

SUMMARY OF COMMENTS AND RESPONSES FROM 45-DAY COMMENT PERIOD ENDING ON OCTOBER 29, 2001

Employer Records of Occupational Injury and Illness

The following is a Summary of Comments, received during the 45-Day Comment Period which ended on October 29, 2001, and Responses to those Comments. Where several commenters have made identical or related comments these have been grouped and responded to as a single comment. The source and dates of the comments are provided along with the names and affiliations of the commenters.

Note: Unless a particular Response indicates otherwise, no action has been taken by the Division of Occupational Safety and Health ("DLSR") to amend the proposed regulations as a result of the comments.

General Comments

Chuck Andrews, Worker Health and Safety Branch, Department of Pesticide Regulation.

Source: e-mail of October 22, 2001

Comment No 1: The commenter indicated that DLSR's rulemaking package would not impact the California Department of Pesticide Regulation's Worker Health and Safety Branch.

Response: DLSR appreciates the review of the proposed regulation by the Worker Health and Safety Branch.

Lauren Mayfield, State Compensation Insurance Fund.

Source: letter dated October 24, 2001

Comment No. 2: The commenter supported the proposed regulatory amendments, believing that they would improve the quality of workplace injury and illness records; allow employers the option to use computer and telecommunications equipment; include explicit definitions of "medical treatment," "first aid," and "restricted work;" increase protection of employee privacy; and include in coverage the motion picture production industry and allied services. The commenter also suggested that the proposed regulation include language addressing the responsibility of the Division of Occupational Safety and Health to inform and educate those employers affected by the amended regulations.

Response: DLSR appreciates the time taken by the State Compensation Insurance Fund to review the proposed regulation and its statement of support

for various proposed changes to the requirements for recording of workplace injuries and illnesses.

With regard to the comment on assistance to employers who must comply with the revised recordkeeping requirements DLSR acknowledges the importance of this activity. The Cal/OSHA Consultation Service is preparing its consultants to provide assistance to employers both telephonically and in the course of on-site consultations. The Consultation Service is also developing a computer-based training program which will be made available at its Internet website.

Existing Title 8 Section 342 - Reporting Work-Connected Fatalities and Serious Injuries

John Vocke, Pacific Gas and Electric Company

Source: Letter dated October 26, 2001

Julianne Broyles, California Chamber of Commerce

Source: Letter dated October 26, 2001

Jan Hansen, Lumber Association of California & Nevada

Source: Letter dated October 29, 2001

Willie Washington, California Manufacturers and Technology Association

Source: Letter dated October 29, 2001

Dave Asivido, TOC Management Services,

Source: e-mail of October 29, 2001

Comment No. 3: The commenters noted that the revised federal regulation with respect to reporting of serious injuries and illnesses, and fatalities (29 CFR 1904.39) provides additional clarity and guidance to regulated employers, particularly in the areas of notification of fatalities occurring more than 30 days after an incident, and notification in those instances wherein notice to the employer is delayed beyond eight (8) hours.

Response: For the following reasons DLSR must decline at this time to make the changes requested by the commenters:

1. Title 8 Section 342 which is a regulation of the Division of Occupational Safety and Health (DOSH) was not a subject of this rulemaking.
2. Labor Code Section 6409.1(b) provides the statutory basis for the injury and illness reporting provisions of Title 8 Section 342 to which the commenters refer. Section 6409.1(b) states that: "In every case involving a serious injury or illness, or death, in addition to the report required by subdivision (a), a report shall be made immediately to the Division of Occupational Safety and

Health by telephone or telegraph.” This statute does not allow DOSH to adopt the federal OSHA limitation on reporting of fatalities or hospitalizations that occur more than 30 days after the incident causing them.

It bears noting that the two provisions of 29 CFR 1904.39 pointed out by the commenters which differ from Title 8 Section 342 are not new provisions, but rather were already contained in the predecessor federal OSHA rule relocated from 29 CFR 1904.8.

