADDRESSES** of this document for additional information on how to access these documents.)

#### XIII. The Paperwork Reduction Act of 1995

The information collection requirements contained in 29 CFR part 1904 Recording and Reporting Occupational Injuries and Illnesses have been approved by OMB and have been assigned OMB control number 1218-0176. This proposal simply reiterates



and clarifies employers' existing obligations to record and maintain work-related injuries and illnesses and does not add any new collection of information requirements. Therefore, there are no increases or decreases to the Recording and Reporting Occupational Injuries and Illnesses burden hour and cost estimates. The Agency solicits comments on this determination, and on the following items:

- Whether the revised collection of information requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and cost) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility and clarity of the information collected; and
- Ways to minimize the compliance burden on employers, for example, by using automated or other technological techniques for collecting and transmitting information.

As required by 5 CFR 1320.5(a)(1)(iv) and 1320.8(d)(2), the following paragraphs provide information about this ICR:

*Title:* 29 CFR part 1904 Recordkeeping and Reporting Occupational Injuries and Illnesses (29 CFR part 1904).

*Description of the ICR:* The Occupational Safety and Health Act and 29 CFR part 1904 require that certain employers generate, maintain, and post records of job-related injuries and illnesses; and report to OSHA any work-related incident resulting in the death of the worker and work-related incidents resulting in in-patient hospitalization, amputation or loss of an eye.

*Summary of the Collections of Information:* Completion of the OSHA Forms 300 and 301; Entry on privacy concern case confidential list; Complete, certify and post OSHA Form 300A, Employee access to OSHA Forms 300 and 301; Reporting fatalities/catastrophes to OSHA; Requests for variances.

*Number of respondents:* 1,594,040.

*Frequency of responses:* Frequency of response varies depending on the specific collection of information.

*Number of responses:* 6,312,003.

*Average time per response:* Ranges from 58 minutes to complete, certify and post Form 300A to five minutes for employers to allow employees, former employees, or employee representatives access to records being maintained by 29 CFR part 1904.

*Estimated total burden hours:* 2,881,842.

*Estimated costs (capital-operation and maintenance):* 0.

Members of the public who wish to comment on the Agency's revised collection of information must send their written comments to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Department of Labor, OSHA (please reference control number 1218-0176 in order to help ensure proper consideration), Office of Management and Budget, Room 10235, Washington, DC 20503, Fax: 202-395-5806 (this is not a toll-free number), email: [OIRA\\_submission@omb.eop.gov](mailto:OIRA_submission@omb.eop.gov). The Agency encourages commenters also to submit their comments related to the Agency's clarification of the collection of information requirements to the rulemaking docket (Docket Number OSHA-2015-0006) along with their comments on other parts of the proposed rule. For instructions on submitting these comments to the rulemaking docket, see the sections of this **Federal Register** document titled **DATES** and **ADDRESSES**. You also may obtain an electronic copy of the complete ICR by visiting the Web page at <http://www.reginfo.gov/public/do/PRAMain> and scrolling under "Currently Under Review" to "Department of Labor (DOL)" to view all of the DOL's ICRs, including those ICRs submitted for proposed rulemakings. To make inquiries, or to request other information, contact Mr. Todd Owen, Directorate of Standards and Guidance, OSHA, Room N-3609, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693-2222.

OSHA notes that a federal agency cannot conduct or sponsor a collection of information unless it is approved by OMB under the PRA and displays a currently valid OMB control number, and the public is not required to respond to a collection of information unless the collection of information displays a currently valid OMB control number. Also, notwithstanding any other provision of law, no person shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number.

#### List of Subjects in 29 CFR Part 1904

Health statistics, Occupational safety and health, Safety, Reporting and recordkeeping requirements, State plans.

#### Authority and Signature

This document was prepared under the direction of David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor. It is issued pursuant to 29 U.S.C. 657, 673; 5 U.S.C. 553; and Secretary of Labor's Order No. 1-2012 (77 FR 3912, January 25, 2012).

Signed at Washington, DC, on July 16, 2015.

**David Michaels,**

*Assistant Secretary of Labor for Occupational Safety and Health.*

Accordingly, the Occupational Safety and Health Administration proposes that part 1904 of title 29 of the Code of Federal Regulations be amended as follows:

#### PART 1904—RECORDING AND REPORTING OCCUPATIONAL INJURIES AND ILLNESSES

- 1. Revise the authority citation for part 1904 to read as follows:

**Authority:** 29 U.S.C. 657, 658, 660, 666, 669, 673, Secretary of Labor's Order No. 3-2000 (65 FR 50017), or 1-2012 (77 FR 3912), and 5 U.S.C. 553.

- 2. Revise § 1904.0 to read as follows:

#### § 1904.0 Purpose.

The purpose of this rule (part 1904) is to require employers to make and maintain accurate records of and report work-related fatalities, injuries, and illnesses, and to make such records available to the Government and to employees and their representatives so that they can be used to secure safe and healthful working conditions. For purposes of this part, accurate records are records of each and every recordable injury and illness that are made and maintained in accordance with the requirements of this part.

**Note to § 1904.0:** Recording or reporting a work-related injury, illness, or fatality does not mean that the employer or employee was at fault, that an OSHA rule has been violated, or that the employee is eligible for workers' compensation or other benefits.

