

3. Reporting Criteria Applicable to Illnesses

Proposal

At a pre-NPRM meeting of the Working Group, AAR proposed that major member railroads would file, with their FRA annual report, a list of claimed but denied occupational illnesses not included on the Form FRA F 6180.56, "Annual Railroad Report of Employee Hours and Casualties by State," because the railroads found the illnesses not to be work-related. The list would be organized by State, and would include the name of the reporting contact person. FRA and other Working Group members had expressed appreciation for this undertaking. It was agreed that this was appropriate for implementation on a voluntary basis, and no comment was sought on this matter.

Comments and Final Rule/Decision

No specific comments were received on this issue. The list, as an attachment to the annual report (FRA F 6180.56), will be adopted on a voluntary basis. Note, however, that after discussing the disadvantages of failing to capture data concerning claimed illnesses and injuries on a standard FRA form, the Working Group agreed to the mandatory recording of this data on a new form (FRA F 6180.107). See discussion of recording claimed illnesses in section "III.G.2." of the preamble, below.

E. Technical Revision to § 225.21, "Forms"

Proposal

The Working Group agreed to add a new subsection § 225.21(j) to create a new form (Form FRA F 6180.107), which would be labeled "Alternative Record for Illnesses Claimed to Be Work-Related." This form would call for the same information that is included on the Form FRA F 6180.98 and would have to be completed to the extent that the information is reasonably available. A further discussion of the nature of this new form is discussed under the revisions to § 225.25, later in this preamble.

Comments and Final Rule/Decision

No specific comments were received on this issue. The changes to this form have been adopted as proposed.

F. Technical Revision to § 225.23, "Joint Operations"

Proposal

The Working Group agreed to propose certain minor changes to the regulatory text (specifically, to § 225.23(a),

concerning joint operations) simply to bring it into conformity with the other major changes to the regulatory text that are proposed. Note that for purposes of telephonic reporting in joint operations, the dispatching railroad would be required to make the telephonic report. See proposed § 225.9.

Comments and Final Rule/Decision

No specific comments were received on this issue. The regulatory text amendments have been adopted as proposed.

G. Revisions to § 225.25, "Recordkeeping"

1. Privacy Concern Cases

Proposal

The Working Group agreed to propose changes to the regulatory text under § 225.25, concerning recordkeeping, by revising § 225.25(h) to address a class of cases described by OSHA as "privacy concern cases." OSHA requires an employer to give its employees and their representatives access to injury and illness records required by OSHA, such as the OSHA 300 Log, with some limitations that apply to privacy concern cases. 29 CFR 1904.35(b)(2), 1904.29(b). A "privacy concern case" is defined by OSHA in 29 CFR 1904.29(b)(7); one type of a privacy concern case is, e.g., an injury or illness to an intimate body part. FRA proposed to define the term similarly in § 225.5. In privacy concern cases, OSHA prohibits recording the name of the injured or ill employee on the Log. The words "privacy case" must be entered in lieu of the employee's name. The employer must "keep a separate, confidential list of the case numbers and employee names for your privacy concern cases so you can update the cases and provide the information to the government if asked to do so." 29 CFR 1904.29(b)(6). In addition, if the employer has a reasonable basis to believe that the information describing the privacy concern case may be personally identifiable even though the employee's name has been left out, the employer may use discretion in describing the injury or illness. The employer must, however, enter enough information to identify the cause of the incident and the general severity of the injury or illness, but need not include details, e.g., a sexual assault case may be described as an injury from assault.

By contrast, FRA required that an employee have access to information in the FRA-required Railroad Employee Injury and/or Illness Record (Form FRA F 6180.98) regarding his or her own injury or illness, not the FRA-required

records regarding injuries or illnesses of other employees. 1997's § 225.25(a), (b), (c). This rendered the FRA-required log of reportables and accountables with its information on the name and Social Security number of the employee, inaccessible to other employees. *Id.* Additionally, FRA proposed to amend the requirement that the record contain an employee's Social Security Number, opting to allow a railroad to enter an employee's identification number instead. See 2003's § 225.25(b)(6). Therefore, FRA considered this difference a sufficient reason not to adopt OSHA's privacy requirements with regard to the reportable and accountable log.

Comments and Final Rule/Decision

No specific comments were received on this issue. For the reasons stated above, the regulatory text amendments have been adopted as proposed. FRA intends to address its variation from OSHA's privacy requirements with regard to the reportable and accountable log in the MOU.

Proposal

Although FRA has not allowed wide access to the reportable and accountable log, FRA requires, however, the posting in a conspicuous place in each of the employer's establishments, certain limited information on reportable accidents/incidents that occurred at the establishment, thereby making this information accessible to all those working at the establishment and not simply the particular employee who suffered the injury or illness. § 225.25(h). That limited information that must be posted includes the incident number used to report the case, the date of the injury or illness, the regular job title of the employee involved, and a description of the injury or condition. Even though the name of the employee is not required to be listed, the identity of the person might in some cases be determined, particularly at small establishments. Under 1997's § 225.25(h)(15), FRA permitted the railroad not to post an injury or illness at the establishment where it occurred if the ill or injured employee requested in writing to the railroad's reporting officer that the injury or illness not be posted. The proposed revision of the rule concerning the posting of injuries or illnesses would be consistent with OSHA's requirements with regard to its Log, but more expansive than those requirements. FRA would also give railroads discretion not to provide details of the injury or condition that constitutes a privacy case.