DLSR acknowledges that the revised federal OSHA regulation for reporting of serious injuries and illnesses does contain new details which may be of assistance to California employers and may not be inconsistent with Labor Code Section 6409.1(b). Therefore, after conclusion of DLSR rulemaking for recording of injuries and illnesses, DLSR anticipates that DOSH will evaluate the merit of proceeding with rulemaking to adopt appropriate elements of the federal OSHA regulation for reporting of serious injuries and illnesses, to an extent consistent with the provisions of Labor Code Section 6409.1(b).

Proposed Title 8 Section 14300.2 – Partial Exemptions for Establishments in Certain Industries

Steve O'Neill, Keenan & Associates

Source: Letter dated October 19, 2001

Catherine Jones, Self-Insured Schools of California

Source: e-mail dated October 29, 2001

Comment No. 4: Mr. Oneill suggested that DLSR should clarify if the industry classifications identified for partial exemption in proposed Section 14300.2 apply to both public and private employers. Ms. Jones commented that the exemptions in proposed Section 14300.1 should apply to both public and private entities.

Response: DLSR has determined that at this time it is appropriate to clarify that the partial exemption for establishments classified in industries listed in Table 1 in proposed Section 14300.2 applies to public as well as private employers. The language of this section and throughout the proposed regulations has been modified to make clear that the provisions apply to both public and private employers. The changes consist of deleting the adjective “business” in certain sections where it might imply that only a private entity must comply, defining the term “company”, and making other minor changes.

Vicki Bermudez, California Nurses Association
Source: Letter dated October 23, 2001

Comment No. 5: The commenter expressed concern that the proposed new partial exemption for employers with more than 10 employees in SIC codes 801, Offices and Clinics of Medical Doctors; 803, Offices of Osteopathic Physicians; 804, Offices of Other Health Practitioners; and 809, Health and Allied Services, Not Elsewhere Classified, would deprive many registered nurses and other employees of readable and easily accessible documentation necessary for recognizing and addressing illness and injury trends in their workplace and requested that these industries be removed from the list of those partially exempted from recordkeeping.

Response: DLSR respectfully declines to modify the table of partially exempt industries in proposed Section 14300.2 as requested by the commenter. At this time, DLSR does not have information available to indicate that employees in California in the exempted SIC codes of concern to the commenter are at greater risk of workplace injury or illness than are indicated by national data for such employees, which is the basis for the exemptions established by federal OSHA.

Proposed Title 8 Section 14300.7 - General Recording Criteria

Cass Grove, Hubbard Structures, Inc.
Source: Letter dated October 11, 2001

Comment No. 6: The requirement of proposed Section 14300.7(b)(3)(D) to count “days away, restricted, or transferred,” regardless of whether or not the employee was scheduled to work on those days will significantly skew the injury rate information provided on the Cal/OSHA Form 300A.

Response: The commenter is correct that eliminating the term “lost workdays,” which restricted the counting of lost days to those “during which the employee would have worked but could not do so” could affect the injury and illness rate information recorded on the Form 300A. However, this is a change that implements language identical to that of 29 CFR 1904.7(b)(3)(iv), which was specifically mandated by 29 CFR 1904.37(b). DLSR is required by Section 1904.37(b) to “have the same requirements as federal OSHA for determining which injuries are recordable and how they are recorded,” and is therefore unable to respond to the comment with a change in the proposal.

Proposed Title 8 Section 14300.9 – Recording Criteria for Cases Involving Medical Removal Under Cal/OSHA Standards

Cass Grove, Hubbard Structures, Inc.

Source: Letter dated October 11, 2001

Comment No. 7: The commenter suggested that "medical removal under OSHA standards" should be clarified. For example, would recording be required under this section if an employer is out on a construction site, asbestos is discovered, and the general contractor shuts the job down until the asbestos is removed?

Response: As indicated at proposed Section 14300.9(a), the requirements of this section apply to employees medically removed under the medical surveillance requirements of a Title 8 standard. As indicated at Section 14300.9(b)(2), a number of Title 8 standards that cover specific chemical substances have medical removal provisions including, but not limited to, standards for lead, cadmium, methylene chloride, formaldehyde and benzene. A medical finding of significant exposure or adverse health effect(s) from work with one of these chemicals typically triggers medical removal of an employee under the provisions of these standards. The example given by the commenter of a construction worksite being shut down as a result of discovery of the presence of a hazardous chemical would not constitute a "medical removal."

