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OSHA Docket Office
Docket Number OSHA-2009-0044
U.S. Department of Labor
200 Constitution Ave., N.W.
Room N-2625
Washington, D.C. 20210

Re: Occupational Injury and Illness Recording and Reporting Requirements; Proposed Rule (RIN 1218-AC45)

Dear Sir or Madam:

The International Foodservice Distributors Association (IFDA), hereby submits the following comments in response to the proposed revisions to the Occupational Injury and Illness Recording and Reporting Requirements (Proposed Rule) published by the Occupational Safety and Health Administration (OSHA) in the Federal Register on January 29, 2010.¹

By way of background, IFDA is the non-profit trade association that represents businesses in the foodservice distribution industry. IFDA's members are located across North America and internationally, and include leading broadline, system, and specialty distributors. They operate more than 700 distribution facilities and represent annual sales of more than \$110 billion. Our members help make the food away from home industry possible, delivering food and other related products to restaurants and institutions. IFDA provides research, educational opportunities, and business forums to its members to help foodservice distributors succeed. In addition, we provide important representation on Capitol Hill and with the Administration,

¹ 75 *Fed. Reg.* 4728 (January 29, 2010).

sharing the perspective of leading foodservice distributors with policymakers to shape the legislative and regulatory process. IFDA and its members are interested in the outcome of this rulemaking and the impact that the proposed rule would have on its members and their employees.

I. INTRODUCTION

IFDA and its member companies have devoted substantial efforts to enhance workplace safety and health programs in the foodservice industry, and to share with their industry counterparts the expertise gained in implementing injury and illness prevention activities at individual worksites. IFDA has routinely focused on OSHA compliance requirements for foodservice distributors, as well as proactive measures that reduce illnesses and injuries within our member companies' operations.

OSHA's proposal to revise its occupational injury and illness recording and reporting regulation to add a column specifically for musculoskeletal disorders (MSDs) is a very substantial concern to IFDA and its members. While we recognize the role of accurate recordkeeping in evaluating and addressing workplace injuries and illnesses, we do not believe that the Proposed Rule is an authorized, reliable or necessary means of achieving this goal. In fact, it is difficult to view this proposal as anything other than the commencement of a flawed and rejected approach to a mandatory ergonomics regulation. The same fundamental defects underlying OSHA's previous failed efforts in this area dictate a rejection of the current proposal advanced by the Agency. Therefore, IFDA is strenuously opposed to the pending revisions to the recording and reporting regulation.

OSHA contends that adding an MSD column on the OSHA 300 Log will: (1) improve the accuracy and completeness of national occupational injury and illness statistics; (2) provide valuable and industry specific information to assist OSHA in effectively targeting its inspection, outreach, guidance and enforcement efforts to address workplace MSDs; and (3) provide useful establishment information that will help both employers and employees readily identify the

incidence of MSDs.² However, the current level of scientific and medical knowledge surrounding MSDs is inadequate to support to the Proposed Rule. Absent a clear, workable, and scientifically-valid definition of a work-related MSD, the information generated from the MSD column would be neither accurate nor useful in achieving the stated objectives of the Proposed Rule. The occupational injury and illness statistics currently compiled by the Bureau of Labor Statistics (BLS) provide the information necessary to accomplish the goals set forth by OSHA, and do so more reliably and effectively than the proposed change to the recordkeeping forms would. Furthermore, while OSHA seriously overestimates the reliability and utility of a separate MSD column, it seriously underestimates its impact and burden on employers.

Rather than lead to more reliable and useful information on work-related MSDs, the proposed change would create misperceptions about the source and scope of MSDs. Such misperceptions are a shaky and dangerous foundation upon which to base policy decisions that could have a significant and detrimental impact on IFDA's members and many other businesses across the nation. Yet, the Proposed Rule appears designed to be just that - a precursor to additional action by OSHA to impose an ergonomics standard in some form. This renewed attempt to create a separate MSD column on the OSHA 300 log is beset with the same fundamental deficiencies that discredited the Agency's previous effort to do so, deficiencies that tainted the regulatory course on which it unsuccessfully embarked in the past and which it again appears prepared to pursue. For these reasons and other reasons discussed below in further detail, IFDA strongly opposes the Proposed Rule and urges OSHA to withdraw this misguided proposal.

