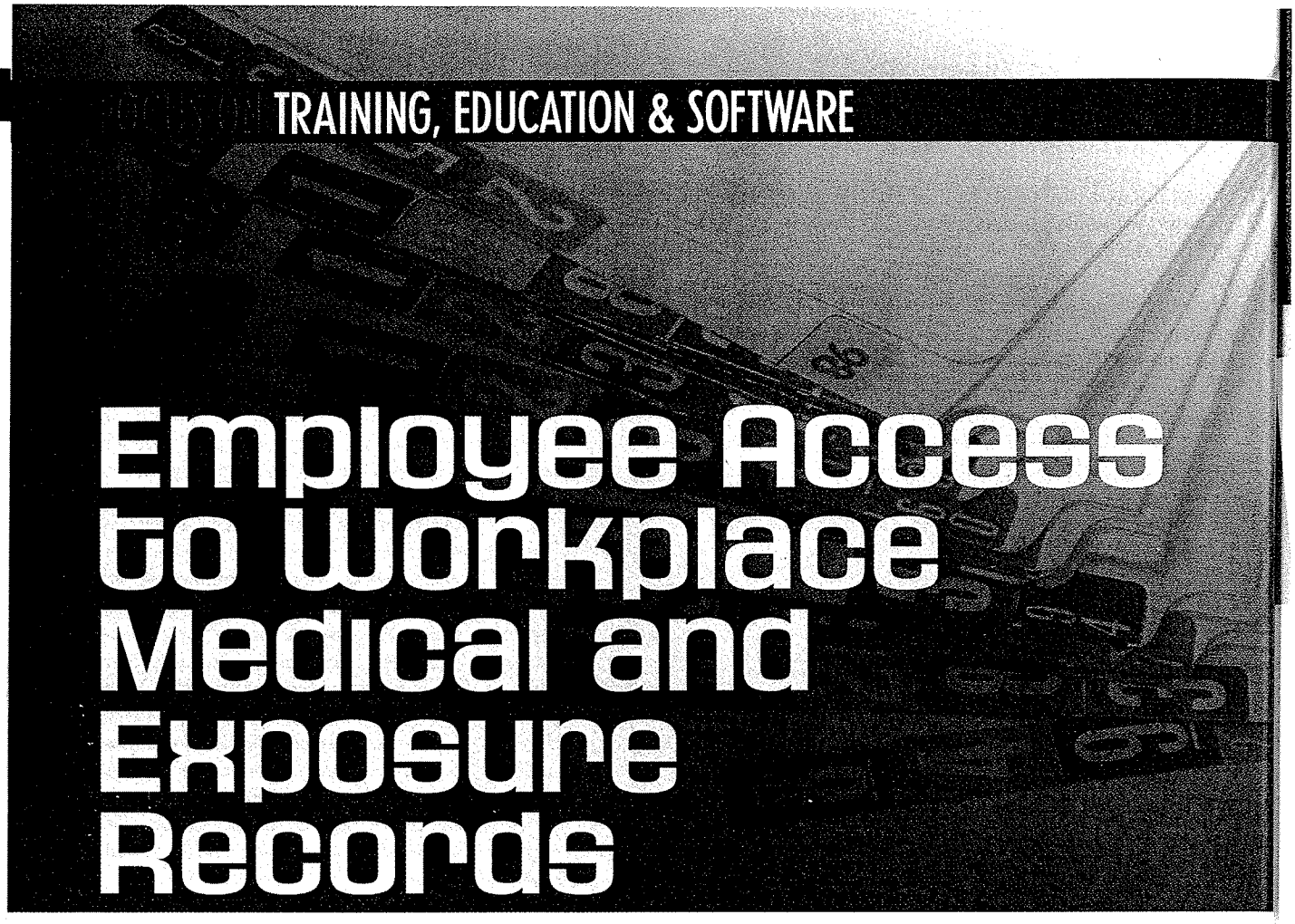

Employee Access to Workplace Medical and Exposure Records

This regulation is a trap for the unwary.

by Mark A. Lies II

Many employers are unaware of significant employee rights under OSHA regulation 29 CFR 1910. 1020 to access certain records relating to their employment. This can often be a vehicle for OSHA citations, as well as worker's compensation claims or product liability litigation. These same regulations impose significant employer obligations to retain these records for periods of time well past the end of the employment relationship and to make them available to former employees. In addition, such records may be accessed by the employee's legal representative, including union representatives, under certain conditions.