Proposed Title 8 Section 14300.10 - Recording Criteria for Cases Involving Occupational Hearing Loss

William T. Callahan, Associated Roofing Contractors of the Bay Area Counties

Source: Letter dated October 1, 2001

Comment No. 8: The commenter suggested that all references to hearing loss in proposed Appendices A, B, D, and E be deleted to be consistent with the lack of reference in the proposed regulatory text.

Response: Please see DLSR's response to Comment No. 9.

Terri L. Ray, International Paper Company

Source: Letter dated October 26, 2001

Lawrence P. Halprin, Keller and Heckman, LLP

Source: Letter dated October 26, 2001

Baruch A. Fellner, Gibson, Dunn & Crutcher, LLP, for the National Association of Manufacturers

Source: Letter dated October 26, 2001

Julianne Broyles, California Chamber of Commerce

Source: Letter dated October 26, 2001

Jan Hansen, Lumber Association of California & Nevada

Source: Letter dated October 29, 2001

Willie Washington, California Manufacturers and Technology Association

Source: Letter dated October 29, 2001

Dave Asivido, TOC Management Services

Source: e-mail of October 29, 2001

Charles Boettger, Driver Risk Services

Source: Verbal comments at public hearing of October 29, 2001

Comment No. 9: The commenters recommended that DLSR adopt the approach to recording hearing loss announced by federal OSHA in the Federal Register of October 12, 2001, which uses a 25 dB criterion, and that DLSR revise Forms 300 and 300A to remove the entries for hearing loss.

Response: DLSR has deleted the reference to "hearing loss" on Form 300 and to "hearing loss cases" on Form 300A. In addition, DLSR has modified the proposal to include at Section 14300.10 the same provisions for recording of hearing loss announced by federal OSHA in the Federal Register of October 12, 2001 (66 FR 52031). DLSR will monitor the actions of federal OSHA with respect to recording of hearing loss and is prepared to undertake rulemaking as necessary to ensure conformity with federal provisions for years beyond 2002.

Ron Kilburg, City of Mountain View

Source: Letter dated October 29, 2001

Comment No. 10: The commenter stated that Portion M of proposed Form 300A lists hearing loss as an illness, and asked whether this was specifically a "standard threshold shift" as designated by Title 8, Section 5097. The commenter also asked if the determination of a standard threshold shift and the time it takes to conduct the follow-up examination was considered.

Response: With regard to the first question, this regulatory action is not intended to have any impact on Section 5097, which is an occupational safety and health standard adopted by a different agency, the California Occupational Safety and Health Standards Board.

With regard to the commenter's second question, DLSR has now proposed to follow the federal requirement as mandated by federal OSHA.

Proposed Title 8 Section 14300.12 - Recording Criteria for Cases Involving Work-Related Musculoskeletal Disorders

William T. Callahan, Associated Roofing Contractors of the Bay Area Counties

Source: Letter dated October 1, 2001

Comment No. 11: The commenter suggested that all references to musculoskeletal disorders in proposed Appendices A, B, D, and E be deleted to be consistent with the lack of reference in the text.

Response: Please see the response to Comment No. 12.

Terri L. Ray, International Paper Company

Source: Letter dated October 26, 2001

Lawrence P. Halprin, Keller and Heckman, LLP

Source: Letter dated October 26, 2001

Baruch A. Fellner, Gibson, Dunn & Crutcher, LLP, for the National Association of Manufacturers

Source: Letter dated October 26, 2001

Julianne Broyles, California Chamber of Commerce

Source: Letter dated October 26, 2001

Jan Hansen, Lumber Association of California & Nevada

Source: Letter dated October 29, 2001

Willie Washington, California Manufacturers and Technology Association

Source: Letter dated October 29, 2001

Dave Asivido, TOC Management Services

Source: e-mail of October 29, 2001

Charles Boettger, Driver Risk Services

Source: Verbal comments at public hearing of October 29, 2001

Comment No. 12: The commenters requested that DLSR postpone special recording procedures for musculoskeletal disorders until federal OSHA completes its review of the subject. The commenters also suggested that DLSR revise its Forms 300 and 300A to remove the data entry references for musculoskeletal disorders.

