Chapter 11

ACCESS TO EMPLOYEE EXPOSURE AND/OR MEDICAL RECORDS

Policy: It is the policy of the Division of Occupational Safety and Health (DOSH), also known as Cal/OSHA or the Division, to ensure access to employee exposure and medical records when required or permitted by 8 CCR Section 3204.

Authority: DOSH will administer this policy in compliance with all applicable laws, rules, and guidance:

- California Penal Code, Sections 6308 and 6408 and Title 8 California Code of Regulations Section 3204

Procedures:

A. Inspections

1. General Inspection

   If, during the course of any investigation or inspection, compliance personnel determine that access to employee exposure and/or medical records is necessary, compliance personnel shall follow the access procedures specified in Section B.

2. 3204 Access Inspection

   a. If the District receives a complaint from an employee, or an employee's designated representative that access to an employee's exposure and/or medical records has not been provided, or provided in a timely manner, or denied altogether by the employer, compliance personnel shall initiate an

investigation into the allegation to determine if a violation of Sec. 3204 has occurred.

b. If, during the course of a 3204 inspection, compliance personnel are denied access to employee exposure and/or medical records, compliance personnel shall follow the access procedures specified in Section B.

B. Access

1. Obtaining an Access Order

   a. No access to Records

      If compliance personnel are denied lawful access by the employer to an employee's exposure and/or medical records, or an employer does not promptly assure access to the Division, compliance personnel shall document the denial on the Cal/OSHA Form 1B as a violation of Sec. 3204(e)(3)(A) and request a written Access Order from the Chief of the Division.

   b. Telephonic Notification

      1. All requests from compliance personnel for an Access Order shall be made through the District Manager, the Regional Manager and Deputy Chief for Field Operations to the Chief.

      2. The Chief shall establish an Access Order Log to record requests for and approvals of access orders. A log number shall be assigned to each Access Order Request and the name of the requestor, the date of approval or disapproval and the requesting District shall be entered into the Log.

      3. After compliance personnel issue an approved Access Order, the District Manager shall send a copy of the issued Order to the Chief for inclusion into the Access Order Log.

   c. Approval

      1. Since medical records may contain information of a personal nature, access to such records implicates substantial privacy interests.

      2. Access Orders shall be approved by the Chief only after the Division has made a careful determination that the information contained in the employee's exposure and/or medical records is relevant to the existence of a violative condition in the employee's workplace or

indicates that the employee's medical condition is related to a particular workplace hazard.

3. An Access Order may be unnecessary if:

    a. Division personnel acquire relevant information by consulting with an employer's physician about the workplace safety and health issue for which the access to an exposure or medical record is sought; or

    b. Access to the requested record is obtained in the course of litigation.

    NOTE: An Access Order shall not be generally be requested solely to verify an employer's compliance with the medical surveillance recordkeeping requirement of a Title 8 Safety Order. If so, access shall be limited to an on-site inspection only and documentation of noncompliance shall include only the employee's name and no specific medical information.

2. Serving an Access Order

    a. Compliance personnel shall present two (2) copies of the Access Order, and the accompanying cover letter, to the employer. One copy shall identify specific employees by personal identifiers.

    b. Compliance personnel shall present one (1) copy of the Access Order, which does not identify specific employees by direct personal identifier, and its accompanying cover letter, to each collective bargaining representative who represents employees whose exposure and/or medical records are subject to the Access Order.

    c. Compliance personnel shall inform the employer of their obligation to prominently post a copy of the written Access Order, which does not identify specific employees by direct personal identifier, and its accompanying cover letter, for at least fifteen (15) days. See Sec. 3204(e)(3)(B).

    d. Compliance personnel shall discuss with any collective bargaining representative and with the employer the appropriateness of individual notice to employees affected by the written Access Order. Where it is agreed that individual notice is appropriate, compliance shall promptly provide to the employer an adequate number of copies of the written Access Order, which does not identify specific employees by direct personal identifier, and its accompanying cover letter, to enable the employer to individually notify each employee or to place a copy in each employee's medical file.

e. Compliance personnel shall inform the employer, any employees or any employee representatives that any objections to the Division obtaining access to records pursuant to a written Access Order shall be sent to Chief while access to the records proceeds.

3. Use of Personally Identifiable Medical Information

   a. Only Division personnel with a need to know the contents of an employee's medical records shall review the records after they are obtained. No Division personnel or contract employee shall examine records containing personally identifiable employee medical information unless authorized by the Chief.

      NOTE: Personally identifiable employee medical information means any information of a medical nature which can be linked to a particular individual through a name, address, social security number, payroll number or can reasonably lead to the identification of a particular individual through a birthdate, height, weight, race, gender, date of initial employment or job title.

   b. When authorized by the Chief, access to personally identifiable employee medical information may be provided to attorneys in the Division's Legal Unit, or to other attorneys representing the Division, and to others when appropriate.

   c. All individuals with access to personally identifiable employee medical information shall use the information for the purposes for which it was obtained, unless the specific written consent of an employee is obtained to use the information for another purpose.

   d. Whenever practicable, compliance personnel shall examine any personally identifiable employee medical information on-site to avoid the need to remove such information from the original files.

   e. The District Manager supervising compliance personnel who requested the Access Order shall, if appropriate, assure that the results of the Division's analysis of personally identifiable employee medical information is communicated to the employee(s) whose personal medical information was used in the analysis.