Medical Records

Each employee has a right to access his/her medical records made or maintained by a physician, nurse, or other health care professional that is in the possession of the employer. The definition is very broad, *including*:

- medical and employment questionnaires;
- results of medical examinations, including pre-employment, periodic, and laboratory tests;
- biological monitoring;
- medical opinions, diagnoses, progress notes, and recommendations;
- first aid records;
- prescriptions; and
- medical complaints.

There are certain *exclusions* from the definition, which are:

- physical specimens (for example, blood and urine samples) that are typically discarded;
- records relating to health insurance claims that are maintained separately from the medical program and its records and not accessible to the employer by individual employee identifiers;
- records created solely in preparation for litigation that are privileged under applicable rules of procedure or evidence; and
- records relating to voluntary Employee Assistance Programs.

Exposure Records

In addition to medical records, there is an entire other group of records that must be maintained for access by current and former employees and their legal representatives. This broad category includes any record that evidences an employee was exposed to a toxic substance or harmful physical agent in the course of employment through inhalation, ingestion, skin contact, absorption, or any other means.

A toxic substance or harmful physical agent to which the employee may have been exposed is likewise broad, *including*:

- chemicals
- bacteria
- virus
- fungus

as well as physical stresses:

- noise
- heat
- cold
- vibration
- repetitive motion

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	Lockout/Tagout CD-ROM Training	Pentium	Win. 98+	64 MB	Spanish		■	■	$495	Interactive
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	Lockout-Tagout	486 min.	Win. 98-XP	4 MB	Spanish			■	$299	OSHA guidelines, leader's guide, DVD or VCD
	Back Injuries	486 min.	Win. 98-XP	4 MB				■	$349	OSHA guidelines, exams, DVD or VCD
	Occupational Noise Exposure	486 min.	Win. 98-XP	4 MB				■	$299	OSHA guidelines, leader's guide, DVD or VCD
	HazCom	486 min.	Win. 98-XP	4 MB	Spanish			■	$399	OSHA guidelines, exams, DVD or VCD
Solutions Software Corp. Circle 307 on card	e-CFRLite	CD-ROM drive	Win. 2000+	1 MB		■		■	$299	Includes all 50 CFR titles
	Chemical List Suite	CD-ROM drive	Win. 2000+	1 MB		■		■	$199	Has TSCA, SARA III, PMN, ELINCS lists, more
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The MARCOM Group Ltd. Circle 309 on card	Interactive CD-ROM Courses—General Safety	Pentium 90	Win. 2000, XP	64 MB/course	Spanish		■	■	$495	35+ topics available, quantity discounts
	Interactive CD-ROM Courses—Regulatory Compliance	Pentium 90	Win. 2000, XP	64 MB/course	Spanish		■	■	$495	20+ topics available, quantity discounts
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CHARTS COMPILED BY RONNIE RITTENBERRY

- radiation
- certain atmospheric pressures

or toxic tort claims against third parties (manufacturers, suppliers) to request the records. There is a sample authorization letter in the regulation that can be required to be completed by the designated representative prior to production, and which should be required.

In addition, in situations where labor unions represent employees, requests for records may be forthcoming as part of efforts to enhance the union's position in collective bargaining by arguing there are safety or health hazards at the workplace. Also, unions that are seeking to organize employees have retained attorneys to represent individual employees to make requests for these records, which they have used to generate OSHA inspections or to put pressure on employers to recognize the union by threatening complaints of safety or health hazards at the workplace.

The regulation contains limitations on who may have access to specific records that should be reviewed prior to production.

The employer is required to transfer all records to any successor employer.

Who Has a Right to Access

The range of parties who are entitled to access includes a current employee, former employee, the legal representative of a deceased employee, or other designated representative who is given authorization by the employee. This latter category has allowed attorneys who may wish to pursue worker's compensation claims against the employer

Compliance Time Period

Once the request is made, the records must

be made available in a reasonable time, place, and manner. The employer should consider requiring the request to be made in writing so it can track the timeframe from the request to compliance. Further, if there is any subsequent claim that employee privacy rights were violated by disclosure, the employer has written evidence to support the request. If the record cannot be made available in 15 working days, the employer must advise the employee or representative within this period as to the reason for the delay and when the records will be made available.

Cost of Production

The employer must provide a copy of the record at no cost to the employee or representative or make available at no cost a mechanical copying facility. The employer should not allow the employee to copy the original records unless a monitor is present to observe, to ensure the records are not taken or otherwise destroyed.