II. SPECIFIC DEFICIENCIES OF THE PROPOSED RULE

Neither the Agency's effort to require employers to record MSDs on a separate column or the reasons compelling a rejection of this requirement are new. On January 19, 2001, OSHA

² *Id.* at 4729.

issued a final recording and reporting rule directing a similar change.³ Shortly thereafter, in March 2001, Congress rescinded the ergonomics standard issued by the Clinton Administration under the Congressional Review Act. After delaying the implementation of the MSD section of the recording and reporting rule, on June 30, 2003, OSHA determined that the “record does not support the column requirement” and deleted the MSD section from the rule.⁴ This conclusion remains as valid today as it was in 2003.

A. Current Scientific and Medical Knowledge is Insufficient to Support the Proposed Rule

OSHA’s authority to require employers to record and report information on injuries and illnesses is not without limitation. Section 8(c)(2) of the Occupational Safety and Health Act of 1970 (OSH Act) directs the Secretary of Labor to: “prescribe regulations requiring employers to maintain *accurate* [emphasis added] records of, and to make periodic reports on, *work-related* [emphasis added] deaths, injuries and illness other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job.”⁵ Section 24(a) of the OSHA Act, which requires the Secretary to “compile *accurate* [emphasis added] statistics on *work* [emphasis added] injuries and illnesses,”⁶ similarly confirms the necessity for accuracy and work-relatedness with respect to OSHA’s injury and illness recording and reporting authority. However, the lack of scientific and medical consensus regarding the term MSD and its causes precludes an accurate definition of the term and calculation of work-relatedness. Therefore, OSHA would be acting outside of its authority by adding a separate MSD column to the OSHA 300 log as the Proposed Rule would require.

The Proposed Rule defines MSDs as “disorders of the muscles, nerves, tendons, ligaments, joints, cartilage and spinal discs. MSDs DO NOT include disorders caused by slips,

³ 66 *Fed. Reg.* 5916 (January 19, 2001).

⁴ 68 *Fed. Reg.* 38601, 38603 (June 30, 2003).

⁵ 29 U.S.C. § 657(c)(2).

⁶ 29 U.S.C. § 673(a).

trips, falls, motor vehicle accidents, or other similar incidents.”⁷ The Proposed Rule cites Carpal tunnel syndrome, Rotator Cuff syndrome, De Quervain’s disease, Trigger finger, Tarsal tunnel syndrome, Sciatica, Epicondylitis, Tendinitis, Raynaud’s phenomenon, Carpet layers knee, Herniated spinal disc, and Low back pain as examples of MSDs.⁸ However, in light of the scientific uncertainty surrounding the term MSD, no accurate and singular definition of an MSD is currently possible.

The proposed definition of MSDs extends far beyond an objective medical condition to encompass a potentially limitless variety of pains and strains of daily life from a multitude of sources. The Proposed Rule directs employers to record a case on the OSHA 300 log as an MSD if:

- (i) An employee has pain, tingling, burning, numbness or any other subjective symptom of an MSD;
- (ii) The symptoms are work-related;
- (iii) The MSD is a new case; and
- (iv) The case meets one or more of the general recording criteria.⁹

While such a catch-all grouping of unrelated symptoms may be a convenient way to categorize what science and medicine cannot, mere convenience will not generate accurate data on occupational illnesses and injuries nor justify a recording obligation on employers. One of the many shortcomings in the existing scientific knowledge on what OSHA refers to as an MSD is that there is no demonstrable quantitative relationship between workplace activities and illnesses and injuries. Serious questions remain regarding the role of work and its relative contribution to *pre-existing conditions*, or symptoms that have their origin in factors *unrelated to work or work exposures*, including physical conditioning, individual characteristics and fitness, and outside activities.

⁷ 75 Fed. Reg. 4740.

⁸ *Id.*

⁹ *Id.* at 4741.