4. Security

   a. General Measures

      1. An exposure and/or medical record containing any personally identifiable employee medical information shall be segregated from

other Division records. When not in active use, files containing such information shall be kept secured in a locked cabinet or vault.

2. Compliance personnel shall maintain a log of uses and transfers of personally identifiable employee medical information.

3. No photocopying of personally identifiable employee medical information shall be done unless necessary to accomplish the purposes for which the information was obtained.

4. Whenever employee medical information obtained pursuant to a written access order is taken off-site with direct personal identifiers included, compliance personnel shall be responsible for maintaining the confidentiality of these employee medical records and shall mark these records as "Confidential."

b. Expectations

Security precautions do not apply to:

1. The use of aggregate employee medical information or medical records which do not contain personally identifiable employee medical information;

2. Records required by Labor Code Sec. 6409 and 8 CCR Sec. 14000 et seq., including the Physician's First Report of Work Injury;

3. Death certificates;

4. Employee exposure records, including biological monitoring records (Sec. 3204(c)(5)(B);

5. Exposure records required by specific occupational safety and health standards; or

6. Records of medical surveillance conducted pursuant to a Special Order or an Order To Take Special Action issued by the Division.

c. Interagency Transfer and Public Disclosure

1. General Rule

After obtaining personally identifiable employee medical information, compliance personnel shall not transfer or disclose the information to another office of the Division or to another governmental agency or to the public (other than to the affected employee or the original

recordholder), except when required by law or when authorized by the Chief.

2. Authorized/Nonauthorized Transfers

   a. After obtaining written authorization by the Chief, personally identifiable employee medical information may be transferred to the following entities:

      i. U.S. Department of Labor, Occupational Safety and Health Administration;

      ii. National Institute for Occupational Safety and Health (NIOSH);

      iii. A District Attorney when necessary to accomplish a statutory purpose of the California Occupational Safety and Health Act.

   b. The Chief shall not authorize a request for an interagency transfer of personally identifiable employee medical information, which has not been consented to by any affected employees, unless the request is by a public health agency which:

      i. Needs the requested information in a personally identifiable form for a substantial public health purpose;

      ii. Will not use the requested information to make individual determinations concerning affected employees which could be to their detriment;

      iii. Has regulations, or established written procedures, providing protection for personally identifiable medical information substantially equivalent to that of Sec. 3204; and

      iv. Satisfies an exemption to the Information Practices Act of 1977 to the extent that the Information Practices Act of 1977 applies to the requested information. See Sec. 1798.24 of Title 1.8, Chapter 1, commencing with Section 1798 of the Civil Code.

   c. The Chief shall not approve a request for public disclosure of personally identifiable employee medical information when the disclosure would constitute a clearly unwarranted invasion of personal privacy. See Government Code Sec. 6254(c) and Civil Code Sec. 1798 et seq.

3. Employee Notice

Except as to interagency transfers to NIOSH or the District Attorney, Division personnel making a disclosure or transfer of personally identifiable employee medical information shall ensure that advance notice is provided to affected employees, any representative of affected employees and the employer on each occasion that the Division intends to transfer or disclose such information.

5. Retention and Destruction of Exposure and/or Medical Records

   Any personally identifiable medical information in an employee's exposure and/or medical records shall be retained by the Division only as long as is necessary to accomplish the Division's statutory responsibilities and shall be destroyed or returned to the recordholder as soon as the records are no longer needed for the purposes for which they were obtained.

C. Citation

1. Violation Documentation

   Compliance personnel shall document all violations in accordance with the procedures set forth in Chapter 7.

2. Violation Classification

   a. Regulatory

      Most violations for failure to comply with the provisions of Section 3204 shall be classified as Regulatory.

      EXAMPLE: A failure to provide information by posting or other appropriate means pursuant to Sec. 3204(g)(1) would be cited as a regulatory violation.

   b. Serious

      1. Compliance personnel shall classify a Sec. 3402 violation as serious if it can be established that:

         a. The employer withheld exposure and/or medical records of employees whose jobs entail real or potential exposures to regulated carcinogens.

         b. The employer withheld exposure and/or medical records of employees where there is a substantial probability that exposures

to chemical and/or physical agents could cause death or serious physical harm.

c. The employer withheld exposure and/or medical records of employees when such actions compromise the diagnostic or therapeutic outcome of a nonoccupational illness.

NOTE: Violations for withholding medical and/or exposure records refers to records requested by employees, their designated representatives or by the Division.

2. Compliance personnel shall classify a Sec. 3402 violation as serious if it can be established that the employer failed to exercise reasonable diligence to protect exposure and/or medical records from destruction, loss or theft, but only if:

   a. There is real or potential exposure to regulated carcinogen(s) in the workplace.

   b. There is substantial probability that exposures to chemical and/or physical agents in the workplace could cause death or serious physical harm.

   c. The destruction, loss or theft of the medical and/or exposures records compromises the diagnostic or therapeutic outcome of a non- occupational illness.

3. Citation

   a. Compliance personnel shall issue a citation to the employer if the employer denies access to employee exposure and/or medical records.

   b. If the employer does not provide access to the records, compliance personnel shall seek the assistance of the Legal Unit in determining if a subpoena duces tecum is needed. See Chapter-10.

4. Abatement

   Compliance personnel shall fix the period for abatement as short as possible. For failure to provide access, the abatement should generally be no longer than five (5) days, unless logistical problems exist which would justify a longer period.