Analyses of Exposure or Medical Records

The regulation also allows access to any analyses that have been made utilizing such records. This provision can be another employer pitfall because the analysis may identify safety or health hazards and constitute an admission of liability. Thus, the employer should decide whether it is prudent to even conduct such an analysis and, if so, whether it should be done at the direction of legal counsel to create legal privileges against disclosure, including attorney-client, work product, and self-critical analysis.

While this article has focused primarily on employee access to these records, many OSHA regulations require the employer to conduct analyses for compliance purposes—for example, analysis of employee audiograms under a Hearing Conservation Program to determine whether there has been any loss of hearing because of occupational exposure to noise. These records also must be available for OSHA inspection.

Employee Notification

As would be expected, the employer is required to notify all new employees of their rights under this regulation; the existence, location, and availability of any record that may be covered by the regulation; and who maintains the records. Employees are entitled to a copy of the regulation upon request.

Preservation of Records

Because many occupational diseases can have long latency periods before the disease becomes apparent or diagnosed, the timeframe for preservation is very lengthy, requiring the preservation of the records for:

- the length of the employee's employment, plus
- thirty (30) years.

The employer is required to transfer all records to any successor employer. If the employer goes out of business, it can make provisions to preserve the records or transfer the records to the director of the National Institute for Occupational Safety and Health if a regulation requires it or give three months' notice to the director before disposing of the records. While this is infrequent, such records have been transferred to NIOSH when an employer has undergone bankruptcy.

Potential Liabilities

This regulation has far-reaching impact for employers. First, failure to comply may give rise to OSHA citations. Second, the improper disclosure of records may give rise to employee claims of invasion of privacy.