The question of work-relatedness is a critical inquiry that current scientific knowledge renders incapable of being answered with respect to MSDs. Giving formal definition to diverse, diffuse, and unrelated complaints suggests that employers are facing discernable conditions with clearly identifiable causes and for which proven remedies are appropriate. Given the uncertainty surrounding the causes of the vague and broad term OSHA refers to as MSDs, how can employers reasonably be expected to ascertain whether such a wide variety of conditions, symptoms, and complaints are attributable to work? Yet, the Proposed Rule would require employers to make just such a determination, no doubt leading employers to record many aches and pains associated with everyday life on the OSHA 300 Log and creating exaggerated “statistics” about the number of work-related MSDs.

While exaggerating the number of work-related MSDs, the proposed rule would create oversimplified and unreliable inferences about the causes of, and hence responses to, MSDs. Aggregating a broad spectrum of conditions, each with different characteristics and causes, on one column suggests that a simple set of preventive measures and treatments is appropriate. However, an aggregated and over-reported number of work-related MSDs will not provide OSHA or employers with reliable or useful information about causation, frequency, or prevention of specific conditions. Instead, it will merely provide a distorted picture of the magnitude of work-related MSDs. Such distortions will invariably lead to a misallocation of resources by OSHA and employers. Employers could be directed to modify factors over which they have no control. Foremost among the potential harms of the Proposed Rule is the potential to use this skewed data not to “compile *accurate* statistics on *work* injuries and illnesses,” but to justify the pursuit of rejected and misguided mandatory ergonomics regulation, an approach that remains unsupported by science and medicine.

B. OSHA Seriously Underestimates the Cost Burden and Operational Demands of the Proposed Rule

OSHA has estimated that the compliance costs of the Proposed Rule throughout the economy total \$1.739 million per year for all affected establishments combined. This amount includes \$735,000 per year for initial familiarization with the proposed MSD recording

requirement annualized over 10 years at a discount rate of 7 percent and \$1.004 million annually for data entry.¹⁰ OSHA calculates that the resulting costs for the typical affected establishment would be \$4.00 in the first year of implementation and 67 cents in future years.¹¹ Accordingly, OSHA concludes that the Proposed Rule is not a “significant regulatory action” and summarily dismisses the impact of the proposal on the regulated community and economy. IFDA submits that these calculations are seriously inaccurate. They do not reflect the true cost, or the deleterious impact such costs will have on foodservice distribution companies and vast numbers of other businesses across a broad spectrum of the economy. OSHA’s estimates seriously understate the amount of time that would be required for employers to familiarize themselves with the new reporting procedure and to decide and record cases in the MSD column. Accordingly, OSHA dramatically underestimates the labor costs associated with compliance with the Proposed Rule.

OSHA estimates that it would take affected employers only five minutes to familiarize themselves with the proposed MSD reporting procedures.¹² This estimate fails to account for the considerable confusion and uncertainty surrounding the term MSD and its characteristics and causes. It defies logic that employers would be allotted only five minutes to analyze and comprehend such a complex requirement for which liability for noncompliance attaches. OSHA further estimates that it will take only one minute to decide whether a specific case is an MSD and mark it on the MSD column on the OSHA 300 Log.¹³ Yet, the burden placed on employers is anything but minimal. The employer must determine whether something falls within the vaguely and broadly defined term that OSHA labels an MSD, and then make the determination whether it is work-related. For the reasons described above, the lack of scientific and medical consensus regarding the scope and causes of MSDs precludes an accurate or quick determination. Nonetheless, employers are expected to make this determination, then determine

¹⁰ *Id.* at 4737.

¹¹ *Id.*

¹² *Id.* at 4736.

¹³ *Id.* at 4737.

whether the MSD is a new case and meets one or more of the general recording criteria, and actually record the data in one minute.