Response: DLSR has deleted the references to "musculoskeletal disorder" on the Forms 300 and 300A in recognition of the one-year delay in implementation of the provisions for recording of musculoskeletal disorders that federal OSHA announced in the Federal Register of October 12, 2001 (66 FR 52031). DLSR has modified the proposal to include at Section 14300.12 the provisions for recording of musculoskeletal disorders also announced by federal OSHA in the Federal Register of October 12, 2001. DLSR will monitor the actions of federal

OSHA with respect to recording of musculoskeletal disorders and is prepared to undertake rulemaking as necessary to ensure conformity with federal provisions for years beyond 2002.

Consistent with the same OSHA announcement regarding musculoskeletal disorders, DLSR has added a note to proposed Section 14300.29(b)(7)(F) indicating that the provision of this subsection addressing employee privacy in connection with recording of musculoskeletal disorders will not take effect until January 1, 2003. DLSR will monitor the actions of federal OSHA with respect to employee privacy in connection with recording musculoskeletal disorders under the provisions of 29 CFR 1904.29(b)(7)(vi), and is prepared to undertake rulemaking as necessary to ensure conformity with federal provisions for years beyond 2002.

Proposed Title 8 Section 14300.29 - Forms

Julianne Broyles, California Chamber of Commerce

Source: Letter dated October 26, 2001

Jan Hansen, Lumber Association of California & Nevada

Source: Letter dated October 29, 2001

Willie Washington, California Manufacturers and Technology Association

Source: Letter dated October 29, 2001

Dave Asivido, TOC Management Services,

Source: e-mail of October 29, 2001

Comment No. 13: The commenters requested that DLSR delete the requirement for the Form 300A consistent with the actions of federal OSHA in the Federal Register of October 12, 2001.

Response: DLSR respectfully declines to implement the commenters' request as federal OSHA's only action announced in the Federal Register of October 12, 2001 with respect to the Form 300A was to delete entry references to data for musculoskeletal disorders and hearing loss cases. In response to that action, DLSR has modified the Form 300A with respect to these two entries, as shown in the revised proposal. Please see DLSR's responses to Comments No. 12 and 9.

Cass Grove, Hubbard Structures, Inc.

Source: Letter dated October 11, 2001

Comment No. 14: The sample Form 300 has errors in the "classify the case" section; the column subheadings do not match up with Form 300A. The commenter suggested they should all be moved one column to the right.

Response: DLSR appreciates the comment and has made the suggested correction.

Charles Boettger, Driver Risk Services

Source: Letter dated October 29, 2001, and verbal comments at public hearing of October 29, 2001

Comment No. 15: It is unclear in the second paragraph of the instructions on the proposed Cal/OSHA Form 301 what is intended by the sentence: "Some state workers' compensation insurance or other reports may be acceptable substitutes." The commenter suggested that it should be stated explicitly if this was intended to be a reference to the State of California Form 5020, Employer's Report of Occupational Injury or Illness.

Response: In response to this comment, DLSR has modified the proposed Cal/OSHA Form 301 to clarify that, to be considered a form equivalent to the Cal/OSHA Form 301, the alternative form must contain all of the same instructions, as well as the same information requested, in the Cal/OSHA Form 301. The Form 5020 is not adequate because it does not contain the confidentiality warnings contained on Form 301.

Proposed Title 8 Section 14300.35 - Employee Involvement

Cass Grove, Hubbard Structures, Inc.

Source: Letter dated October 11, 2001

Comment No. 16: The commenter stated that the terms of proposed Section 14300.35 will allow employees access to current or stored recordkeeping logs (Form 300) even though under existing rules when the OSHA Log 200 is posted the names of employees are not included.

