

Comments and Final Rule/Decision

No comments were received on these proposed changes. For the reasons stated above, the amendments have been adopted as proposed. FRA intends to address these slight variations from OSHA's privacy requirements in the MOU.

Proposal

Another issue relevant to reporting privacy concern cases arose in § 1904.29(b)(7)(vi) of OSHA's January 19, 2001, Final Rule, which stated that musculoskeletal disorders were not considered privacy concern cases. OSHA delayed the effective date of this exclusion until January 1, 2003, in its October 12, 2001, final rule. On July 1, 2002, OSHA proposed to delay the effective date of this same provision until January 1, 2004, and requested comment on the provision. See 67 FR 44124. On December 17, 2002, OSHA published a final rule adopting the proposed delay. See 67 FR 77165. As the issue of OSHA's proposed delay of this provision was not before the Working Group when consensus was reached, FRA sought comment on whether or not this exclusion should be adopted if OSHA's proposed January 1, 2004, delay took effect. It was noted that if FRA were to adopt the exclusion as approved by the Working Group, FRA would be doing so in advance of OSHA's adoption of it and in advance of OSHA's defining the very term that is supposed to be excluded, a result that may not have been contemplated by the Working Group when it agreed to the proposed rule text on this issue prior to OSHA's issuance of the proposed delay. See discussion concerning reporting criteria for MSDs at section "III.D.1." of the preamble, above. Even if OSHA chose not to delay the effective date of this provision and to give it effect on January 1, 2003, FRA sought comment on whether or not FRA should diverge from OSHA by not adopting the exclusion.

Comments

Although no specific comments were received regarding the adoption of OSHA's proposed exclusion of MSDs from the definition of "privacy concern case," FRA raised this issue at the post-NPRM Working Group meeting. FRA noted that because OSHA had not yet adopted this exclusion and had not even adopted a definition of MSDs that would indicate what should be excluded, it would not make sense for FRA to adopt this exclusion. When presented with the issue at the meeting, there seemed to be general agreement by

all concerned to have this exclusion in the definition of "privacy concern case" deleted from the revised part 225 and the FRA *Guide*.

Final Rule/Decision

Because OSHA has not yet adopted the exclusion of MSDs from its definition of "privacy concern case," and since FRA has not been provided with a justification for departing from OSHA on this issue, FRA has *not* adopted the exclusion of MSDs from the definition of "privacy concern case" in its final rule.

Finally, the question was raised in the Working Group whether FRA's proposed regulations conformed to the Health Insurance Portability and Accessibility Act of 1996 (Pub. L. 104-191 (HIPAA)) and to the Department of Health and Human Services' regulations implementing HIPAA with regard to the privacy of medical records. See "the Standards for Privacy of Individually Identifiable Health Information." 65 FR 82462 (Dec. 28, 2000), codified at 45 CFR parts 160 and 164. Since it appears that OSHA's regulations conform to HIPAA, and FRA proposes to conform to OSHA in all essential respects with regard to the treatment of medical information, FRA believes that its final regulations will not conflict with HIPAA requirements.

2. Claimed Illnesses for Which Work-Relatedness Is Doubtful

a. Recording Claimed Illnesses

Proposal

Under the 1997 FRA rule, all accountable or reportable injuries and illnesses were required to be recorded on Form FRA F 6180.98, "Railroad Employee Injury and/or Illness Record," or an equivalent record containing the same information. The subset of those cases that qualified for reporting were then reported on the appropriate forms. See 1997's § 225.25(a), (b). If the case was not reported, the railroad was required to state a reason on Form FRA F 6180.98 or the equivalent record. See 1997's § 225.25(b)(26). Although this system has generally worked well, problems have arisen with respect to accounting of claimed occupational illnesses. As further explained below, railroads are subject to tort-based liability for illnesses and injuries that arise as a result of conditions in the workplace. By their nature, many occupational illnesses, particularly repetitive stress cases, may arise either from exposures outside the workplace, inside the workplace, or a combination of the two. Accordingly, issues of work-relatedness become very prominent.

Railroads evaluate claims of this nature using medical and ergonomic experts, often relying upon job analysis studies as well as focusing on the individual claims.

With respect to accounting and reportability under part 225, railroad representatives stated their concern that mere allegations (e.g., receipt of a complaint in a tort suit naming a large number of plaintiffs) not give rise to a duty to report. They added that many such claims are settled for what amounts to nuisance values, often with no admission of liability on the part of the railroad, so even the payment of compensation is not clear evidence that the railroad viewed the claim of work-relatedness as valid.

Although sympathetic to these concerns, FRA was disappointed in the quality of data provided in the past related to occupational illnesses. Indeed, in recent years the number of such events reported to FRA has been extremely small. FRA has an obligation to verify, insofar as possible, whether the railroad's judgments rest on a reasonable basis, and discharging that responsibility requires that there be a reasonable audit trail to verify on what basis the railroad's decisions were made. While the basic elements of the audit trail are evident within the internal control plans of most railroads, this is not universally the case.

Accordingly, FRA asked the Working Group to consider establishing a separate category of claimed illnesses. This category would be comprised of (1) illnesses for which there is insufficient information to determine whether the illness is work-related; (2) illnesses for which the railroad has made a preliminary determination that the illness was not work-related; and (3) illnesses for which the railroad has made a final determination that the illness is not work-related. These records would contain the same information as the Form FRA F 6180.98, but might at the railroad's election—

- Be captioned "alleged";
- Be retained in a separate file from other accountables; and
- If accountables are maintained electronically, be excluded from the requirement to be provided at any railroad establishment within 4 hours of a request.

This would permit the records to be kept at a central location, in either paper or electronic format.

The railroad's internal control plan would be required to specify the custodian of these records and where they could be found. For any case determined to be reportable, the