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	Basic Life Support Instructor Package	Instructor guide, video, PowerPoint® presentation	Spanish		■	■	■		Cost per instructor package
	Essentials Instructor Package	Instructor guide, video, PowerPoint® presentation			■	■	■		Cost per instructor package
Coastal Training Technologies Corp.	"Hazard Communication: The Road to Safety" Trainer's Toolkit®	DVD/VHS, 20 employee handbooks, customizable PowerPoint®, more	Spanish, Portuguese, Hindi, more			■	■	Depends on number trained	High-impact video scenes
	"Lockout/Tagout: Lightning In a Bottle" Trainer's Toolkit®	DVD/VHS, 20 employee handbooks, customizable PowerPoint®, more	Spanish			■	■	Depends on number trained	High-impact video scenes
	"Respiratory Protection: Another World" Trainer's Toolkit®	DVD/VHS, 20 employee handbooks, customizable PowerPoint®, more	Spanish, Dutch, Tamil, more			■	■	Depends on number trained	High-impact video scenes
	"Lockout/Tagout: Controlling the Beast" Trainer's Toolkit®	DVD/VHS, 20 employee handbooks, customizable PowerPoint®, more	Spanish, Portuguese, Dutch, more			■	■	Depends on number trained	High-impact video scenes
CoreMedia Training Solutions	Challenge of Change	5 videos, management guide				■	■	$1,495	Scripted training, implementation guide
	Safety Management Series	5 videos, management guide				■	■	$1,995	Scripted training, implementation guide
	Recognize it!	VHS, disk, support materials	Spanish			■	■	$495	Scripted training, implementation guide
DuPont Safety Resources **Circle 311 on card**	STOP™ (Safety Training Observation Program) for Supervision	Workbooks, meeting guides, videos, observation cards, audit checklists	Spanish, French, UK English	■	■	■	■	Call for pricing	Self-implemented program for line management
	STOP™ for Each Other	Workbooks, meeting guides, videos, observation cards, audit checklists	Spanish	■	■	■	■	Call for pricing	Integrates self-study, field application activities, more
	STOP™ for Employees	Workbooks, meeting guides, videos, observation cards	Spanish, French, more	■	■	■	■	Call for pricing	Self-implemented program for wage-roll employees
	STOP™ for Ergonomics	Workbooks, meeting guides, videos, audit checklists		■	■	■	■	Call for pricing	Focuses on ergonomic observation categories
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J.J. Keller & Associates Inc.	Back Safety: A User's Guide	Video (DVD or VHS), trainer's guide, users' handbooks, poster			■	■	■	$28-$35 (min. 10 students)	$345 for DVD version; $279 for VHS version
	Workplace Hazard Perception Challenge	Video (DVD or VHS), trainer's guide, skill cards, certificates of completion	Spanish		■	■	■	$28-$35 (min. 10 students)	$345 for DVD version; $279 for VHS version
	Forklift Hazard Perception Challenge	Video (DVD or VHS), trainer's guide, users' handbooks, poster	Spanish		■	■	■	$28-$35 (min. 10 students)	$345 for DVD version; $279 for VHS version
	Hazard Communications Training for Employees	Video (DVD or VHS), info cards, training log, MSDS pocket dictionary, more	Spanish		■	■	■	$28-$35 (min. 10 students)	$345 for DVD version; $279 for VHS version
	Loading Dock and Warehouse Safety: The Ins and Outs	Video (DVD or VHS), skill cards, training log, poster, more			■	■	■	$20-$25 (min. 10 students)	$245 for DVD version; $199 for VHS version
Safety Short Production Inc.	Safety Meeting Kit: Lockout-Tagout	OSHA guidelines, leader's guide, video/DVD	Spanish		■	■		<$10 average	Segmented training option
	Safety Meeting Kit: Power Industrial Truck Operator Course	OSHA guidelines, leader's guide, video/DVD	Spanish		■	■		<$10 average	Segmented training option
	Safety Meeting Kit: Back Injuries	OSHA guidelines, leader's guide, video/DVD			■	■		<$10 average	Segmented training option
	Safety Meeting Kit: Occupational Noise Exposure	OSHA guidelines, leader's guide, video/DVD			■	■		<$10 average	Segmented training option
	Safety Meeting Kit: HazCom	OSHA guidelines, leader's guide, video/DVD	Spanish		■	■		<$10 average	Segmented training option
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	Competent Person/Builder Train the Trainer - Scaffolding	Training manual, DVDs, PowerPoint®, videotapes, instruction guide	Spanish		■	■	■	$500	Customized training on site, by correspondence, more
	Scaffold User Train the Trainer	Interactive network CBT on CD-ROM, 100-page book, video	Spanish		■	■	■	$495	Interactive; can be placed on a site network
Summit Training Source Inc.	Summit Videos	Program, facilitator's guide, employee handbooks, PowerPoint® presentation	Spanish, Arabic, Russian, more		■	■	■	$295-$395/program	600+ programs in VHS, DVD, DSV formats
	Employee Handbooks and Facilitator Guides	Program outline, information; quizzes		■	■	■	■	$1.50-$4.95	
	Trainer's Toolbox	Video, 25 employee handbooks, PowerPoint® presentation		■	■	■	■	$95/toolbox	Available for programs w/Valley Video productions
The MARCOM Group Ltd.	Safety Meeting Kits	Leader's guide, video/DVD, 30 booklets, 5 posters, certificate, more	Spanish	■	■	■	■	$195/unlimited students	Available w/video or DVD on 35+ topics
	Regulatory Compliance Kits	Leader's guide, video/DVD, 30 booklets, 5 posters, manual, more	Spanish	■	■	■	■	$295-$595/unlimited students	Available w/video or DVD on 20+ topics

Kits, Videos, and Books

COMPANY	PRODUCT	INCLUDES	OTHER LANGUAGES	PRE-EXAM	POST-EXAM	LEADERSHIP BOOK	STUDENT WORKBOOK	COST PER STUDENT	SPECIAL FEATURES
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	Laboratory Safety Series	Leader's guide, video/DVD, employee quiz, scheduling forms, certificate		■	■	■	■	$99.95/unlimited students	Available w/video or DVD on 12 topics
We're Into Safety Circle 314 on card	Forklift Training Kit	PowerPoint® slides, student booklet, certificate, more			■		■	$150	Fully customizable, free tech support

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Third, these records may provide an employer with a defense to future worker's compensation claims (by proving lack of exposure to a hazardous substance), which will be lost if the records are not maintained. Fourth, in this era of claims by employees that employers lost or destroyed evidence the employee could use to maintain a claim against a third party (e.g., a chemical manufacturer or supplier), failure to maintain the records could give rise to a claim that the employer "spoiled" evidence to support such a third-party complaint and that the employer is responsible for damages outside of worker's compensation. There has been increased litigation by plaintiffs who claim that evidence that could have supported a claim against a third party has been subject to spoliation, and they have sought to maintain actions against the responsible parties, including their employers.

Conclusion

Employers must become aware of the provisions of this complex regulation in order to avoid the many liabilities that can result from non-compliance. They should develop a policy and practices to evidence compliance. ■

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