OSHA entirely overlooks the cost to employers of training employees about the Proposed Rule and costs associated with ascertaining whether a condition presented by an employee is an MSD and work-related. Such assessments likely include medical evaluation beyond the capabilities of the employee charged with entering the data on the OSHA 300 log. Yet, OSHA estimates the cost of the new rule to be only \$4.00 per establishment in the first year and 67 cents thereafter. Beyond the direct cost imposed on companies by the Proposed Rule is the misdirection of time and resources that employers could use to better affect elsewhere in their safety and health activities. The new requirement will unduly restrict the flexibility employers need to effectively address and prevent occupational injuries and illnesses. The costs and burdens of the Proposed Rule are even more pronounced for smaller businesses, whose financial and human resources are more limited. OSHA summarily dismisses this concern, concluding that “it still would be very unlikely that the costs would pose any economic difficulty” for small firms.¹⁴

While OSHA seriously understates the cost of the Proposed Rule, the Agency seriously overstates its benefits. The data that BLS currently compiles can be used to achieve the goals set forth by OSHA, and is both more reliable and useful than the information OSHA seeks to generate from the Proposed Rule. The fundamental inaccuracies, incompleteness, and superficiality of OSHA’s economic analysis necessitate a rejection of this proposal.

C. 2001 Settlement Agreement Between OSHA and the National Association of Manufacturers (NAM)

Although not a party to the agreement, IFDA notes the 2001 settlement agreement entered into between OSHA and NAM.¹⁵ The settlement agreement required OSHA to include language in the initial Compliance Directive stating, among other things, that “minor

¹⁴ *Id.* at 4738.

¹⁵ 66 *Fed. Reg.* 66943 (December 27, 2001).

musculoskeletal discomfort” is not recordable under § 1904.7(b)(4) as a restricted work case “if a health care professional determines that the employee is fully able to perform all of his or her routine job functions, and the employer assigns a work restriction for the purpose of preventing a more serious injury.”¹⁶ In contravention of this settlement agreement, OSHA now intends to remove the agreed upon language from the Recordkeeping Compliance Directive. OSHA’s rationale for removing the language from the Compliance Directive is that “it creates confusion about recording MSDs.”¹⁷ It is puzzling that OSHA would cite this language as a cause of confusion about reporting MSDs. The entire proposal for reporting MSDs is fraught with confusion, as was OSHA’s previous attempt. OSHA recognizes the need for clear direction to employers regarding recording MSDs. Yet, the unavoidable confusion of recording MSDs prevents the clarity that OSHA acknowledges is so important. OSHA relies on language in the settlement agreement stipulating that nothing in it affected the Agency’s right to modify or interpret its Recordkeeping regulations in the future. However, deleting the language required by the settlement agreement appears to violate the agreement itself.

D. The Proposed Rule is a Precursor to Inappropriate Enforcement Activity and Standard-Setting in the Area Ergonomics

IFDA is greatly concerned that the proposed MSD recording and reporting requirement will be used as an aggressive, unwarranted, and overreaching enforcement tool by OSHA. This concern is not unfounded. OSHA acknowledges that the MSD column will be used to “assist OSHA in effectively targeting its inspection, outreach, guidance, and enforcement efforts to address workplace MSDs.”¹⁸ Most troubling to IFDA and its members is that the Proposed Rule, if implemented, will set OSHA on a course toward a mandatory ergonomics standard in some form that is no more justified by science, law, or economics than the standard rejected in 2001. While the proposed recording and reporting requirement for MSDs is not an ergonomics standard, OSHA states that: “Having more complete MSD data would assist OSHA, and other safety and health policy makers, in understanding MSDs and making informed decisions on

¹⁶ *Id.* at 66944.

¹⁷ 75 *Fed. Reg.* at 4735.

¹⁸ *Id.* at 4729.

policies concerning workplace MSDs.”¹⁹ The path is clearly contemplated, yet it will not be guided by “informed” decisions, but rather predetermined by distorted data generated pursuant to the Proposed Rule.

Viewing these statements in the context of the long and controversial debate over ergonomics regulation, the Proposed Rule appears to be evidence of the OSHA’s intent to implement a broad regulatory framework that we fear will have substantial adverse effects on employees, workplaces, companies and the economy.

III. CONCLUSION

For the reasons noted above, IFDA and its members have significant concerns with the language and substance of the Proposed Rule. Accordingly, we urge OSHA to reconsider and reverse the regulatory course to which it appears to be irrevocably committed, and conclude that the Proposed Rule should be withdrawn.

We appreciate the opportunity to participate in this important regulatory process.

Respectfully submitted,

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Government Relations

¹⁹ *Id.* at 4731.