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OSHA Docket Office
Docket Number OSHA-2009-0044
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Avenue, NW, Room N-2625
Washington, DC 20210

RE: RIN 1218-AC45, Occupational Injury and Illness Recording and Reporting Requirements

Dear Docket Clerk:

On behalf of the Retail Industry Leaders Association (RILA), I respectfully submit these comments in response to the Occupational Safety and Health Administration's (OSHA) Proposed Rulemaking for Occupational Injury and Illness Recording and Reporting Requirements that was noticed in the *Federal Register* on January 29, 2010 (75 Federal Register 4728-4741). RILA recognizes the importance of accurate recordkeeping in helping the agency to address significant work-related safety and health issues. However, we are concerned about the proposed rulemaking and believe that restoring a column to the OSHA 300 Log to record work-related musculoskeletal disorders (MSD) would yield potentially misleading information about workplace injuries and illnesses. Retailers strive each day to provide a workplace that protects and prevents occupational injuries and illnesses and we want to ensure that the information your agency receives accurately reflects our challenges so that we can continue to decrease workplace injuries and illnesses.

By way of background, the Retail Industry Leaders Association is the trade association of the world's largest and most innovative retail companies. RILA promotes consumer choice and economic freedom through public policy and industry operational excellence. Its members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than \$1.5 trillion in annual sales, millions of American jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad. RILA member companies are typically committed leaders in workplace safety and want to work with OSHA to meet our shared goals of eliminating workplace injuries and illnesses.

Restoring the Musculoskeletal Disorder Column to the OSHA 300 Log

OSHA provides the following definition of a musculoskeletal disorder (MSD): "*MSD's are disorders of the muscles, nerves, tendons, ligaments, joints, cartilage, and spinal discs. MSD's do not include disorders caused by slips, trips, falls, motor vehicle accidents, or similar accidents. Examples of MSD's include: Carpal tunnel syndrome, Rotator cuff syndrome, De Quervain's disease, Trigger finger, Tarsal tunnel syndrome, Sciatica, Epidcondylitis, Tendinitis, Raynaud's phenomenon, Carpet layer's knee, Herniated spinal disc, and low back pain*".

Because of the breadth and lack of clarity inherent in this definition, RILA believes that restoring the MSD column to the OSHA 300 Log would lead to significant and complex challenges for employers.

OSHA first included this definition of a MSD in its 2001 NPRM (Section 1904.12(b)(1)). Then, as now, there is no practical guidance from the agency as to how employers would determine an appropriate diagnosis of a MSD. In addition, the definition fails to recognize the complexity of determining whether aggravation or cumulative trauma of an existing MSD condition was attributed to occupational exposure and causation instead of leisure activity outside the workplace. For example, an employee could engage in a purely recreational, non-work related activity on a weekend—such as running or extensive computer use—sustain a MSD injury, and come back to work where the normal activities of the employee's job would contribute or aggravate the pre-existing MSD, resulting in the employer reporting this on the OSHA 300 Log. Further, the definition fails to recognize the general health of an employee and how this may impact or aggravate a MSD.

RILA questions the usefulness of adding a MSD column on the OSHA 300 Log and whether it would help employers accurately track injuries and illnesses because not all injuries reported will be work-related. We urge the agency to consider that the addition of such a column could have the unintended consequence of increasing liability for businesses. For example, the average recordkeeping person in a retail setting is a store manager (not a safety expert) who could easily misinterpret an employee injury and put the company at risk for misclassification and citation violations even when the manager was acting in good faith. Therefore, if this rule becomes final, RILA believes strongly that recordkeeping log entries should not but used as a trigger for OSHA inspection and misclassification penalties that would be attributable under the proposed regulation.

Finally, RILA member companies have expressed concern that under current interrelated federal and state assistance programs such as workers' compensation, employees who are inappropriately classified with a work-related MSD would have access to benefits for which they otherwise may not be entitled. OSHA should consider a system whereby the employer is able to record a MSD after an appropriate diagnosis from a medical professional. This would not require an employer to then have to go back and alter records based on the misclassification of a company recordkeeper, allow an employer to mitigate the risks associated and reduce the burden on federal and state programs.

Economic Impact

Most employers, both large and small, keep OSHA forms in a software format to better and more accurately capture work-related injuries and illnesses. Under the proposed rule, employers would need to replace or modify their existing software and procedures, which would ultimately add a considerable cost to the employer. For large retailers, can run upwards of hundreds of thousands of dollars to upgrade the software and train employees how to use it, money that we would prefer go toward programs proven to reduce workplace injuries and illnesses.

Further, despite our opinion about instituting this change once the rule is finalized, we believe the proposed timelines do not adequately allow for a satisfactory implementation of this new rule. We would therefore request that because of the complexity and issues foreseen with this rulemaking, OSHA not enforce the use of this column until January 1, 2012, one year after its proposed start date, January 1, 2011.

Finally, RILA member companies are greatly concerned about how the information reported will ultimately be collected and used by the DOL and OSHA. If implemented, employers will do their best to comply with a very complex and burdensome regulation. However, we are concerned that this rule could expose employers to serious risk and penalty violations, compelling employers to over-report and defeating the purpose of the column for accurate recordkeeping purposes and exposing businesses to undue criticism that their workplaces are unsafe for employees.

Conclusion

Contrary to OSHA's goal, RILA believes restoring the MSD column to the OSHA 300 Log would only result in inaccurate data that would increase violations and penalties for unintentional misclassification of injuries, drive up the costs for workers' compensation and other public benefits, and give OSHA enhanced enforcement procedures without providing employers the necessary guidance and compliance assistance to fulfill the provisions of the regulation. We also share many of the views expressed in the comments filed by the U.S. Chamber of Commerce and urge that OSHA withdraw the proposed rule.

RILA members are committed to meeting our shared goals for protecting our employees and meeting today's workforce safety challenges. Thank you for this opportunity to submit comments. Should you have additional thoughts or questions, please do not hesitate to contact me at (703) 600-2012 or via email at john.emling@rila.org.

Sincerely,



John G. Emling
Senior Vice President, Government Affairs