#### Subpart C—Making and Maintaining Accurate Records, Recordkeeping Forms, and Recording Criteria

- 3. Revise the heading of subpart C as set forth above.
- 4. In § 1904.4, revise paragraph (a) introductory text and add a note to § 1904.4(a) to read as follows:

#### § 1904.4 Recording criteria.

(a) *Basic requirement.* Each employer required by this part to keep records of fatalities, injuries, and illnesses must, in accordance with the requirements of

this part, make and maintain an accurate record of each and every fatality, injury, and illness that:

\* \* \* \* \*

**Note to § 1904.4(a):** This obligation to make and maintain an accurate record of each and every recordable fatality, injury, and illness continues throughout the entire record retention period described in § 1904.33.

\* \* \* \* \*

■ 5. Revise § 1904.29(b)(3) to read as follows:

**§ 1904.29 Forms.**

\* \* \* \* \*

(b) \* \* \*

(3) *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 within seven (7) calendar days of receiving information that the recordable injury or illness occurred. A failure to meet this deadline does not extinguish your continuing obligation to make a record of the injury or illness and to maintain accurate records of all recordable injuries and illnesses in accordance with the requirements of this part. This obligation continues throughout the entire record retention period described in § 1904.33. See §§ 1904.4(a); 1904.32(a)(1); 1904.33(b)(1); and 1904.40(a).

\* \* \* \* \*

■ 6. Revise the heading and paragraphs (a) and (b)(1) of § 1904.32 to read as follows:

**§ 1904.32 Year-end review and annual summary.**

(a) *Basic requirement.* At the end of each calendar year, you must:

(1) Review that year's OSHA 300 Log to verify that it contains accurate entries for all recordable injuries and illnesses that occurred during the year, and make any additions or corrections necessary to ensure its accuracy;

(2) Verify that each injury and illness recorded on the 300 Log, including any injuries and illnesses added to the Log following your year-end review pursuant to § 1904.32(a)(1), is accurately recorded on a corresponding 301 Incident Report form;

(3) After you have verified the accuracy of the Log, create an annual summary of injuries and illnesses recorded on the Log;

(4) Certify the summary; and

(5) Post the summary.

(b) \* \* \*

(1) *How extensively do I have to review the OSHA 300 Log at the end of the year?* You must review the Log and its entries as extensively as necessary to

verify that all recordable injuries and illnesses that occurred during the year are entered and that the Log and its entries are accurate.

\* \* \* \* \*

■ 7. Revise the heading and paragraph (b) of § 1904.33 to read as follows:

**§ 1904.33 Retention and maintenance of accurate records.**

\* \* \* \* \*

(b) *Implementation—(1) Other than the obligation identified in § 1904.32, do I have further recording duties with respect to the OSHA 300 Logs and 301 Incident Reports during the five-year retention period?* You must make the following additions and corrections to the OSHA Log and Incident Reports during the five-year retention period:

(i) The OSHA Logs must contain entries for all recordable injuries and illnesses that occurred during the calendar year to which each Log relates. In addition, each and every recordable injury and illness must be recorded on an Incident Report. This means that if a recordable case occurred and you failed to record it on the Log for the year in which the injury or illness occurred, and/or on an Incident Report, you are under a continuing obligation to record the case on the Log and/or Incident Report during the five-year retention period for that Log and/or Incident Report;

(ii) You must also make any additions and corrections to the OSHA Log that are necessary to accurately reflect any changes that have occurred with respect to previously recorded injuries and illnesses. Thus, if the classification, description, or outcome of a previously recorded case changes, you must remove or line out the original entry and enter the new information; and

(iii) You must have an Incident Report for each and every recordable injury and illness; however, you are not required to make additions or corrections to Incident Reports during the five-year retention period.

(2) *Do I have to make additions or corrections to the annual summary during the five-year retention period?* You are not required to make additions or corrections to the annual summaries during the five-year retention period.

■ 8. Revise paragraphs (b)(2) introductory text and (b)(2)(iii) of § 1904.35 to read as follows:

**§ 1904.35 Employee involvement.**

\* \* \* \* \*

(b) \* \* \*

(2) *Do I have to give my employees and their representatives access to the OSHA injury and illness records?* Yes, your employees, former employees,

their personal representatives, and their authorized employee representatives have the right to access accurate OSHA injury and illness records, with some limitations, as discussed below.

\* \* \* \* \*

(iii) *If an employee or representative asks for access to the OSHA 300 Log, when do I have to provide it?* When an employee, former employee, personal representative, or authorized employee representative asks for copies of your current or stored OSHA 300 Log(s) for an establishment the employee or former employee has worked in, you must give the requester a copy of the relevant and accurate OSHA 300 Log(s) by the end of the next business day.

\* \* \* \* \*

**Subpart E—Reporting Accurate Fatality, Injury, and Illness Information to the Government**

■ 9. Revise the heading of subpart E as set forth above.

■ 10. Revise the heading and paragraph (a) of § 1904.40 to read as follows:

**§ 1904.40 Providing accurate records to government representatives.**

(a) *Basic requirement.* When an authorized government representative requests the records you keep under part 1904, you must provide accurate records, or copies thereof, within four (4) business hours of the request.

\* \* \* \* \*

[FR Doc. 2015–18003 Filed 7–28–15; 8:45 am]

BILLING CODE 4510-26-P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Parts 87 and 1068**

[EPA–HQ–OAR–2014–0828; FRL–9931–43–OAR]

RIN 2060–AS31

**Proposed Finding That Greenhouse Gas Emissions From Aircraft Cause or Contribute to Air Pollution That May Reasonably Be Anticipated To Endanger Public Health and Welfare and Advance Notice of Proposed Rulemaking; Notice of Updates to Public Hearing**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Updates to public hearing.

**SUMMARY:** The Environmental Protection Agency (EPA) published the *Proposed Finding that Greenhouse Gas Emissions from Aircraft Cause or Contribute to Air Pollution that May Reasonably Be Anticipated to Endanger Public Health*