Response: It is true that under existing rules only the summary totals on the last page of the OSHA Log 200 are to be posted for the previous calendar year. However, existing Title 8 Section 14308(b) provides for employees to have access to the log and summary of all recordable occupational injuries and illnesses, including the names of affected employees where these are not precluded by OSHA or Cal/OSHA policy from inclusion on the Log (e.g. for cases of contaminated needlesticks where the resultant illnesses could include hepatitis B or hepatitis C). The provisions of proposed Section 14300.29(b)(6) increase employee privacy by specifically detailing those types of injuries and illnesses for which affected employees' names are to be kept in a record separate from that provided to employees requesting access to records of recordable injuries and illnesses in their workplace.

Cass Grove, Hubbard Structures, Inc.
Source: Letter dated October 11, 2001

Comment No. 17: The commenter believed it is unclear in the employee involvement section as to whose records an employee has access to under the proposed regulation.

Response: Proposed Section 14300.35(b)(2)(C) provides that employees, former employees, personal representatives, or authorized employee representatives must, upon request, be provided by the end of the next business day with “copies of your current or stored Cal/OSHA Form 300 forms or a current or stored annual summary for an establishment the employee or former employee has worked in.” Proposed Section 14300.35(b)(2)(E) provides that employees, former employees, and personal representatives must, upon request, be provided by the end of the next business day with “a copy of the Cal/OSHA Form 301 Incident Report describing an injury or illness to that employee or former employee.” Authorized representatives may also request and receive copies of the Form 301, but with private information deleted. DLSR believes this language is clear and unambiguous.

Proposed Title 8 Section 14300.46 - Definitions

John Vocke, Pacific Gas and Electric Company

Source: Letter dated October 26, 2001

Jonathan Frisch, Pacific Gas and Electric Company

Source: Verbal comments at public hearing of October 29, 2001

Comment No. 18: The commenters requested that the regulation state that "certification" of the annual summary does not require affixing an original signature to the summary itself, but rather that a single certification may be signed by the executive, copied, and appended to each Cal/OSHA Form 300A for the company. The commenter included the following excerpt from the Federal Register of January 19, 2001 (66 FR 6043) as justification for its request:

The certification required by the final rule may be made by signing and dating the certification section of the OSHA 300-A form, which replaces the summary portion of the former OSHA 200 form, or by signing and dating a separate certification statement and appending it to the OSHA Form 300-A.

Response: In the originally proposed text at Title 8 Section 14300.32, DLSR used language identical to that of the equivalent federal rule, 29 CFR 1904.32. However, at originally proposed Section 14300.46, DLSR included a definition of the term “certify,” which is used in both Section 14300.32 and 29 CFR 1904.32.

DLSR's definition had no equivalent in the equivalent federal OSHA rule, since the federal rule does not define the term. DLSR's inclusion of a definition of this term when it was not defined in the equivalent federal OSHA rule had the potential to result in interpretations of the regulatory text in Section 14300.32 being different from interpretations of the text in 29 CFR 1904.32, and therefore, DLSR decided to remove the proposed definition.

DLSR notes that the "bottom line" of the federal approach, which is now mirrored exactly by the regulatory text proposed by DLSR, is certification. The purpose of the signature called for on the Form 300A is to demonstrate that the employer has complied with the certification requirement. DLSR appreciates the commenters' reference to the Federal Register on this topic, and has provided below several additional excerpts from the same page (66 FR 6043), all of which are instructive on the topic of the meaning, purpose, and rendering of certification.

"...Certification of the summary attests that the individual making the certification has a reasonable belief, derived from his or her knowledge of the process by which the information in the Log was reported and recorded, that the Log and summary are "true" and "complete."...

OSHA concludes that the company executive certification process will ensure greater completeness and accuracy of the Summary by raising accountability for OSHA recordkeeping to a higher managerial level than existed under the former rule. OSHA believes that senior management accountability is essential if the Log and Annual Summary are to be accurate and complete. ...

Because OSHA cannot oversee the preparation of the Log and Summary of each establishment and cannot audit more than a small sample of all covered employers' records, this goal is accomplished by requiring employers or company executives to certify the accuracy and completeness of the Log and Summary. ...

The final rule does not specify how employers are to evaluate their recordkeeping systems to ensure their accuracy and completeness or what steps an employer must follow to certify the accuracy and completeness of the Log and Summary with confidence. However, to be able to certify that one has a reasonable belief that the records are complete and accurate would suggest, at a minimum, that the certifier is familiar with OSHA's recordkeeping requirements, and the company's recordkeeping practices and policies, has read the Log and Summary, and has obtained assurance from the staff responsible for maintaining the records (if the certifier does not personally keep the records) that all of OSHA's requirements have been met and all practices and policies followed. In most if not all cases, the certifier will be familiar with the

details of some of the injuries and illnesses that have occurred at the establishment and will therefore be able to spot check the OSHA 300 Log to see if those cases have been entered correctly. In many cases, especially in small to medium establishments, the certifier will be aware of all of the injuries and illnesses that have been reported at the establishment and will thus be able to inspect the forms to make sure all of the cases that should have been entered have in fact been recorded.

The certification required by the final rule may be made by signing and dating the certification section of the OSHA 300-A form, which replaces the summary portion of the former OSHA 200 form, or by signing and dating a separate certification statement and appending it to the OSHA Form 300-A. A separate certification statement must contain the identical penalty warnings and employee access information as found on the OSHA Form 300-A. A separate statement may be needed when the certifier works at another location and the certification is mailed or faxed to the location where the Summary is posted."

Comments Standard Industrial Classification (SIC) Code 781, Motion Picture Production and Allied Services

Melissa Patack, Motion Picture Association of America, California Group

Source: Letter dated October 26, 2001

Comment No. 19: A motion picture distribution company may have ongoing responsibility to market and distribute a film made by a motion picture production company, but the distribution company has no role in the hiring or supervision of production company employees and should not be responsible for recording and keeping the records of the production company employees.

Response: If a distribution company is involved with a production company on the same project, and it fits the description of the commenter, i.e., it is a separate entity, it does not hire or supervise the production company's employees, and it has no responsibility for or authority over the employees of the production company, it will have no recording obligation with respect to the production company's employees. This is a matter of what is clearly stated in the proposed regulations regarding the recording obligations of the employer as well as generally applicable California occupational safety and health law.

Comment No. 20: A film may be made away from a conventional sound stage, at one or more remote sites. Direct communication between the production on location and the production office may be sporadic and infrequent. Motion picture employees often work for a variety of employers, and employers often have thousands of employees on their payrolls. Motion picture employers must

be afforded reasonable time to verify an employee's current or former status, as well as that of their representative. Therefore, the deadlines for some recordkeeping obligations should be lengthened in recognition of factors unique to the film production industry, as follows:

(1) The response time for transmitting information from a remote location to a central recordkeeping location should be restated so that records need only be provided within seven days of completion of the project at the remote location.

(2) The deadline for providing employee access to Forms 300 and 300A within one business day of the request should be lengthened to within 7 calendar days of the request.

(3) The response time for providing government representative access to records should be lengthened from 4 hours to 7 calendar days.

Response: DLSR recognizes the uniqueness of the film industry due to factors such as those mentioned by the commenter, as well as other unique variables such as special effects and stunt coordination, the potential multiplicity of temporary locations, and the compressed and variable scheduling as well as other difficulties associated with location and talent availability. Accordingly, DLSR has proposed the following revisions to the regulatory text:

14300.30(b)(2)(A): Add at the end of the subsection:

Exception: If you have an establishment in SIC Code 781 and it is operated at a location that is remote from your central location, you must transmit the information to the central location within the lesser of 30 calendar days of learning of the injury or illness or 7 calendar days of termination of operations at the remote location.

14300.35(b)(2)(C): Add at the end of the subsection:

Exception: If your establishment is in SIC Code 781, you must give the requester the information within 7 calendar days.

14300.35(b)(2)(E)1.: Add at the end of the subsection:

Exception: If your establishment is in SIC Code 781, you must give the requester the information within 7 calendar days.

14300.40(a): Add at the end of the subsection:

Exception: If your establishment is in SIC Code 781, you must make a reasonable effort to comply as required by this section within 4 business hours of receiving the request. If it is not possible to comply with that deadline with reasonable effort, you must comply no later than by the end of the next business day.

End of Summary of Comments and Responses to 45-Day Notice